

[Cite as *State v. Helms*, 2017-Ohio-4383.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO)	
)	
PLAINTIFF-APPELLEE)	
)	CASE NO. 15 MA 0183
VS.)	
)	OPINION
RONNIE HELMS)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of
Common Pleas of Mahoning County,
Ohio
Case No. 11 CR 1019

JUDGMENT: Affirmed.

APPEARANCES:
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JUDGES:
Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: May 31, 2017

[Cite as *State v. Helms*, 2017-Ohio-4383.]
DeGENARO, J.

{¶1} In this delayed appeal, Defendant-Appellant, Ronnie Helms, appeals the trial court's judgment convicting him of rape and kidnapping and sentencing him accordingly. Helms argues the trial court erred by failing to merge his convictions for those charges. For the following reasons, Helms' assignment of error is meritless and the judgment of the trial court is affirmed.

{¶2} In 2011, Helms was indicted by a grand jury on one count of rape, R.C. 2907.02(A)(2)(B), with an attached sexual predator specification, R.C. 2941.148; and one count of kidnapping, R.C. 2905.01(A)(4)(C), with an attached sexual motivation specification, R.C. 2941.147, both first degree felonies. As described in the bill of particulars, Helms drove the victim home, stopped the car by her home and made sexual advances which were rejected. Helms then locked the doors and instructed the victim that she was not getting out of the car. Helms then drove her to a different location, where he held her down while she struggled and raped her.

{¶3} Helms was arraigned, pled not guilty and counsel was appointed. Helms subsequently entered into a Crim.R. 11 plea agreement, whereby the State agreed to dismiss the two specifications, and Helms agreed to plead guilty to rape and kidnapping. The parties agreed to a jointly-recommended sentence of 13 years.

{¶4} Following a plea hearing in September 2012, Helms pled guilty to the two charges and the State dismissed the specifications. The matter proceeded immediately to sentencing, where the trial court dismissed the specification and imposed the jointly-recommended 13-year sentence: 10 years on the rape count, and 3 years on the kidnapping count, to be served consecutively, along with a five-year term of mandatory post-release control. Helms stipulated to his classification as a Tier-III sex offender. Helms failed to argue at sentencing that the rape and kidnapping convictions should merge, and failed to file a direct appeal within the 30-day time-frame provided in App.R. 4(A).

{¶5} In 2014, Helms filed three pro-se motions: two to withdraw his guilty plea, and one asking the court to immediately release him due to an alleged speedy trial violation. These motions were overruled by the trial court.

{¶16} Pertinent to this appeal, Helms timely appealed that judgment pro se, arguing for the first time that his rape and kidnapping convictions should have merged. This court rejected that argument for procedural reasons, noting that none of his post-sentence motions had argued merger; and that at that point he had failed to directly appeal his conviction and sentence where such an argument could have been properly raised. Thus, this court affirmed the judgment of the trial court. See *State v. Helms*, 7th Dist. No. 14 MA 96, 2015-Ohio-1708.

{¶17} In July 2015, Helms filed several pro-se motions to hold a limited re-sentencing hearing regarding allied offenses, which the trial court denied.

{¶18} Finally, Helms filed a motion for leave to file a delayed direct appeal from his initial sentencing entry of September 27, 2012, which this court granted.

Merger

{¶19} In his sole assignment of error, Helms asserts:

The trial court erred by not holding a hearing to determine if the allied offenses should be merged for sentencing.

{¶10} As an initial matter, "[e]ven where there is an agreed-upon sentence, the defendant is still entitled to plain error review regarding merger." *State v. Tesack*, 7th Dist. No. 15 JE 4, 2015–Ohio–5601, ¶ 22, citing *State v. Peck*, 7th Dist. No. 12 MA 205, 2013–Ohio–5526, ¶ 14–15, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010–Ohio–1, 922 N.E.2d 923. In *Underwood*, The Ohio Supreme Court held that the requirement to merge allied offenses is mandatory, occurs at sentencing, is reviewable on appeal even pursuant to a Crim.R. 11 jointly agreed-upon sentence, and may be reviewed for plain error even when no allied offense objection is raised at trial. *Id.* at ¶ 20, 26, 31.

{¶11} "While plain error may be reviewed by an appellate court, plain error must still be demonstrated by the record." *Peck* at ¶ 15. In that regard, the Ohio Supreme Court recently stated:

An accused's failure to raise the issue of allied offenses of similar import in the trial court forfeits all but plain error, and a forfeited error is not reversible error unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. Accordingly, an accused has the burden to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus; absent that showing, the accused cannot demonstrate that the trial court's failure to inquire whether the convictions merge for purposes of sentencing was plain error.

State v. Rogers, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3.

{¶12} Pursuant to R.C. 2941.25(A), "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." However, "[w]here the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B).

{¶13} In *State v. Ruff*, 143 Ohio St.3d 114, 2015–Ohio–995, 34 N.E.3d 892, the Court held that if a defendant's conduct supports multiple offenses, the defendant can be convicted of all of the offenses if any one of the following is true: (1) the conduct constitutes offenses of dissimilar import, (2) the conduct shows the offenses were committed separately, or (3) the conduct shows the offenses were committed with separate animus. *Id.* at paragraph three of the syllabus, citing R.C. 2941.25(B). Two or more offenses are of dissimilar import within the meaning of R.C. 2941.25(B) "when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable." *Id.* at paragraph two of the syllabus.

{¶14} With regard to rape and kidnapping, to determine whether they are committed with a separate animus so as to permit separate punishment under R.C. 2941.25(B), the Ohio Supreme Court has established guidelines:

(a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions;

(b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions.

State v. Williams, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 23, quoting *State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), at syllabus.

{¶15} The Ohio Supreme Court found a separate animus for kidnapping where the defendant moved the victim from an outside stairway into his apartment and then to his bedroom. *State v. Rogers*, 17 Ohio St.3d 174, 181-182, 478 N.E.2d 984 (1985), vacated on other grounds, *Rogers v. Ohio*, 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452 (1985). Similarly, in *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, the Court held there a separate animus for kidnapping and rape where there was substantial movement as the defendant lured victim into his apartment and then moved her into his bedroom; the victim's restraint was secretive, as it took place inside the defendant's apartment; and there was prolonged restraint, as victim ate popcorn and watched videos inside the apartment before being orally raped. *Id.* at ¶ 135.

{¶16} Here, the bill of particulars indicates Helms drove the victim home, stopped the car by her home and made sexual advances which were rejected. Helms then locked the doors and instructed the victim that she was not getting out of the car. Helms then drove her to a different location, where he held her down while she struggled and he raped her.

{¶17} Notably, Helms drove the victim to a different location to rape her; he did not rape her in the location where he began making sexual advances. This demonstrates that the rape and kidnapping were committed with a separate animus. Therefore, Helms failed "to demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus[.]" *Rogers* at ¶ 3.

{¶18} In sum, the trial court's failure to merge the rape and kidnapping convictions does not amount to error, let alone plain error. Accordingly, Helms' sole assignment of error is meritless, and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P. J., concurs.