[Cite as *State v. Lung*, 2012-Ohio-5352.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
		CASE NO. CA2012-03-004
Plaintiff-Appellee,	:	
		O P I N I O N
	:	11/19/2012
- vs -		
	:	
JOSEPH LUNG,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 2011-2014

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Brandon Charles McClain, 70 Birch Alley, Suite 240, Beavercreek, Ohio 45440, for defendant-appellant

BRESSLER, J.

{¶ 1} Defendant-appellant, Joseph Lung, appeals his sentence in the Brown County Court of Common Pleas for kidnapping.

{¶ 2} At 4:00 a.m. on December 27, 2010, Keren Lung (appellant's wife) was awakened by one of her sons frantically saying, "Mom, wake up. Joe has the shotgun." The shotgun was loaded. Thereafter, appellant held Keren and her children (appellant's step-

sons) at gunpoint. Keren and her children were separated by 30 feet. Neither Keren nor the children were allowed to move, to be together, or to leave the house. The children were crying, screaming, and begging appellant, "Please stop. Don't shoot us. Let us go." Eventually, the children were able to escape. Keren was left alone with appellant until she, too, was able to escape. As she was fleeing the house, Keren kept screaming, "Don't shoot me. Don't shoot me. Joe, don't shoot me."

{¶ 3} In January 2011, appellant was indicted on five counts of kidnapping, each with a firearm specification, one count of domestic violence, and one count of having weapons while under disability. On July 1, 2011, appellant pled guilty to two counts of kidnapping in violation of R.C. 2905.01(B)(2) (second-degree felonies), one count with a firearm specification, the other count without a firearm specification. He was sentenced to three years in prison on each count of kidnapping and three years in prison on the firearm specification, all to be served consecutively, for a total of nine years.

{¶ 4} Appellant appeals, raising two assignments of error.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT COMMITTED PLAIN ERROR BY IMPOSING SEPARATE CONVICTIONS AND SENTENCES UPON MR. LUNG FOR ALLIED OFFENSES ARISING OUT OF THE SAME CONDUCT AND OF SIMILAR IMPORT.

{¶ 7} Appellant argues that the trial court erred in sentencing him on both counts of kidnapping because the offenses are allied offenses of similar import committed with the same animus.

{¶ 8} We note at the outset that appellant waived all but plain error by failing to raise any allied offense objection with the trial court. However, the Ohio Supreme Court has held that the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31; *State v. Luong*, 12th Dist. No.

CA2011-06-101, 2012-Ohio-4519, ¶ 48.

{¶ 9} R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct and provides that:

> (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.

{¶ 10} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test for determining whether offenses are allied offenses of similar import under R.C. 2941.25 (thereby overruling *State v. Rance*, 85 Ohio St.3d 632 [1999]). Courts must first determine "whether it is possible to commit one offense *and* commit the other with the same conduct." (Emphasis sic.) *Id.* at ¶ 48. It is not necessary that the commission of one offense will always result in the commission of the other. *Id.* Rather, the question is simply whether it is possible for both offenses to be committed by the same conduct. *Id.*

{¶ 11} If it is possible to commit both offenses with the same conduct, courts must next determine whether the offenses were in fact committed by the same conduct, that is, by a single act, performed with a single state of mind. *Id.* at ¶ 49. If so, the offenses are allied offenses of similar import and must be merged. *Id.* at ¶ 50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. *Id.* at ¶ 51.

{¶ 12} "Animus" is defined for purposes of R.C. 2941.25(B) as "'purpose' or 'more properly, immediate motive.'" *State v. Lewis*, 12th Dist. No. CA2008-10-045, 2012-Ohio-885,

¶ 13, quoting *State v. Logan*, 60 Ohio St.2d 126, 131 (1979). "If the defendant acted with the same purpose, intent, or motive in both instances, the animus is identical for both offenses." *Lewis* at *id.* Animus is often difficult to prove directly, but must be inferred from the surrounding circumstances. *State v. Caudill*, 11 Ohio App.3d 252, 256 (12th Dist.1983).

{¶ 13} Appellant was charged with kidnapping in violation of R.C. 2905.01(B)(2). The statute prohibits a person from restraining the liberty of another by force, threat, or deception, or, in the case of a victim under the age of 13, by any means, under circumstances that create a substantial risk of serious physical harm to the victim, or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim. Clearly, and the state implicitly concedes on appeal, it is possible to commit both kidnapping offenses with the same conduct.

{¶ 14} We next determine whether appellant in fact committed both kidnapping offenses by way of a single act, performed with a single state of mind, or whether he had separate animus for each offense. *Johnson*, 2010-Ohio-6314 at ¶ 49.

{¶ 15} For purposes of this determination, we note that in applying R.C. 2941.25, the Ohio Supreme Court has long followed a two-tiered test to determine whether two offenses constitute allied offenses of similar import. While the analysis under the first prong has changed several times over the years, the second prong has consistently remained the same, that is, whether the offenses were committed with a separate animus. *See Logan*, 60 Ohio St.2d 126; *State v. Mitchell*, 6 Ohio St.3d 416 (1983); *State v. Talley*, 18 Ohio St.3d 152 (1985); *State v. Mughni*, 33 Ohio St.3d 65 (1987); *State v. Blankenship*, 38 Ohio St.3d 116 (1988); *Rance*, 85 Ohio St.3d 632; *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625; *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059; *Johnson*.

{¶ 16} We find that the two kidnapping offenses were committed with a separate animus. This court has held that where a defendant commits the same offense against

different victims during the same course of conduct, a separate animus exists for each offense. *State v. Gregory*, 90 Ohio App.3d 124, 129 (12th Dist.1993). "Nothing in *Johnson* alters that conclusion." *State v. Young*, 2d Dist. No. 23642, 2011-Ohio-747, ¶ 39.

{¶ 17} In *Gregory*, we found that the defendant's two felonious assault charges were committed with a separate animus where the defendant was aware of the presence of two potential victims in the car at which he fired several gunshots and where he attempted to cause physical harm to two separate victims. *Id.* *See also Caudill*, 11 Ohio App.3d 252 (separate sentences on two counts of aggravated vehicular homicide upheld where defendant's course of conduct demonstrated he had a separate animus for killing a motorist and her passenger even though the two offenses stemmed from the same vehicular accident); *State v. Bonham*, 12th Dist. No. CA91-08-058, 1992 WL 68657 (Apr. 6, 1992) (separate animus where the defendant used a baseball bat to physically harm four individuals in a parking lot, and where each felonious assault committed by the defendant was perpetrated against a different victim); *State v. Sanders*, 12th Dist. No. CA2001-03-068, 2002 WL 471172 (Mar. 29, 2002) (separate animus where the defendant committed the same offense against each police officer by throwing broken plates at each officer).

{¶ 18} In the case at bar, each kidnapping offense committed by appellant was perpetrated against a different victim (Keren and one of her sons). As we stated, a separate animus exists for each offense where a defendant commits the same offense against different victims during the same course of conduct. *See Gregory*, 90 Ohio App.3d 124. As the Seventh Appellate District stated in a case involving two counts of abduction, "although the conduct satisfying the elements of each crime overlaps to a degree, each count and each conviction identifies a different victim. Committing the same crime, even simultaneously, with regard to different victims does not result in merger pursuant to R.C. 2941.25." *State v. Petefish*, 7th Dist. No. 10 MA 78, 2012-Ohio-2723, ¶ 10 (the victims, a woman and her minor

daughter, were abducted and held captive together in a bedroom until they were able to escape).

{¶ 19} Appellant's separate animus is further demonstrated by the fact that he separately held the kidnapping victims at gunpoint, approximately 30 feet away from one another. Neither Keren nor the children were allowed to move, to be together, or to leave the house. Appellant pointed his loaded shotgun at his wife and her children where they could see each other.

{¶ 20} We therefore find that the two kidnapping offenses are not allied offenses of similar import. The trial court properly sentenced appellant on both counts of kidnapping. Appellant's first assignment of error is overruled.

{¶ 21} Assignment of Error No. 2:

{¶ 22} MR. LUNG WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶ 23} Appellant argues he received ineffective assistance of counsel because his trial counsel failed to (1) request that his sentences be merged as allied offenses of similar import, and (2) subsequently object to the trial court's imposition of separate sentences for his kidnapping convictions.

{¶ 24} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052 (1984); *State v. Church*, 12th Dist. No. CA2011-04-070, 2012-Ohio-3877, ¶ 42.

{¶ 25} Given our holding under appellant's first assignment of error, we find that trial counsel was neither deficient nor ineffective in failing to request that appellant's sentences be

merged or in failing to object to the imposition of separate sentences. *See State v. Behanan*, 12th Dist. No. CA2009-10-266, 2010-Ohio-4403; *State v. Cooper*, 2d Dist. No. 23143, 2010-Ohio-5517.

{¶ 26} Appellant's second assignment of error is overruled.

{¶ 27} Judgment affirmed.

HENDRICKSON, P.J. and RINGLAND, J., concur.

Bressler, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV of the Ohio Constitution.