

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-098
	:	<u>OPINION</u>
- vs -	:	8/1/2011
	:	
ARMANDO B. HERNANDEZ,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR26665

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Craig A. Newburger, 477 Forest Edge Drive, South Lebanon, Ohio 45065, for defendant-appellant

PIPER, J.

{¶1} Defendant-appellant, Armando Hernandez, appeals his conviction in the Warren County Court of Common Pleas for three counts of rape, and single counts of abduction and attempted rape. We affirm the decision of the trial court in part, reverse in part, and remand for resentencing.

{¶2} On June 3, 2010, 16-year-old K.B. and her partner Katelyn were staying at the Red Roof Inn in Mason, Ohio and swimming in the outdoor pool. K.B. testified that as she

and Katelyn swam in the pool, they saw several "Mexican men" paying them close attention and that she felt uncomfortable with the way in which the Mexicans "kept staring" at them. After K.B. and Katelyn's discomfort level continued to rise, they left the pool and returned to their room. K.B. testified that the Mexicans followed them back to their room, but did not attempt to come in.

{¶3} Later that night, K.B. and Katelyn received a telephone call from a man speaking Spanish, but hung up because they did not understand Spanish. During a second phone call, the same Spanish-speaking male called back, but asked in English, "Do you need some company tonight?" K.B. testified that she could hear a "white guy" translating in the background and assumed it was the same white male she had seen with the Mexicans at the pool earlier that evening. K.B. and Katelyn hung up the phone again and the man did not call back.

{¶4} Around midnight, K.B. left her motel room to smoke a cigarette. She saw a Mexican man, later identified as Hernandez, drinking beer a few doors down from her room. Hernandez motioned her over, and K.B. walked toward him. At that point, Hernandez pointed to his motel room on the second floor and said to K.B., "I have something of yours." Hernandez offered K.B. a beer, which she accepted and took a drink. K.B. testified that she decided to follow Hernandez to his room to retrieve whatever Hernandez had of hers because she "thought maybe I left something at the pool."

{¶5} K.B. testified that she began to follow Hernandez to his room, but on the way, they stopped and Hernandez walked around the building and out of her view for approximately five minutes. K.B. stated that within a minute of Hernandez walking away from her, a black male approached her from across the parking lot and told her that she "better not leave." K.B. stated that she was afraid of what would happen if she tried to leave, and therefore stayed until Hernandez came back.

{¶6} Once Hernandez reappeared, K.B. followed him back to his room on the second floor in a separate building than the building in which her motel room was located. Once there, Hernandez knocked on the door, and the same white male K.B. had seen at the pool with the Mexicans answered the door. Hernandez and the white male spoke briefly in Spanish, and then the white male exited the room. K.B. testified that once the white male left and went downstairs, Hernandez grabbed her around the waist, and pushed her into the room.

{¶7} After Hernandez pushed K.B. into the room, he locked the motel room door and pushed her down onto the bed. K.B. tried to kick Hernandez several times, but Hernandez got on top of her and held her body down. While K.B. "screamed for help" and told Hernandez "no," Hernandez continued to hold her down and began to remove K.B.'s clothes. Once Hernandez removed his clothes and finished taking off K.B.'s clothes, Hernandez engaged in vaginal intercourse with her.

{¶8} K.B. testified that as Hernandez raped her, he sucked her neck and tried to kiss her repeatedly. After the first instance of vaginal intercourse, Hernandez prepared and smoked a marijuana cigarette. During that time, K.B. got off of the bed and tried to retrieve her clothes and flee. However, Hernandez grabbed her and pushed her back onto the other bed in the room. Despite K.B. telling him to stop, Hernandez engaged in vaginal intercourse again. K.B. also testified that Hernandez performed cunnilingus on her after the first vaginal rape on the second bed. Hernandez also attempted to engage in anal intercourse, but was unable to keep his penis in K.B.'s rectum. Hernandez then engaged in vaginal intercourse again. According to K.B.'s testimony, the sexual contact did not end until the two heard a knock at the door and Hernandez realized it was the police. At some point before the knock, Hernandez wiped K.B.'s vagina with a rag.

{¶9} K.B. testified that when they heard a knock at the door, Hernandez got off of

her and began to hide his marijuana. K.B. then took her clothes to the bathroom and began to dress. Three police officers entered the room and stated that they smelled marijuana. At that point, K.B. walked out of the bathroom and told the officers that Hernandez raped her. Officers took K.B.'s statement and then took her to the hospital where she was examined.

{¶10} At the hospital, medical personnel collected evidence in a rape kit, and also photographed K.B.'s neck area where she had three bruises, one of which was attributed to Hernandez.

{¶11} Katelyn testified that she and K.B. had been in the pool swimming and left when they felt uncomfortable due to the Mexican men. She also testified that she hung up the phone when the Mexican men called on the phone, and that she was aware that K.B. stepped out of the room after midnight to have a cigarette. According to Katelyn's testimony, she became alarmed when K.B. did not return and began searching the motel for K.B. At one point, two men who were staying in the motel room next to K.B. and Katelyn helped in the search, and suggested that Katelyn call 911 when they had not found K.B. after approximately 30 minutes. Katelyn then called the police and reported K.B. missing.

{¶12} Deputy Ryan Saylor of the Warren County Sheriff's Office testified that he responded to the Red Roof Inn when his department received a missing person report. He testified that after Katelyn told him what happened earlier with the Mexicans, he and two other officers began looking for K.B. and/or Hernandez's room, and that they were directed to Hernandez's room by another guest. Once he and the officers arrived at the upstairs room, he knocked several times before Hernandez opened the door. Saylor testified that he smelled marijuana coming from the room, and that K.B. walked out of the bathroom and told the officers that Hernandez had raped her. Saylor described K.B.'s demeanor as "shock, not very much emotions." Deputy Saylor took K.B. to his patrol car where he had her make a written statement while he called for EMS to transport her to the hospital.

{¶13} Deputy Scott Williams of the Warren County Sheriff's Office testified that he responded to the missing person dispatch, and that he assisted Deputy Saylor in looking for K.B. Williams stated that he and the other officers knocked on Hernandez's door, but that it took a while for him to open it. Once opened, Williams saw that Hernandez had his pants on, though they were unzipped, but wore no shirt. Williams also saw K.B. walk out of the bathroom and described her demeanor as "lethargic or in shock or staring off into space." Williams stayed with Hernandez as Saylor walked K.B. down to his squad car, and during that time, Williams witnessed Hernandez having a conversation with Sergeant Carr, who spoke fluent Spanish.

{¶14} Sergeant Carr testified that once K.B. and Deputy Saylor left the room, she stayed with Hernandez and discovered his identify by speaking Spanish with him. Once K.B. gave her written statement to Saylor detailing the rape, Carr spoke to Hernandez about K.B.'s allegations. Carr informed Hernandez specifically that K.B. alleged that he had raped her.

{¶15} During his conversation with Carr, Hernandez claimed that he was laying on the bed in his hotel room, and that K.B. came to his door and asked if she could come in and watch television with him. Hernandez claimed that he did not do "anything" with K.B., and Carr testified that Hernandez told her at least three times that he had not had any contact with K.B., sexual or otherwise. Hernandez then offered to provide a DNA sample, and Deputy Williams took a penile swab.

{¶16} Hernandez was arrested that night and later indicted on three counts of rape and single counts of abduction and attempted rape. Hernandez waived his right to a jury trial, and instead, had his case heard before the bench.

{¶17} In addition to the witness testimony discussed above, the court also heard testimony from the sexual assault nurse examiner (SANE) who performed the rape examination on K.B. The SANE nurse stated that as part of her examination, she

interviewed K.B., and that K.B. told her that she had been raped several times. The SANE nurse then took several swabs from K.B.'s rectum, vagina, and breasts. These swabs were tested by the crime laboratory, and Forensic Scientist, Annette Davis, testified to the results. Davis stated that her testing revealed semen on the swabs taken from K.B.'s rectum and vagina, and that there was amylase, a "constituent of saliva", found on both of K.B.'s breasts. Davis testified that while she was unable to test the semen from K.B.'s vagina, the samples from K.B.'s breasts and rectum were sufficient for testing, and that the samples recovered from K.B. matched Hernandez's DNA.

{¶18} Through an interpreter, Hernandez testified at trial and stated that he and a few co-workers were staying at the Red Roof Inn as part of a job assignment painting water towers in the area. He stated that he saw Katelyn and K.B. in the swimming pool on the night of the incident hugging, kissing, and touching each other. Hernandez testified that K.B. smiled at him several times and was laughing. However, Hernandez stated that he did not talk with either K.B. or Katelyn. Hernandez stated that later that evening, he saw K.B. exit her room, and engage in a conversation with a black male, who later asked him for a cigarette. Hernandez testified that he gave the man a cigarette and then walked upstairs to his room, at which time, K.B. followed him up the stairs.

{¶19} Hernandez testified that once they got to his upstairs room, he knocked on the door and the white male in the room left to go outside. According to Hernandez, K.B. walked into the room, and he never pushed or dragged her into the room. Hernandez stated that the two started to watch television and then stood up and started kissing each other, and then engaged in consensual vaginal and oral sex. However, Hernandez denied ever having or trying to have anal sex with K.B.

{¶20} The trial court found Hernandez guilty of three counts of rape, and sentenced him to three years for each count, to run concurrently. The trial court also sentenced

Hernandez to one year for the abduction charge, to run concurrently with the three rape charges. The trial court then sentenced Hernandez to three years for the attempted rape charge, to run consecutive to the other three year sentence, for a total aggregate sentence of six years. Hernandez now appeals his convictions and sentence, raising the following assignments of error.

{¶21} Assignment of Error No. 1:

{¶22} "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR GOES AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS."

{¶23} Hernandez argues in his first assignment of error that his convictions are not supported by the manifest weight or sufficiency of the evidence. This argument lacks merit.

{¶24} Manifest weight and sufficiency of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298. When addressing sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶25} While the test for sufficiency requires an appellate court to determine whether the state has met its burden of proof at trial, a manifest weight challenge examines the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Wilson*. "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence

and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12.

{¶26} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *Thompkins*, 78 Ohio St.3d at 387.

{¶27} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson* at ¶35, citing *State v. Lombardi*, Summit App. No. 22435, 2005-Ohio-4942, ¶9.

{¶28} Hernandez was charged with three counts 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." According to R.C. 2901.01(A)(1), force "means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."

{¶29} The trial court heard testimony that Hernandez forced K.B. onto the bed, got on top of her, and held her body down. In response to the constraint physically exerted by Hernandez, K.B. tried to kick Hernandez several times, "screamed for help," and told

Hernandez "no." However, Hernandez continued to hold K.B. down against the bed and began to remove her clothes. Once Hernandez removed his clothes and finished taking off K.B.'s clothes against her will, Hernandez engaged in sexual conduct with her by vaginal intercourse. The testimony therefore indicates that Hernandez forced K.B. into the sexual contact. See *State v. Nicodemus* (May 15, 1997), Franklin App. No. 96APA10-1359, 1997 WL 254095, *13 (finding use of force to compel sexual activity where appellant continued to engage in sexual conduct despite being pushed away repeatedly by the victim); and *State v. Alkire*, Madison App.No. CA2008-09-023, 2009-Ohio-2813 (affirming conviction for rape by force where victim repeatedly pushed appellant away, and told appellant "no" and "stop" on several occasions during the sexual contact).

{¶30} The second count of rape stemmed from Hernandez performing cunnilingus on K.B. by force. The trial court heard testimony that after K.B. tried to escape the room as Hernandez smoked marijuana, he grabbed her and pushed her back onto the other bed in the room. Despite K.B. telling him to stop, Hernandez engaged in vaginal intercourse again and performed cunnilingus on K.B. as he held her down on the bed.

{¶31} The third rape charge is specific to the last time that Hernandez engaged in vaginal intercourse with K.B. by use of force. The trial court heard testimony that after Hernandez attempted to engage in anal intercourse, he engaged in vaginal intercourse while holding K.B. down on the bed.

{¶32} In addition to K.B.'s testimony, the trial court also heard evidence that the DNA material found on K.B.'s breasts were a match with Hernandez, and that one of the bruises on K.B.'s neck was attributable to Hernandez. The inclination of the greater amount of this credible evidence supports Hernandez's convictions for rape.

{¶33} According to R.C. 2905.02, "(A) no person, without privilege to do so, shall knowingly do any of the following: (1) By force or threat, remove another from the place

where the other person is found; (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear *** (B) No person, with a sexual motivation, shall violate division (A) of this section.

{¶34} The trial court heard testimony that in order to engage in sexual intercourse with K.B., Hernandez knowingly forced K.B. into his motel room and then restrained her liberty by locking the motel room door. Hernandez only permitted K.B. to leave when the police arrived. K.B. also testified several times that even though she fought back and tried to leave, she was fearful that if she tried to do anything else to gain her freedom, Hernandez would hurt her even worse than he already was. The manifest weight of the evidence therefore supports Hernandez's conviction for abduction.

{¶35} According to R.C. 2923.02(A), "no person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense." As previously stated, R.C. 2907.02(A)(2) forbids a person from engaging "in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶36} "In *State v. Heinisch* (1990), 50 Ohio St.3d 231, 238-239, the Court held that attempted rape requires that the actor intend to compel the victim to submit to sexual conduct by force or threat and commit some act that 'convincingly demonstrates' such intent. The conduct complained of need not be the last proximate act prior to the commission of the felony. Rather, the actor need only take a substantial step, or act strongly corroborative of the actor's criminal purpose." *State v. Fuller*, Butler App. Nos. CA2000-11-217, CA2001-03-048, CA2001-03-061, 2002-Ohio-4110, ¶23.

{¶37} The trial court heard testimony that Hernandez tried to engage in anal sex with K.B. against her will, but was unable to keep his penis in her rectum. Although he was

unable to complete the act, by trying to place his penis in K.B.'s rectum, Hernandez engaged in conduct that if successful would have constituted the crime of rape. See *State v. Wells*, 91 Ohio St.3d 32, 34, 2001-Ohio-227, (holding that "where the evidence shows that the defendant attempts to penetrate the victim's anus, and, for whatever reason, fails to do so and makes contact only with the buttocks, there is sufficient evidence to prove the defendant guilty of the crime of attempted anal rape").

{¶38} The trial court also heard testimony that semen was taken from K.B.'s rectum during the examination by the SANE nurse, and that the semen matched Hernandez's DNA, thereby indicating that Hernandez attempted to have anal sex with K.B. Hernandez's attempt to place his penis in K.B.'s rectum, and his repeated attempts to keep it there by the use of force, constituted the act that "convincingly demonstrates" Hernandez's intent to engage in anal sex by use of force.

{¶39} The state produced K.B.'s testimony, recounting the events of the rape, her unwillingness to engage in sexual activity with Hernandez, and her resistance. Multiple times on direct and cross-examination, K.B. testified that she told Hernandez "no" and that she tried to push him away, but was unable to stop him from engaging in multiple acts of sexual contact with her.

{¶40} In rape cases such as this, "courts have consistently held that the testimony of the victim, if believed, is sufficient to support a conviction, even without further corroboration." *State v. Dunn*, Lorain App. No. 04CA008549, 2005-Ohio-1270, ¶11. Even so, K.B.'s version of events is supported by physical evidence such as the DNA taken from her rectum and breasts that matched Hernandez, and the bruise attributed to Hernandez.

{¶41} In order to demonstrate that his convictions were against the manifest weight of the evidence, Hernandez asserts that any sexual contact with K.B. was consensual. However, the trial court convicted Hernandez of raping K.B., thereby rejecting this claim. The

trial court made its determination after accepting testimony from K.B., Katelyn, three members of the Warren County Sheriff's Office, the SANE nurse who performed a rape-kit examination on K.B., the lab technician who matched the DNA taken from K.B. to Hernandez, as well as Hernandez in his own defense. "Upon acknowledging that such extensive testimony will inevitably produce some inconsistent or conflicting assertions, we recognize the sound principal that the trier of fact is best positioned to weigh the credibility of the individual witness and reach a conclusion based on the totality of the evidence." *State v. Dunn*, Lorain App. No. 04CA008549, 2005-Ohio-1270, ¶10.

{¶42} Therefore, after reviewing the entire record and weighing the evidence, including the credibility of the witnesses, with permissible and reasonable inferences, we cannot say that the trial court clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. Having concluded that all of Hernandez's convictions were supported by the manifest weight of the evidence, thus also disposing of the sufficiency argument in the process, Hernandez's first assignment of error is overruled.

{¶43} Assignment of Error No. 2:

{¶44} "THE TRIAL COURT ERRED WHEN IT IMPOSED SEPARATE CONVICTIONS AND PRISON SENTENCES FOR RAPE, ATTEMPTED RAPE AND ABDUCTION."

{¶45} Hernandez argues in his second assignment of error that the trial court erred when it imposed separate convictions and prison sentences for three counts of rape, one count of attempted rape, and one count of abduction.

{¶46} The Ohio Supreme Court has recently set forth a two-part test to determine if offenses are allied offenses of similar import under R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one

offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. *** If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *Id.* at ¶48. (Emphasis in original.) The court went on to state, "if the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. Conversely, if 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." *Id.* at ¶49-51. (Emphasis in original.)

{¶47} Applying the *Johnson* analysis to the case at bar, we must first determine if it is possible for rape, attempted rape, and abduction to be committed with the same conduct. To be guilty of rape in violation of R.C. 2907.02(A)(2), the state had to prove that Hernandez engaged in sexual conduct with K.B. and purposely compelled her to submit by force or threat of force. To be guilty of attempted rape in violation of R.C. 2923.02(A), the state had to prove that Hernandez purposely or knowingly engaged in conduct which, if successful, would constitute or result in the offense of rape as stated above. To be guilty of abduction in violation of R.C. 2905.02, the state had to prove that Hernandez, with a sexual motivation and without privilege to do so, knowingly and by force or threat, restrained K.B.'s liberty under circumstances that created a risk of physical harm to her or placed her in fear.

{¶48} Regarding the rapes and attempted rape, the law in Ohio is clear that oral, anal, and vaginal rapes are distinct acts that constitute separate acts. *State v. Barnes* (1981), 68 Ohio St.2d 13, 14. As stated in *Barnes*, "repeated acts of forcible sexual intercourse are not

to be construed as a roll of thunder, -- an echo of a single sound rebounded until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim." *Id.* at 19.

{¶49} As one court noted, "the victim testified to a separate act of vaginal intercourse before the anal penetration. We hold that entry into two bodily orifices constituted two separate acts of rape." *State v. Ware* (1977), 53 Ohio App.2d 210, 211. The court in *Ware* went on to cite R.C. 2941.25(B), for the proposition that "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."

{¶50} K.B. testified that after Hernandez raped her vaginally on the first bed, he raped her a second time on the second bed by cunnilingus and then attempted to anally rape her. It was not possible for Hernandez, by the same conduct, to place his penis in K.B.'s vagina, perform cunnilingus on K.B., and try to anally rape her. These three sexual assaults required different parts of Hernandez's anatomy and different orifices on K.B.'s body, as well as different positions and the distinct thoughts necessary to move from body part to body part. Moreover, Hernandez's actions denigrated K.B.'s integrity and caused her further dangers and harms associated with oral, anal, and vaginal rapes. We therefore answer the first question presented in *Johnson*, whether it is possible to commit one offense *and* commit the other with the same conduct, in the negative and find that each successive rape committed against K.B. warranted its own separate conviction and criminal punishment.

{¶51} Regarding the abduction, we find that Hernandez committed the abduction and

other sexual crimes with the same animus as set forth in the second prong of the *Johnson* test, i.e., a single act, committed with a single state of mind. "If the defendant acted with the same 'purpose, intent, or motive' in both instances, the animus is identical for both offenses." *Stave v. Valvano* (Dec. 30, 1992), Hamilton App. Nos. C-920227, C-920228, 1992 WL 393196, *2, citing *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 84. "Like all mental states, animus is often difficult to prove directly, but must be inferred from the surrounding circumstances. *** Where an individual's immediate motive involves the commission of one offense, but in the course of committing that crime he must, A priori, [sic] commit another, then he may well possess but a single animus, and in that event may be convicted of only one crime." *State v. Logan* (1979), 60 Ohio St.2d 126, 131.

{¶52} Hernandez was charged in the indictment with abducting K.B. with a motive to violate her sexually. Testimony indicated that Hernandez grabbed K.B. around the waist and pushed her into his motel room. Hernandez then locked the door, pushed K.B. onto the bed and then raped her. The force used to compel K.B. into the sexual acts, such as forcing her into the room, pinning her against the bed and knocking her backwards when she tried to leave, was a single course of action, committed with a single state of mind. See *State v. Williams*, Cuyahoga App. No. 94616, 2011-Ohio-925, ¶61 (finding rape and kidnapping allied offenses where "the indictment alleged that the kidnapping was sexually motivated and therefore appellant's animus for the kidnapping and rape was the same or, stated differently, the rape and kidnapping were a single act, committed with a single state of mind").

{¶53} Hernandez's restraint of K.B. was incidental to the underlying sexual crimes, and had no significance independent of those sexual crimes. Instead, K.B.'s movement from the motel's outside corridor into Hernandez's room was slight, and the detention was no longer than the time necessary to complete the underlying sexual offenses.

{¶54} Having found that the trial court properly convicted Hernandez of the rapes and

attempted rape, but should have merged the abduction charge, we sustain Hernandez's second assignment of error as it relates to the abduction charge only.

{¶55} Assignment of Error No. 3:

{¶56} "THE TRIAL COURT ERRED WHEN IT IMPOSED A CONSECUTIVE, SEPARATE SENTENCE FOR ATTEMPTED RAPE, AND FURTHER ERRED BY NOT PROVIDING JUDICIAL FINDINGS FOR IMPOSING SAID CONSECUTIVE SENTENCES."

{¶57} Hernandez argues in his final assignment of error that the trial court erred by imposing consecutive, separate sentences for attempted rape and not providing judicial findings for imposing the consecutive sentences. This argument lacks merit.

{¶58} Similar arguments have been made to this court in wake of the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct 711, which held that the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, finding of facts necessary to impose consecutive, rather than concurrent, sentences for multiple offenses.

{¶59} Hernandez argues that the trial court should have been required to make judicial findings as it was required by statute to do before the Ohio Supreme Court decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the Ohio Supreme Court found statutes requiring judicial findings prior to imposition of maximum, nonminimum, or consecutive sentences unconstitutional because doing so violated the Sixth Amendment right to jury trial. Since *Ice*, the Ohio Supreme Court has considered whether the pre-*Foster* statutes were revived by *Ice*, and held that they were not. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320.

{¶60} The court in *Hodge* stated that while *Ice* negated the idea that judicial fact finding was a violation of the Sixth Amendment, such a finding did not serve to revive the pre-*Foster* statute. Therefore, the court stated that the General Assembly was no longer

constrained by *Foster's* holdings and may, if it chooses to do so, respond with enactment of a statutory provision in light of *Ice's* holding. However, the Ohio General Assembly has not yet enacted such legislation, and Hernandez was not entitled to judicial fact finding before imposition of consecutive sentences. Hernandez's final assignment of error is overruled.

{¶61} Judgment affirmed in part, reversed in part, and remanded for resentencing consistent with this opinion.

POWELL, P.J., and RINGLAND, J., concur.