[Cite as *State v. Heard*, 2010-Ohio-1703.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-09-1121

Appellee — Trial Court No. CR0200803715

v.

Ruben Heard, III — **DECISION AND JUDGMENT**

Appellant — Decided: April 16, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Timothy F. Braun, Assistant Prosecuting Attorney, for appellee.

Patricia Horner, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following an *Alford* plea, in which the trial court found appellant, Ruben Heard, III, guilty of one count of kidnapping, one count of rape, and one count of aggravated burglary, classified him as a Tier III sex offender, and sentenced him to serve an

aggregate prison term of 13 years. On appeal, appellant sets forth the following two assignments of error:

{¶ 2} "I. [Appellant] should not have been convicted of rape and kidnaping [sic] as they are allied offenses of similar import.

{¶ 3} "II. [Appellant's] sentence was arbitrary and unreasonable."

{¶ 4} On November 19, 2008, the Lucas County Grand Jury indicted appellant and two other individuals, Samson Cosme and Dallas Feltner, on charges of aggravated burglary, kidnapping, and rape. A fourth individual, LaKeith Miller, was charged with aggravated burglary. The charges arose from an incident that occurred on November 9, 2008, when appellant, Cosme, Miller and Feltner broke into the home of Robert Strominger, brandishing guns, after which they bound and gagged Strominger and several other occupants of the home with duct tape. The four then proceeded to ransack and rob the home.[1]

{¶ 5} One of the victims was a female, A.T. While the robbery was taking place, Cosme took A.T. to a back bedroom, where he raped her while holding a gun to her head. After Cosme finished raping A.T., Heard entered the room, placed a gun near A.T.'s head, and forced her to perform oral sex.

{¶ 6} In spite of the fact that appellant and his three accomplices wore bandanas over their faces, they were recognized and identified by their victims, who quickly

[1]The attack was apparently provoked by a dispute over whether or not Cosme and Feltner were satisfied with a service provided by Strominger, who is a tattoo artist.

reported the attacks and the robbery to Toledo Police. Property stolen from Strominger's house later was found in the possession of appellant, Cosme and Feltner.

{¶ 7} On December 12, 2008, appellant filed a motion to suppress certain statements he made to police, which was later withdrawn. On February 3, 2009, appellant appeared in court and entered a plea pursuant to *North Carolina v. Alford* (1970), 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 ("*Alford* plea"). That same day a hearing was held, at which the trial court addressed appellant directly, during which appellant stated that he was not under the influence of alcohol, illegal drugs, or prescription medication. Appellant told the court that he had not received any threats or promises in exchange for his plea. The trial court then reviewed the charges against appellant, and stated that appellant could receive a prison sentence of three to 10 years on each count, as well as up to a $20,000 fine.

{¶ 8} The trial court explained that a rape conviction carries a mandatory prison sentence, with no possibility of community control or judicial release, and that, in the court's discretion, appellant could be ordered to serve his sentences either consecutively or concurrently. The trial court further explained the conditions of postrelease control and the consequences of violating a postrelease control sanction, if one was imposed, as well as appellant's limited rights of appeal. The trial court advised appellant of his constitutional rights to a trial by a 12-member jury; to have the elements of the charged offenses proven beyond a reasonable doubt; to have a unanimous verdict; to cross-examine witnesses at trial; to subpoena his own witnesses for trial; to have an attorney

present at all stages of the court proceedings; and not to testify in his own defense. After the recital of each constitutional right, appellant indicated that he understood and wished to give up that right as part of his plea.

{¶ 9} In addition to the above explanation, the trial court explained the consequences of entering an *Alford* plea, after which appellant indicated that he understood the nature of such a plea. Appellant also stated that he was satisfied with his counsel's representation and he agreed with counsel's decision, based on the evidence, to withdraw his motion to suppress. Appellant told the court he was "truly sorry" for his actions, and expressed his desire to have a minimum sentence because he needed to spend time with his infant son.

{¶ 10} After appellant spoke to the trial court, the prosecutor recited the basis of the charges against appellant. In addition to the previously recited facts, the prosecutor stated that appellant was the first person to come through Strominger's front door, point a gun at the occupants of the house, and order them all to the floor. The prosecutor also stated that A.T. initially refused to perform oral sex on appellant; however, she complied after appellant hit her on the side of the head with his gun. The prosecutor also stated that appellant attempted to vaginally rape A.T.; however, he could not complete the act because her legs were bound together.

{¶ 11} At the close of the prosecutor's statements, the trial court found that appellant made a knowing, intelligent and voluntary waiver of his constitutional rights, accepted appellant's *Alford* plea, and found him guilty of one count of aggravated

burglary, in violation of R.C. 2911.11(A)(1); kidnapping, in violation of R.C. 2905.01(A)(2) and (C); and rape, in violation of R.C. 2907.02(A)(2) and (B), all first degree felonies. Sentencing was continued, pending the outcome of a sexual classification hearing.

{¶ 12} On April 2, 2009, a combined sexual classification hearing and sentencing hearing was held. At the outset, defense counsel reminded the trial court that appellant had no prior felony or misdemeanor convictions, and he did not help to plan the attack. Counsel also stated that appellant was "desperate for money" and participated in the raid on Strominger's house for that reason; however, once there, appellant got "caught up in things that * * * to this day don't seem real to him at all." Counsel also stated that appellant is devoted to his young son, and asked for leniency in sentencing. Defendant then told the trial court that he is sorry for his actions and would like another chance. Defendant stated that he did not intend to "be in this situation again ever * * *" and that he never meant to hurt A.T. "in no shape or form." Appellant also stated that he is a diabetic, and he feared that prison would be detrimental to his health.

{¶ 13} After hearing appellant's statement, the trial court designated appellant as a Tier III sex offender, and explained to him the registration requirements that accompany that designation. Appellant indicated that he understood the designation and its requirements, which include the duty to register in-person every 90 days, for life, and indicated that he had voluntarily signed the written explanation of his duty to register.

{¶ 14} Following the sexual offender classification portion of the hearing, the prosecutor reminded the trial court that, although appellant stated he is not a rapist, the facts show otherwise, since he took advantage of a helpless, bound female after entering a dwelling with the intent of stealing money. The state then recommended that appellant serve 15 years in prison.

{¶ 15} Before sentencing appellant, the trial court stated that, in its opinion, appellant was caught up in a "gang mentality" when he committed the instant offenses. However, the trial court also stated that the seriousness of appellant's offenses, are "of such gravity that despite perhaps a sterling past history punishment must be imposed adequate to reflect the necessity of protecting the interest of society generally * * *." The trial court also stated that it had reviewed the record of proceedings, which included the presentence investigation report, oral statements made in court, and the victim impact statements, and stated that it considered the applicable factors in R.C. 2929.11 and other statutes regarding seriousness and recidivism, and that appellant was afforded all his rights pursuant to Crim.R. 32.

{¶ 16} The trial court ordered appellant to serve a sentence of seven years for aggravated burglary, five years for kidnapping, and six years for rape. The sentences for kidnapping and aggravated burglary were made concurrent to each other and consecutive to the mandatory sentence for rape, for a total sentence of 13 years. In addition, appellant was ordered to pay the costs of prosecution and any fees pursuant to R.C. 2929.19(A)(4) and R.C. 9.92(C). The trial court found that "it can reasonably be expected that

[appellant] would have the means to pay all or at least a part of the applicable costs of supervision confinement and assigned Counsel costs." The remaining counts of the indictment were dismissed. Appellant was ordered to submit to DNA testing, and was advised that he had 30 days in which to file a limited appeal.

{¶ 17} On April 7, 2009, the trial court journalized a judgment entry of sentencing in which it stated that appellant entered an *Alford* plea and was found guilty of aggravated robbery, kidnapping and rape, all first degree felonies. The trial court also stated that, before sentencing appellant to a total of 13 years in prison, it had considered the entire record, "as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12." A timely notice of appeal was filed in this court on April 29, 2009.

{¶ 18} In his first assignment of error, appellant asserts that the trial court erred by convicting him of both rape and kidnapping. In support, appellant argues that the crimes of rape and kidnapping are allied offenses of similar import pursuant to R.C. 2941.25, which states that:

{¶ 19} "(A) Where the same conduct by [a] 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.

{¶ 20} "(B) Where 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."

{¶ 21} In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, ¶ 10-13, the Ohio Supreme Court explained how to determine whether two offenses are allied offenses of similar import by stating that:

{¶ 22} "[t]his court has interpreted R.C. 2941.25 to involve a two-step analysis. 'In the first step, the elements of the two crimes are compared. If the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import and the court must then proceed to the second step. In the second step, the defendant's *conduct* is reviewed to determine whether the defendant can be convicted of both offenses. If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses.'" (Emphasis sic.) Id., quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117.

{¶ 23} In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 21-24, the Ohio Supreme Court held that in determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case. However, an exact alignment of those elements is not required. Id.

{¶ 24} Appellant was charged with the crime of kidnapping pursuant to R.C. 2905.01 which states, in relevant part, that:

{¶ 25} "(A) No person, by force, threat, or deception, * * * by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

{¶ 26} "* * *

{¶ 27} "(2) To facilitate the commission of any felony or flight thereafter;

{¶ 28} "* * *

{¶ 29} "(C)(1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division * * *, kidnapping is a felony of the first degree. * * *"

{¶ 30} Appellant was also charged with rape pursuant to R.C. 2907.02 which states, in relevant part:

{¶ 31} "(A)(2) 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.

{¶ 32} "(B) Whoever violates this section is guilty of rape, a felony of the first degree. * * *."

{¶ 33} The Supreme Court of Ohio has held that restraint of a victim by force is sufficient to constitute the offense of kidnapping. *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, ¶ 23. Accordingly, "'implicit within every forcible rape * * * is a kidnapping.'" Id. at ¶ 23, quoting *State v. Logan* (1979), 60 Ohio St.2d 126, 130. Rape and kidnapping are, therefore, allied offenses of similar import for purposes of R.C. 2941.25(A). *State v. Butts*, 9th Dist. No. 24517, 2009-Ohio-6430, ¶ 33. (Other citations omitted.) However, we must next examine whether the two crimes were committed

separately or with a separate animus. *Blankenship*, supra. The determining factor in our analysis is "'whether the restraint or movement of the victim is merely incidental to a separate underlying crime or, instead, whether it has a significance independent of the other offense.'" *Butts*, supra, quoting *State v. Logan*, supra, at 135; *State v. Gibson*, 8th Dist. No. 92275, 2009-Ohio-4984.

{¶ 34} As set forth above, all of the occupants of Strominger's home were bound and gagged while appellant, Cosme, Feltner and Miller proceeded to ransack Strominger's house. It was only after A.T. was taken to another room and raped by Cosme that appellant went into the room and also raped A.T. The original animus for kidnapping A.T. was the aggravated burglary. Accordingly, any restraint employed in the kidnapping was independent of, and not merely incidental to, that which was used to facilitate the rape. See *State v. Stadmire*, 8th Dist. No. 88735, 2007-Ohio-3644, ¶ 52. In this case, therefore, even though kidnapping and rape are allied offenses of similar import, appellant could be convicted of both offenses.

{¶ 35} On consideration, we find that the trial court did not err by sentencing appellant for both kidnapping and rape. Appellant's first assignment of error is not well-taken.

{¶ 36} In his second assignment of error, appellant asserts that the trial court erred by ordering him to serve a total of 13 years in prison. In support, appellant argues that he had no prior felony convictions as an adult, and no prior juvenile adjudications that would have been felonies if committed by an adult. Appellant further argues that the

record shows the trial court failed to consider that he did not help to plan the attack on Strominger's house, he did not force A.T. into a separate room, and he did not bind her with duct tape.

{¶ 37} In reviewing a felony sentence, we employ a two-prong analysis. First, we must "examine the sentencing court's compliance with all applicable rules and statutes * * * to determine whether the sentence is clearly and convincingly contrary to law." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. If the first prong is satisfied, we then review the trial court's decision under an abuse of discretion standard. Id. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 38} Appellant was convicted of one count each of aggravated burglary, kidnapping and rape, which are all first degree felonies. Pursuant to R.C. 2929.14(A)(1), the range of sentencing for a first degree felony is from three to 10 years. Appellant does not claim on appeal, and the record does not show, that the trial court's sentence as to each conviction was contrary to law. Accordingly, we will proceed to a determination as to whether the trial court abused its discretion by sentencing appellant to a total of 13 years in prison.

{¶ 39} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Ohio Supreme Court eliminated mandatory judicial fact-finding. Accordingly, post-*Foster*, trial courts "'are no longer required to make findings and give reasons for imposing maximum,

consecutive or more than the minimum sentence.'" *State v. Kalish*, supra, at ¶ 11; *Foster*, paragraph seven of the syllabus. However, the trial court must still consider the factors set forth in R.C. 2929.11 and 2929.12 before imposing a sentence. *Kalish*, supra, at ¶ 13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶ 38. In *Kalish*, the Ohio Supreme Court stated that R.C. 2929.11 and 2929.12 are not fact-finding statutes, but rather they "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish*, supra, at ¶ 17.

{¶ 40} R.C. 2929.11(A) states that:

{¶ 41} "[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶ 42} R.C. 2929.12 sets forth a nonexhaustive list of factors that the trial court is required to consider when determining whether the defendant's conduct is more or less serious that conduct normally constituting the offense. In addition, the trial court must consider the likelihood that the offender will commit future crimes.

{¶ 43} In this case, before pronouncing its sentence, the trial court stated that it had reviewed the statements of defense counsel, appellant and the prosecutor, as well as

the victim's impact statement and appellant's presentence investigative report. In addition, the trial court stated that it had considered the principles and purposes of sentencing as set forth in R.C. 2929.11, and all "other applicable statutory laws as well as the applicable case law." Additionally, the judgment entry of sentencing states that the trial court considered the factors set forth in R.C. 2929.11 and 2929.12.

{¶ 44} On consideration of the foregoing, we find that the trial court did not abuse its discretion by sentencing appellant to a total of 13 years in prison. Appellant's second assignment of error is not well-taken.

{¶ 45} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE