[Cite as *State v. Toy*, 2010-Ohio-1098.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-04-116
	:	O P I N I O N
- vs -		3/22/2010
	:	
STEVEN M. TOY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-01-0085

Robin N. Piper III, Butler County Prosecuting Attorney, Michael A. Oster, Jr., Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

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POWELL, J.

{¶1} Defendant-appellant, Steven M. Toy, appeals the judgment of the Butler County Court of Common Pleas convicting him of rape and kidnapping. The judgment is affirmed.

{¶2} Appellant was indicted on two counts of rape in violation of R.C. 2907.02(A)(2), first-degree felonies, and one count of kidnapping in violation of R.C. 2905.01(A)(4), another first-degree felony, for conduct against his girlfriend's 16-year-old

daughter, K.B., that occurred on January 8-9, 2009.

{¶3} Appellant was tried by a jury and was convicted on counts one (rape) and three (kidnapping). The trial court sentenced appellant to an eight-year prison term for his rape conviction, to be served consecutively with a three-year prison term for the kidnapping conviction. Appellant timely appealed and raises one assignment of error:

{¶4} "THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF BOTH RAPE AND KIDNAPPING WHEN THEY ARE ALLIED OFFENSES OF SIMILAR IMPORT."

{¶5} Appellant agues that rape and kidnapping are allied offenses of similar import and that they were not committed with a separate animus. Appellant argues, therefore, that the rape and kidnapping counts should have been merged into a single conviction under R.C. 2941.25, which provides:

{¶6} "(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.

{¶7} "(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."

{¶8} The Ohio Supreme Court established a two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25. See *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, ¶101, citing *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625. The first step requires a reviewing court to compare the elements of the offenses in the abstract, without

considering the evidence in the case. *Cabrales* at paragraph one of the syllabus. If the court finds that the elements of the offenses are so similar "that the commission of one crime will result in the commission of the other," then the court must proceed to the second step in the analysis. Id. See, also, *State v. Trammell* (June 11, 2001), Butler App. No. CA2000-06-117; *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. The second step requires the court to review the defendant's conduct to determine whether the crimes were committed separately or with a separate animus for each crime. *Cabrales* at ¶14. If so, the defendant may be convicted of both offenses. Id.

{¶9} In the case at bar, the parties do not dispute that rape and kidnapping constitute allied offenses of similar import under the first prong of the *Cabrales* test.[1] Therefore, we turn our attention to the second prong to determine whether appellant committed the crimes "separately, or with a separate animus as to each," so as to allow appellant to be convicted of both offenses. R.C. 2941.25(B).

{¶10} In *State v. Logan* (1979), 60 Ohio St.2d 126, the Ohio Supreme Court provided guidance in determining whether kidnapping and another offense (in this case, rape) were committed with the same or a separate animus. The Court held that "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." Id. at

1. We note that in the past, this court has held that rape and kidnapping constitute allied offenses of similar import under R.C. 2941.25(A). See, e.g., *Trammell*, Butler CA2000-06-117 at 2 ("A comparison of the elements of rape and kidnapping reveals 'such a singularity of purpose and conduct that kidnapping may be said to be implicit within every forcible rape.'"); *State v. Carter*, Clinton App. No. CA2002-02-012, 2002-Ohio-6108, ¶38 ("The restraint inherent in any threat or use of force generally makes any rape under R.C. 2907.02[A][2] meet the elements of kidnapping under the restraint element of R.C. 2905.01[A][4]."). See, also, *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418; *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059, ¶36 ("in *State v. Donald* (1979), 57 Ohio St.2d 73, 74-75, we held that kidnapping, under R.C. 2905.01[A][4], and rape, under * * * R.C. 2907.02[A][2], are allied offenses. It is impossible to commit a rape, defined as engaging in sexual conduct with another by force or threat of force, without also committing kidnapping, defined as restraining the liberty of another by force, threat, or deception, to engage in sexual activity").

subparagraph (a) of the syllabus. Further, "[w]here the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from * * * the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions." Id. atsubparagraph (b) of the syllabus. In *Logan*, the Court defined "animus," for purposes of R.C. 2941.25(B), to mean "purpose or, more properly, immediate motive." *Logan* at 131.

{¶11} In the case at bar, the trial court concluded that a separate animus existed sufficient to support convictions for both rape and kidnapping on the basis that (1) K.B. was held for a prolonged period of time, even after the rape occurred, and (2) that there was "physical harm separate and apart from the underlying rape." For the reasons below, we agree with the trial court's conclusion.

{¶12} First, there is substantial evidence that K.B.'s restraint was prolonged and secretive as to establish a separate animus for each crime. K.B. testified that appellant picked her up from her home in Colerain at approximately 8 p.m. on January 8, 2009, and drove her to the West Chester Wendy's restaurant for something to eat. K.B. stated that appellant then drove her to the parking lots adjacent to the West Chester Wal-Mart, where he parked his semi-trailer trucks. During the next three hours, K.B. waited in several different vehicles owned by appellant until he was able to unlock the cab to his black semi-truck. While K.B. waited in the cab of the semi, appellant exited the vehicle and went to Wal-Mart to purchase a large box of cable ties ("zip ties") at 11:57 p.m.

{¶13} When appellant returned with the zip ties, he asked K.B. for her bracelets, saying "let me show you a trick." Despite K.B.'s protests, appellant placed the zip ties around her wrists, fashioning a makeshift set of handcuffs. K.B. testified that appellant then removed her belt and attempted to have sexual intercourse with her, but apologized and stopped a short time later. Appellant then got dressed, and while K.B.

remained in the back with her hands bound, appellant drove the semi-truck around what was described as the Tri-County area until approximately 3 a.m., when he returned the truck to the West Chester Wal-Mart parking lot. K.B. testified that while her hands were still bound, appellant placed a rag with "some type of smell" over her face and asked if she would "kick and scream" again, stating that she was "going to have to breathe eventually." K.B. testified that at that point, she submitted to sexual intercourse with appellant twice during the early morning hours of January 9, 2009.

{¶14} K.B. testified that around 6 a.m. on January 9, appellant used another zip tie to attach K.B. to a cargo net in the back of the semi-truck. K.B. stated that she remained bound to the cargo net until 10 a.m., when appellant finally exited the vehicle, giving K.B. the opportunity to break her ties to the net and escape to a nearby day care center.

{¶15} Based on the foregoing, we conclude that appellant's restraint of the victim was not merely incidental to the rape. Prior to attempting to engage in any sexual conduct, appellant took K.B. to a number of locations in his vehicle and the duration of the restraint was not brief – in fact, it lasted roughly 14 hours. Further, the "handcuffs" appellant used to restrain K.B. subjected her to a "substantial increase in risk of harm separate and apart" from the rape. The makeshift handcuffs not only facilitated the rape, but also substantially increased K.B.'s danger of asphyxiation when she was unable to defend herself while appellant placed a rag over her face. Beyond the dangers of potential asphyxia, the trial court noted that the zip ties created deep "ligature marks" on K.B.'s wrists, indicating additional injury separate from the injury caused by the rape. See *Carter*, 2002-Ohio-6108 (a separate animus existed for rape and kidnapping where the victim was bound with handcuffs and was thus unable to remove a latex glove and sock that defendant placed in her mouth). See, also, *State v.*

Collins (July 27, 1987), Butler App. Nos. CA86-04-048, CA86-04-058; *State v. Marcum* (Aug. 21, 1995), Madison App. No. CA94-08-028, at 3-4; *State v. Saleh*, Franklin App. No. 07AP-431, 2009-Ohio-1542.

{¶16} There is also substantial evidence indicating that appellant subjected K.B. to secretive confinement, another factor under *Logan* showing a separate animus. K.B. told the jury that several hours after the rape occurred, appellant indicated that the police were outside the vehicle and that she should cover herself up and pretend to be asleep. At that point, appellant also bound K.B. to the semi's cargo net with another zip tie. K.B. testified that she remained bound to the net for several more hours until finally escaping after appellant exited the vehicle. In sum, we find that the distance traveled and the duration of the restraint, combined with its secretive and harmful nature is evidence that a separate animus existed for the two crimes. We conclude that the trial court did not err in finding a separate animus in the case at bar, and did not err in convicting appellant of both rape and kidnapping. Therefore, appellant's sole assignment of error is overruled.

{¶17} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.