[Cite as *State v. Cooper*, 2010-Ohio-5517.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23143
v.	:	T.C. NO. 08CR1431
DONALD COOPER	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 12th day of November, 2010.

. . . . . .

ANDREW T. FRENCH, Atty. Reg. No. 0069384, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

WILLIAM N. MERRELL, Atty. Reg. No. 0015957, P. O. Box 2901, Springfield, Ohio 45501
Attorney for Defendant-Appellant

. . . . . .

FROELICH, J.

{¶ 1} Defendant-appellant Donald Cooper appeals his conviction and sentence for rape and gross sexual imposition. For the following reasons, the judgment of the trial court will be Affirmed.

I

{¶ 2} Shortly after 6:00 a.m. on March 29, 2008, twenty-year-old D.D. was on her way home from work. When she got off of the bus in downtown Dayton, she called her mother to pick her up, who told her daughter that she (the mother) did not have enough gas. Not wanting to wait for another bus, D.D. decided to walk to the Five Oaks neighborhood in which she lived.

{¶ 3} As D.D. walked north on Main Street, approaching Helena Street, she heard a man at the bus stop across the street call out, "Hey girl. Come here." D.D. looked up and saw the man (later identified as Cooper) walking toward her. D.D. kept walking, but Cooper started walking faster, catching up to her. Cooper grabbed D.D.'s arm and asked her where she was going, insisting that he wanted to talk to her. The two talked for a couple of minutes, then D.D. told Cooper that she had to get home to her daughter.

{¶ 4} Being only two blocks away from her home, D.D. tried to walk away, but Cooper followed her, continuing to talk. Becoming more concerned, D.D. sent a text message to her mother, asking for help. Cooper suddenly kissed D.D., who pushed him away, and repeated that she needed to get home to her child. Cooper grabbed her arm and told her, "You're not going anywhere." As Cooper dragged D.D. into an alley, she hit the send button on her phone to text her mother again.

{¶ 5} In the alley, Cooper pushed D.D. onto her knees and shoved his penis into her mouth. Cooper then withdrew his penis and forced D.D. to masturbate him. D.D. managed to call her mother, who could hear her begging someone to leave her alone. The call was disconnected, and D.D.'s mother left the house to look for her daughter. D.D. claimed that Cooper then turned her around and pulled

down her pants. D.D. testified on direct examination that Cooper vaginally raped her from behind, but on re-direct examination, she testified that Cooper anally raped her. When Cooper withdrew, D.D. ran down the alley to her home, where she told her siblings what had happened. D.D.'s mother arrived home a couple of minutes later, and the family went looking for Cooper, finding him back at the bus stop where D.D.'s ordeal began. They saw a police officer at a nearby store and reported the attack.

{¶ 6} The officer arrested Cooper, and D.D. was taken to the hospital. She suffered from cut, swollen, and bruised lips, bruising to both arms, and an abrasion to her cervix. Cooper was indicted on two counts of rape and one count of gross sexual imposition.

{¶ 7} Cooper testified that he had sex with D.D., but he insisted that it was consensual. He said D.D. was a prostitute and that he paid her $20 and shared some crack cocaine with her in exchange for oral sex that morning. Cooper also offered the testimony of Daphne Tillman, a drug addict and prostitute with an extensive criminal history. Tillman claimed that she knew D.D. to be a prostitute. She testified that she saw D.D. and Cooper smoking crack cocaine at the bus stop before walking together down the alley.

{¶ 8} On rebuttal, the State offered the testimony of several police officers who stated that D.D. did not appear to be under the influence of either drugs or alcohol when they spoke to her. A detective in the vice squad was not familiar with either D.D.'s name or her face, and at the time of this offense there were no police records for D.D. for any crime, including prostitution.

{¶ 9} A jury found Cooper guilty of gross sexual imposition and one count of rape for the act of fellatio, but not guilty of the other count of rape. The trial court ordered Cooper to serve consecutive sentences of ten years for rape and eighteen months for gross sexual imposition. Cooper appeals.

II

Cooper's First Assignment of Error:

{¶ 10} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY, A VIOLATION OF R.C. SECTION 2907.03 AND SUCH FAILURE AMOUNTED TO PLAIN ERROR."

{¶ 11} In his first assignment of error, Cooper maintains that the trial court erred in failing to instruct on sexual battery, a lesser included offense of rape. As Cooper acknowledges, he has waived all but plain error by not objecting or requesting a different instruction in the trial court. See, e.g., *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶74. "'Plain error exists only where it is clear that the verdict would have been otherwise but for the error.'" Id., quoting *State v. Skatzes,* 104 Ohio St.3d 195, 2004-Ohio-6391, ¶52. We find no plain error in the trial court's failure to instruct on sexual battery in this case.

{¶ 12} A trial court's determination of whether to instruct a jury on a lesser included offense is a two-step process. *State v. Gregory* (Aug. 19, 1994), Montgomery App. No. 14187. "The court must first determine whether the offense may be a lesser included offense." Id. If so, "the court must then determine whether the evidence warrants the giving of the lesser included

instruction." Id.

{¶ 13} "'An offense may be a lesser included offense of another only if: (1) the offense is a crime of lesser degree than the other; (2) the offense of greater degree cannot, as statutorily defined, ever be committed without the offense of the lesser degree, as statutorily defined, also being committed, and (3) some element of the greater offense is not required to prove the commission of the lesser offense.'" Id., quoting *State v. Kidder* (1987), 32 Ohio St.3d 279.

{¶ 14} Cooper was convicted of rape in violation of R.C. 2907.02(A)(2), in that he engaged in sexual conduct with another, purposely compelling the other person to submit by force or threat of force. He argues that the trial court should have instructed on the lesser included offense of sexual battery in violation of R.C. 2907.03(A)(1), which provides that "No person shall engage in sexual conduct with another, not the spouse of the offender, when * * * [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." The offenses sexual battery and rape "differ in mens rea, knowingly for sexual battery versus purposefully for rape, and degree of compulsion applied to the victim, coercion for sexual battery and force or threat of force for rape." *State v. Cain,* Franklin App. No. 06AP-1252, 2007-Ohio-6181, ¶5.

{¶ 15} "The Supreme Court of Ohio has held that sexual battery committed by use of coercion as defined in R.C. 2907.03(A)(1) is a lesser-included offense of forcible rape." Id., ¶8, citing *State v. Wilkins (*1980), 64 Ohio St.2d 282; *State v. Stricker,* Franklin App. No. 03AP-746, 2004-Ohio-3557. However, "[t]he mere fact that an offense can be a lesser included offense of another offense does not mean

that a court must instruct on both offenses where the greater offense is charged." *Wilkins,* supra, at 387. Instead, an instruction on a lesser included offense must be given "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, 216. Moreover, "[i]f the evidence adduced on behalf of the defense is such that if accepted by the trier of fact it would constitute a complete defense to all substantive elements of the crime charged, the trier of fact will not be permitted to consider a lesser included offense unless the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction upon a lesser included offense." *Wilkins,* supra, at 388.

{¶ 16} Cooper's defense was that D.D. consented to perform oral sex. Had the jury believed this testimony, his defense to the charge of rape was complete. Contrary to Cooper's assertion, "[t]he jury could not have found that defendant acted knowingly but not purposely; it had to choose between a complete defense, and therefore acquittal, or the commission of the crime of rape." Id., at 389. "[W]here a defendant presents a complete defense to the substantive elements of the crime, * * * an instruction on a lesser included offense is improper." *State v. Keenan* (1998), 81 Ohio St.3d 133, 139. See, also, *State v. Taylor,* Montgomery App. No. 21122, 2006-Ohio-2655, ¶35 ("[A] trier of fact will not be allowed to consider a lesser-included offense when the evidence adduced on behalf of the defense is such that, if accepted by the trier of fact, the evidence would constitute a

complete defense to all substantive elements of the crime charged.")

{¶ 17} Because Cooper claimed that D.D. consented to the sexual conduct, no instruction on the lesser included offense of sexual battery was warranted. Cooper's first assignment of error is overruled.

III

Cooper's Second Assignment of Error:

{¶ 18} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO MERGE THE SENTENCES IMPOSED ON THE TWO REMAINING COUNTS PURSUANT TO R.C. 2941.25 AND SUCH FAILURE AMOUNTED TO PLAIN ERROR."

{¶ 19} In his second assignment of error, Cooper contends that his gross sexual imposition and rape charges were allied offenses of similar import, which were required to be merged for sentencing pursuant to R.C. 2941.25(A). Cooper acknowledges that this issue was not raised below, and he has therefore waived all but plain error. See, e.g., *State v. Hay,* Union App. No. 14-2000-24, 2000-Ohio-1938, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 211.

{¶ 20} The Ohio Supreme Court has established a two-part test for determining whether multiple offenses are allied offenses of similar import pursuant to R.C. §2941.25. First, the court must compare the elements of the offenses in the abstract to determine whether the elements correspond to such a degree that the commission of one crime will necessarily result in the commission of the other. *State v. Rance*, 85 Ohio St.3d 632, 636, 1999-Ohio-291, citation omitted. If the elements do so correspond, the offenses are allied offenses of similar import, and

the defendant may only be convicted of and sentenced for both offenses if he committed the crimes separately or with a separate animus. Id. at 638-39, citations omitted.

{¶ 21} Cooper was convicted of rape in violation of R.C. 2907.02(A)(2), which states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." He was also convicted of gross sexual imposition in violation of R.C. 2907.05(A)(1), which provides: "No person shall have sexual contact with another * * * when * * * [t]he offender purposely compels the other person * * * to submit by force or threat of force."

{¶ 22} The Ohio Supreme Court has compared the elements of these two offenses in the abstract and concluded that rape and gross sexual imposition are allied offenses of similar import. *State v. Evans,* 122 Ohio St.3d 381, 2009-Ohio-2974, ¶30, citations omitted. However, the analysis does not end here. While a defendant may not be convicted of rape and gross sexual imposition arising out of the same conduct, there are circumstances under which he may be convicted of both. *State v. Hawks,* Cuyahoga App. No. 93582, 2010-Ohio-4345, ¶21, citing *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006; additional citations omitted. *State v. Hay,* Union App. No. 14-2000-24, 2000-Ohio-1938, citing *State v. Johnson* (1988), 36 Ohio St.3d 224, 226; *State v. Jones* (1996), 114 Ohio App.3d 306, 325. We must next consider whether the crimes were committed with a separate animus.

{¶ 23} In *State v. Dudley,* Montgomery App. No. 22931, 2010-Ohio-3240, we

held that the offenses of rape and gross sexual imposition had to be merged. This holding does not overrule the second step of an allied offenses analysis under *Rance,* which focuses upon the factual basis for the charges and the animus behind those acts. We held under the particular facts of *Dudley* that the offenses were allied offenses of similar import and had to be merged both because the commission of one crime necessarily resulted in the commission of the other and because the acts were committed with the same animus.

{¶ 24} When a defendant gropes his victim's breast and buttocks, as well as rapes her, we have held that the acts of groping are not merely incidental to the rape, and a trial court does not err in separately sentencing the defendant for each of the counts of gross sexual imposition based upon those actions, as well as for the rape. *State v. Young,* Montgomery App. No. 23438, 2010-Ohio-5157, ¶¶109-10, citing *State v. Knight*, Cuyahoga App. No. 89534, 2008-Ohio-579. See, also, *Foust,* supra, at ¶45 (gross sexual imposition charges as a result of the defendant's touching his victim's breasts and vagina were distinct and separate from the act of rape).

{¶ 25} In *Hay,* supra, a case more factually similar to this case, the Third District Court of Appeals considered whether masturbation was separate and distinct from rape. The Court explained that "[t]he charge of gross sexual imposition was premised upon the alleged masturbation of [the victim's] penis. This is separate and distinct from the action, specifically the act of fellatio, which constituted the sexual conduct which lead to the appellant's criminal charge for rape. Therefore, the appellant committed two separate offenses, and he may be

convicted of both." *Hay,* supra, citing R.C. 2941.25(B).

{¶ 26} We conclude that Cooper's act of forcing D.D. to masturbate him was not merely incidental to the act of rape, but was instead a separate and distinct act, committed with a separate animus. Therefore, the trial court did not err in sentencing D.D. separately for the two offenses.

{¶ 27} Cooper's second assignment of error is overruled.

IV

Cooper's Third Assignment of Error:

{¶ 28} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

{¶ 29} In his third assignment of error, Cooper maintains that he was denied the effective assistance of trial counsel because counsel failed to ask for an instruction on sexual battery, as a lesser included offense of rape, and in failing to request that his sentences be merged as allied offenses of similar import. We disagree.

{¶ 30} In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id.

{¶ 31} As discussed in response to Cooper's first assignment of error, no

instruction on the lesser included offense of sexual battery was warranted in this case because Cooper offered the complete defense of consent. Furthermore, as explained in response to his second assignment of error, the acts constituting gross sexual imposition and rape were committed with a separate animus, and therefore were not required to be merged for sentencing. Accordingly, counsel did not act deficiently either in not requesting a sexual battery instruction or in failing to object to the imposition of consecutive sentences.

{¶ 32} Cooper's third assignment of error is overruled.

V

{¶ 33} All three of Cooper's assignments of errors having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

FAIN, J. and GRADY, J., concur.

Copies mailed to:

Andrew T. French
William N. Merrell
Hon. Dennis J. Langer