[Cite as *State v. McCormick*, 2014-Ohio-2433.]

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

State of Ohio

Appellee

v.

Major C. McCormick

Appellant

Court of Appeals No. L-13-1147
L-13-1148

Trial Court No. CR0201301028
CR0201301204

DECISION AND JUDGMENT

Decided: June 6, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney,
Brenda J. Majdalani and Lindsay Navarre, Assistant Prosecuting Attorneys,
for appellee.

Kent Sobran, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the sentence imposed on him after having been found guilty of abduction and felonious assault on an *Alford* plea in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On December 26, 2012, Toledo Police responded to a call from a convenience store by a woman who told them that she had been held captive in her own home and repeatedly beaten over a period of four hours. According to the woman, she was letting appellant, Major C. McCormick, stay at her home.

{¶ 3} At approximately 7:30 a.m. that morning, she reported, appellant became enraged when she received a telephone call from a boyfriend. The woman told police that appellant tackled her onto a bed and climbed on top of her. He then choked her with one hand while pulling her hair with the other. At one point, the woman reported, appellant used the pillow from a couch to smother her until she lost consciousness.

{¶ 4} Later, the woman stated, appellant allowed her to use the bathroom, but insisted that she keep the door open lest she try to escape. While in the bathroom, the woman noted that a large clump of her hair was missing and that her scalp was bleeding. According to the victim, when she left the bathroom and angled toward an outside door, appellant hit her with a couch cushion, knocking her to the floor. When she screamed for help, appellant told her everyone else was at work and no one would hear her, she reported.

{¶ 5} The woman told police that, after four hours of attacking her, appellant fell asleep. At that point she fled the house and called for help from a convenience store. She required medical assistance.

{¶ 6} Appellant was arrested and eventually named in two separate indictments; the first charging two counts of kidnapping, first degree felonies. The second indictment charged felonious assault, a second degree felony.

{¶ 7} Appellant initially pled not guilty to all charges, but, following negotiations with the state, agreed to amend his plea in return for the state dismissing one of the kidnapping charges and amending the other count to abduction, a third degree felony.

{¶ 8} On April 8, 2013, appellant pled guilty to the amended counts pursuant to *North Carolina v. Alford,* 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The trial court conducted a plea colloquy pursuant to Crim.R. 11, found appellant guilty and ordered a presentence investigation. At the sentencing hearing, the court imposed an 8-year term of incarceration for the felonious assault and a three-year term for the abduction. The court ordered that these sentences be served consecutively.

{¶ 9} From the judgment of conviction, appellant now brings this appeal. Appellant sets forth a single assignment of error:

> The trial court abused its discretion when it sentenced appellant to maximum and consecutive sentences.

{¶ 10} Appellant posits his argument in two parts. First he asserts that felonious assault and abduction are allied offenses of similar import and should have merged pursuant to R.C. 2941.25. Alternatively, appellant argues that, if the offenses do not merge, the imposition of maximum, consecutive sentences is an abuse of discretion.

I. Allied Offenses

{¶ 11} R.C. 2941.25 provides:

> (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.
>
> (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.

{¶ 12} The provision prevents multiple convictions of a single defendant arising out of the same occurrence. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 43. The statute limits legal exposure on acts which naturally arise from similar criminal acts when committed in a single transaction.

{¶ 13} The test to determine if multiple charges should be classified as allied offenses is two-pronged: (1) "whether it is possible to commit one offense and commit the other with the same conduct" and (2) "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Id.* at ¶ 48-49, quoting *State v. Brow*n, 119 Ohio St. 3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 50. "[I]f the court determines that the commission of one offense will never result in the

commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶ 51. When counts merge, the trial court must sentence on only one of the offenses. *State v. Alcala*, 6th Dist. Sandusky No. S-11-026, 2012-Ohio-4318, ¶ 40.

{¶ 14} The offenses to which appellant pled were felonious assault, in violation of R.C. 2903.11(A)(1), and abduction, in violation or R.C. 2905.02(A)(2). The elements of felonious assault, as charged, are (1) knowingly, (2) causing serious physical harm, (3) to another or to another's unborn. The elements of abduction are (1) without privilege to do so, (2) knowingly, (3) by force or threat, (4) restraining the liberty, (5) of another person, (6) under circumstances that create a risk of physical harm to the victim, or (7) place the other person in fear.

{¶ 15} The state argues that felonious assault and abduction are offenses by which the conduct for the commission of one offense may never result in commission of the other. We disagree. Both offenses must be committed knowingly. The force necessary for restraint could be the same force by which serious physical harm is caused. Thus it would seem that it would be possible to commit felonious assault in the process of abduction.

{¶ 16} The state cites *State v. Simmons*, 8th Dist. Cuyahoga No. 96208, 2011-Ohio-6074, ¶ 62-63, which it asserts holds the opposite, but a careful examination of this

authority reveals less certitude. In dicta, the *Simmons* court notes that the elements of the two offenses do not totally coincide, but premises its legal conclusion on the fact that "the offenses here were carried out at different times and with a separate animus."

{¶ 17} *Simmons*, nonetheless, is instructive for the second prong of the *Johnson* test, because Simmons, like appellant, beat and choked his victim into unconsciousness, then, after she regained consciousness, took her cell phone and restrained her until the next morning, when she escaped. *Id.* at ¶ 4-5. These facts are remarkably similar to those before us.

{¶ 18} Here appellant beat and choked his victim into unconsciousness on more than one occasion over a four hour period. When she regained consciousness each time appellant physically prevented her from leaving the house. From these facts, we can only conclude that the offenses of which appellant was convicted were committed at different times and with separate animus. The trial court did not err in denying appellant's request to merge the offenses.

II. Sentencing

{¶ 19} In the second prong of appellant's argument, he maintains that the trial court abused its discretion when it sentenced him to consecutive maximum sentences.

{¶ 20} Both appellant and the state cite *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, for the standard of review for criminal sentencing. This standard has been superseded by statute. *State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 11.

{¶ 21} An appeals court hearing a statutory felony sentence appeal must review the record, including the findings underlying the sentence. The appellate court may increase, reduce, modify, or vacate and remand a disputed sentence if it clearly and convincingly finds either of the following:

> (a) That the record does not support the sentencing court's findings under [R.C. 2929.13 (B) or (D)], [R.C. 2929.14 (B)(2)(e) or (C)(4)], or [R.C. 2929.20 (I)], whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law. R.C. 2953.08(G)(2).

{¶ 22} The standard of review for an appeal of a sentence is not abuse of discretion. *Tammerline* at ¶ 11. If a sentencing court is statutorily required to make findings or state findings on the record concerning the imposition of a sentence and fails to do so, the appeals court is directed to remand the case and instruct the sentencing court to state, on the record, the required findings. R.C. 2953.08(G)(1).

{¶ 23} There is a presumption that a sentence of imprisonment is to be imposed for a second degree felony. The court need make no findings unless it elects not to impose imprisonment. R.C. 2929.13(D). There is no presumption for or against imprisonment for a third degree felony, the court need only comply with the purposes and principles of sentencing articulated in R.C. 2929.11 and 2929.12. In its judgment of conviction, the trial court states that it has considered the purposes and principles of sentencing. There is nothing in the record to suggest otherwise.

{¶ 24} The trial court found that found that consecutive sentences were necessary,

> to protect the public from future crime or to punish the defendant, and not disproportionate to the seriousness of the defendant's conduct or the danger the defendant poses, the Court further finds the harm caused was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflect the seriousness of the offender's conduct and the defendant's criminal history requires consecutive sentences.

{¶ 25} These findings are consistent with those required for the imposition of consecutive sentences by R.C. 2929.14(C)(b) and (c). Our examination of the record, including the presentence investigation report, finds that these findings supported.

{¶ 26} R.C. 2929.20 (I) is inapplicable in this matter.

{¶ 27} With respect to the imposition of maximum sentences, felonious assault, as charged, is a second degree felony. A second degree felony is punishable by a prison term of "two, three, four, five, six, seven, or eight years." R.C. 2929.14(A)(2). Abduction, as charged, is a third degree felony and is punishable by a prison term of "nine, twelve, eighteen, twenty-four, thirty, or thirty-six months." R.C. 2929.14(A)(3)(b). Consequently, the sentences imposed by the trial court are not contrary to law.

{¶ 28} Appellant's offenses were not allied offenses of similar import and, therefore, were not subject to merger. The court's requisite findings were supported by

the record and the sentences imposed were not contrary to law. Accordingly, the trial court did not err in imposing maximum, consecutive sentences and appellant's sole assignment of error is not well-taken.

{¶ 29} On consideration, the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellant pay the court 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.

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE