[Cite as *State v. Seymore*, 2012-Ohio-3125.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
		CASE NOS. CA2011-07-131
Plaintiff-Appellee,	:	CA2011-07-143
	:	O P I N I O N
- vs -		7/9/2012
	:	
ROBERT M. SEYMOUR a.k.a. ROBERT M. SEYMORE,	:	
	:	
Defendant-Appellant.		
	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2010-12-2059

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Bldg., 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Scott M. Blauvelt, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

RINGLAND, J.

{¶ 1} Defendant-appellant, Robert M. Seymore, appeals from a decision of the Butler County Court of Common Pleas convicting him of one count of domestic violence, one count of aggravated burglary, two counts of assault, one count of grand theft, one count of failure to comply with an order or signal of a police officer, and one count of violating a protection

order.[1] We affirm the trial court's decision regarding its acceptance of Seymore's guilty pleas. However, under the facts and circumstances of this case, domestic violence, aggravated burglary, and violating a protection order are allied offenses of similar import that should have been merged under R.C. 2941.25. Consequently, we remand this matter for resentencing.

{¶ 2} On April 13, 2011, Seymore was indicted by a Butler County Grand Jury on the above charges. A jury trial was scheduled to commence on July 6, 2011. However, on July 5, 2011, Seymore entered guilty pleas as to all counts charged in the indictment. At the plea hearing, Seymore waived the reading of the facts and stipulated to the facts contained within the bill of particulars.

{¶ 3} At the plea hearing, the following exchange took place between the trial court and Seymore:

> THE COURT: And more importantly, Mr. Seymour [sic], is it your understanding that you are going to plead guilty as outlined by the prosecutor in this matter?
>
> THE DEFENDANT: That's correct.
>
> * * *
>
> THE COURT: And is anyone forcing you, threatening you, or pressuring you to enter these pleas of guilty to the seven counts?
>
> THE DEFENDANT: Can I just not answer that question?
>
> [TRIAL COUNSEL]: What do you mean by that?
>
> THE COURT: * * * I'm not going to take a plea that someone feels they are being forced, pressured or threatened. If you want to have a minute or two to talk to Mr. Seymour [sic], that's fine, but if not, we will just go to trial tomorrow because I'm not going to take a plea where someone is forced or threatened –

1. While this appeal consists of two cases, case numbers CR2010-12-2059 and CR2011-03-0432, Seymore concedes that the trial court did not err in case number CR2010-12-2059. As a result, our discussion only addresses case number CR2011-03-0432.

> [TRIAL COUNSEL]: I understand.
>
> THE COURT: -- if they feel they are. I'm not saying he was, but – so why don't we go off the record, allow [trial counsel] some – a few minutes to talk to Mr. Seymour [sic] and then we will come back here and if not, one way or another, we will come back and figure out what we are going to do.

After a short recess, the following exchange took place:

> [TRIAL COUNSEL]: Your Honor, it's correct, we did speak for a few minutes here. And I want to make it clear to you, Mr. Seymour [sic] is not trying to delay these proceedings. He did not know he was going to be brought over this morning. He originally was expecting we were going to have a trial tomorrow, but he has indicated to me a willingness to plead and he wants to proceed with that. He just reflected on the fact that this is an important decision with a lot of weight to it and he wanted to have a moment to step back from the pressure of the moment, if you will, and reflect. And we have done that and he is ready to proceed with this plea.
>
> THE COURT: Okay. I'm going to start again. Mr. Seymour [sic], do you feel like anyone is threatening you, pressuring you or forcing you to enter a plea of guilty to the seven counts that you are?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Has anyone made you any promises in exchange for this plea?
>
> THE DEFENDANT: No, sir.

The trial court then continued the colloquy, informing Seymore of various constitutional and nonconstitutional provisions as required under Crim.R. 11(C)(2)(a). In the end, Seymore pled guilty to all seven counts.

{¶ 4} Seymore was sentenced to a total of 13 years and 6 months in prison, with a credit for 129 days previously served. The trial court did not engage in any type of allied offenses analysis, and trial counsel did not object. Sentences for all counts were ordered to be served consecutively with the exception of the sentence for violating a protection order, which was ordered to be served concurrently with the other counts.

{¶ 5} Seymore now appeals, raising three assignments of error for review.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED TO THE PREJUDICE OF [SEYMORE] IN ITS ACCEPTANCE OF INVOLUNTARY GUILTY PLEAS, IN VIOLATION OF [SEYMORE'S] DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

{¶ 8} Seymore argues that his pleas were not voluntary. While Seymore concedes that the voluntary requirement under Crim.R. 11(C)(2)(a) is a nonconstitutional provision, Seymore asserts that the trial court was required to do more than repeat a question to him to dispel the concern that he was not entering the pleas voluntarily. We disagree.

{¶ 9} The procedure a trial court must adhere to before accepting a criminal defendant's felony plea is governed by Crim.R. 11(C)(2), which provides as follows:

> In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:
>
> (a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.
>
> (b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.
>
> (c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

{¶ 10} With respect to the nonconstitutional notifications required by Crim.R. 11(C)(2)(a) and (b), a trial court's "substantial compliance" during the plea colloquy is sufficient for a valid plea. *State v. Veney,* 120 Ohio St.3d 176, 2008-Ohio-5200, ¶ 14-16; *State v. Dunaway*, 12th Dist. Nos. CA2009-05-141 and CA2009-06-164, 2010-Ohio-2304, ¶ 14. Under this standard, a court's slight deviation from the text of the rule is permissible, so long as the totality of the circumstances indicates that the defendant subjectively understands the implications of his plea and the rights he is waiving. *State v. Douglass,* 12th Dist. Nos. CA2008-07-168 and CA2008-08-199, 2009-Ohio-3826, ¶ 10.

{¶ 11} When the trial court does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, the reviewing court must then determine whether the trial court partially complied, or failed to comply with the rule. *Id.* If the trial court partially complied with Crim.R. 11, the plea may be vacated only if the defendant demonstrates a prejudicial effect. *Id.*, citing *State v. Nero*, 56 Ohio St.3d 106, 108 (1990). The test for prejudice is "whether the plea would have otherwise been made." *Nero* at 108.

{¶ 12} In this case, Seymore did not want to reply to the trial court's inquiry as to whether he felt pressured to enter the guilty pleas. The trial court responded by taking a brief recess because it was "not going to take a plea where someone is forced or threatened." This recess allowed Seymore to discuss his pleas with his attorney and to dispel any hesitations regarding the pleas. After the recess, the trial court again asked Seymore, "do you feel like anyone is threatening you, pressuring you, or forcing you to enter a plea of guilty to the seven counts that you are?" Seymore responded, "No, sir." Later in the colloquy, the trial court asked, "Are you giving this plea freely and voluntarily?" Seymore responded, "Yes, sir." Seymore then pled guilty to each of the seven counts as charged in the indictment. Furthermore, after a plea agreement was reached, Seymore, his attorney, and the

prosecuting attorney signed a written "Plea of Guilty and Jury Waiver." Directly above Seymore's signature, this document reads: "I enter this plea voluntarily." At the plea hearing, Seymore indicated that his attorney went over the document and that he understood its contents.

{¶ 13} In light of the foregoing considerations, we find the trial court did take steps to ensure Seymore's pleas were voluntary. Consequently, we find that the trial court substantially complied with the voluntary requirement under Crim.R. 11(C)(2)(a). *See State v. Sexton*, 2nd Dist. No. 04CA14, 2005-Ohio-449. Furthermore, Seymore does not assert, and the record does not indicate, that the trial court failed to comply with any other provision under Crim.R. 11(C)(2), including the constitutional provisions. Accordingly, Seymore's first assignment of error is overruled.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF [SEYMORE] IN IMPOSING MULTIPLE SENTENCES FOR ALLIED OFFENSES OF SIMILAR IMPORT.

{¶ 16} Seymore argues that domestic violence, aggravated burglary, and violating a protection order are all allied offenses of similar import, which should have been merged by the trial court. Seymore asserts that these offenses comprised a single event and were committed by the same conduct with no separate animus. We agree.

{¶ 17} Initially, we note that the state urges us to deviate from the standards set forth in *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, regarding the proper standard of review for allied offenses of similar import because it is a progeny of *State v. Rance*, 85 Ohio St.3d 632 (1999). The state rationalizes that because *Rance* was overruled by *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, *Underwood* is no longer good law, and therefore, plain error is no longer the proper standard of review to employ when analyzing

allied offenses of similar import. However, *Johnson* merely states "we hereby overrule *Rance* to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Id.* at ¶ 44. Until the Ohio Supreme Court states otherwise, we will continue to follow *Rance* and its progeny regarding the proper standard of review for allied offenses of similar import.

{¶ 18} As Seymore failed to raise an objection in the trial court challenging whether the offenses were allied offenses of similar import, he has waived all but plain error. Plain error exists where there is an obvious deviation from a legal rule that affected the outcome of the proceeding. Crim.R. 52(B); *State v. Blanda,* 12th Dist. No. CA2010-03-050, 2011-Ohio-411, ¶ 20, citing *State v. Barnes,* 94 Ohio St.3d 21, 27 (2002). In regard to sentencing, the imposition of multiple sentences for allied offenses of similar import amounts to plain error, whether ordered to be served consecutively or concurrently. *Underwood* at ¶ 31.

{¶ 19} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct committed with the same animus. *State v. Brown,* 12th Dist. No. CA2009-05-142, 2010-Ohio-324, ¶ 7. The statute 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.

{¶ 20} In *Johnson*, the Ohio Supreme Court established a two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *State v. Craycraft,* 12th Dist. Nos. CA2009-02-013 and CA2009-02-014, 2011-Ohio-413, ¶ 11. Courts must first determine whether it is possible to commit one offense and commit the other with the same

conduct. *Johnson* at ¶ 48; *State v. McCullough,* 12th Dist. Nos. CA2010-04-006 and CA2010-04-008, 2011-Ohio-992, ¶ 14. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed by the same conduct. *Johnson* at ¶ 48; *Craycraft* at ¶ 11.

{¶ 21} If it is found that the offenses can be committed by the same conduct, the court must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶ 49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Johnson* at ¶ 50; *State v. Roy*, 12th Dist. No. CA2009-11-290, 2011-Ohio-1992, ¶ 11. However, if 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; *Craycraft* at ¶ 11-12; *Roy* at ¶ 11.

{¶ 22} First, we must determine whether it is possible to commit the offenses of domestic violence, aggravated burglary, and violating a protection order with the same conduct. In this case, domestic violence is knowingly causing or attempting to cause physical harm to a family or household member when the offender had previously been convicted of domestic violence. *See* R.C. 2919.25(A). Aggravated burglary is trespassing by force, stealth, or deception in an occupied structure with the purpose to commit a criminal offense while attempting, threatening, or inflicting physical harm on another. *See* R.C. 2911.11(A)(1). Furthermore, Seymore was charged with recklessly violating a protection order while committing a felony offense. *See* R.C. 2919.27(A)(1) and 2919.27(B)(4). Harm to a victim can be caused by the same conduct that was used to commit both aggravated burglary in

violation of R.C. 2911.11(A)(1) and domestic violence. In addition, a person can violate a protection order by committing harm to the protected person, which can be the same conduct that was used to commit the aggravated burglary in violation of R.C. 2911.11(A)(1) and domestic violence. Accordingly, it is certainly possible for all three offenses to be committed by the same conduct.

{¶ 23} Now we must determine whether Seymore committed the offenses with the same conduct, i.e., a single act and a single state of mind. At Seymore's plea hearing, the parties stipulated to the facts as contained in the bill of particulars. For all three offenses, the bill of particulars states that each respective offense was committed on or about March 5, 2011 "when the Defendant broke through the door of 630 Lafayette Apt. F, while Lisa Martinez was inside, Defendant struck Lisa Martinez in the face, causing her nose to bleed and facial swelling, Defendant was under a DVTPO issued on 12/20/10 forbidding Defendant to have contact with Lisa Martinez * * *." [sic]

{¶ 24} Despite relying upon the same conduct in the bill of particulars for all three offenses, the state argues that we are foreclosed from finding that Seymore's convictions for domestic violence and aggravated burglary were based on the same conduct because of our recent decision *State v. Crosby*, 12th Dist. Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907. However, we find this case distinguishable. In *Crosby*, we found the defendant committed burglary with a different act and a separate animus from safecracking and grand theft. In that case, we rationalized that the defendant could have entered the residence with any criminal purpose, yet abandoned the criminal act before actually completing it. In contrast, Seymore is charged with *aggravated* burglary in violation of R.C. 2911.11(A)(1), which requires the offender to inflict, attempt, or threaten physical harm on another. In the case at bar, Seymore did not actually complete the aggravated burglary until he struck Martinez in the face. Accordingly, we find that Seymore committed aggravated burglary with

the same conduct as domestic violence.

{¶ 25} The state concedes that the offenses of domestic violence and violating a protection order may have been committed with a single act. However, the state argues that these offenses were committed with a separate animus because Seymore first had the intent to violate the protection order and then had the intent to engage in domestic violence. We find this argument unpersuasive.

{¶ 26} Seymore was charged with violating a protection order as a felony, indicating Seymore was engaged in committing a felony offense when he violated the protection order. Moreover, the supporting evidence was the same for the offenses. All three offenses were based on Seymore's conduct inside Martinez's apartment when he struck her in the face, causing her nose to bleed and her face to swell. We find that the commission of domestic violence, aggravated burglary, and violating a protection order were committed by a single act with a single state of mind. *See State v. Weathers*, 12th Dist. No. CA2011-01-013, 2011-Ohio-6793 (finding felonious assault, domestic violence, and violating a protection order allied offenses of similar import subject to merger when the state relied on the same felonious conduct for all three offenses).

{¶ 27} Under the record before us, domestic violence, aggravated burglary, and violating a protection order are allied offenses of similar import and must be merged for sentencing. We find that the trial court committed plain error by not merging these offenses. Accordingly, Seymore's second assignment of error is sustained.

{¶ 28} Assignment of Error No. 3:

{¶ 29} [SEYMORE] WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶ 30} Seymore argues that trial counsel was ineffective because trial counsel failed to

seek merger of allied offenses of similar import and failed to object to the imposition of multiple sentences for allied offenses of similar import. However, based on our finding that the trial court committed plain error by not merging his domestic violence, aggravated burglary, and violating a protection order convictions under his second assignment of error, we now find that this argument is rendered moot.

{¶ 31} The judgment is affirmed regarding the trial court's acceptance of Seymore's guilty pleas. The sentence is vacated and this matter is remanded to the trial court solely for resentencing. Upon remand, the state can elect which allied offense to pursue, which the trial court must accept and then merge the crimes for resentencing.

POWELL, P.J., and HUTZEL, J., concur.