COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	**CASE NO. 2012 CR 00588**
Plaintiff	**:**	**Judge McBride**
vs.	**:**	
WILLIAM TODD SCHLEEHAUF	**:**	**DECISION/ENTRY**
Defendant	**:**	

Kevin T. Miles, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

D. Vincent Faris, assistant public defender for the defendant William Todd Schleehauf, 10 South Third Street, Batavia, Ohio 45103.

This cause is before the court for consideration of the issue of possible merger of offenses. The court scheduled and held a hearing on the merger issue on September 27, 2012. At the conclusion of that hearing, the court took the issue under advisement.

Upon consideration of the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On August 1, 2012, the defendant William Todd Schleehauf was charged in an eleven-count indictment. Thereafter, on September 6, 2012, the defendant entered pleas of guilty to the following charges: (1) one count of kidnapping in violation of R.C. 2905.01(A)(2), a felony of the first degree, with a repeat violent offender specification; (2) one count of attempted rape in violation of R.C. 2907.02(A)(2) and 2923.02, a felony of the second degree; and (3) one count of aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the first degree. At the plea hearing, the prosecutor set forth in pertinent part the statement of facts as follows:

> "The defendant was paroled from prison on April 25, 2012. The Defendant was to report to a halfway house in Volunteers of America in Hamilton County; however the defendant failed to report to the VOA. On May 1, 2012, he confronted the victim K.S. in the hallway of her apartment building. The defendant is the victim's biological father. Upon confronting the victim, the defendant ordered the victim back into her apartment and pushed her back into the apartment. Once inside, the defendant forced the victim into the kitchen grabbing a knife and holding it to the victim's throat. Once the defendant held the knife to the victim, he told her not to scream or fight him or he would kill her and her mom. The defendant then forced the victim back into the master bedroom at knifepoint, once inside the bedroom, the defendant forced the victim to undress and lie on the bed. The defendant pulled off the victim's shoes, pants, and underwear, and the defendant removed his own clothing. The defendant then held the knife to the victim's throat and attempted to insert his penis into her vagina. Once the defendant was finished, he ordered the victim to shower; he then ordered the victim to her room to change clothes and then ordered her to go to her mother's room. Hours later, the defendant then left the apartment. * * * "

The court asked if the defendant was restraining the victim when he ordered her to take a shower and the prosecutor indicated that was correct. The defendant was then asked if he had any disagreement with the statement of facts and he indicated that he did not. The court notes that the defendant offered some different facts when he spoke to the probation officer for his pre-sentence investigation report; however, the court finds that these self-serving statements made after the plea hearing are not credible and they will not be considered by the court.

The defendant now argues that all three counts to which he entered pleas of guilty are allied offenses of similar import and must be merged for the purposes of sentencing.

LEGAL ANALYSIS

Pursuant to R.C. 2941.25:

> "(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."

In *State v. Johnson,* 128 Ohio St.3d 153, 942 N.E.2d 1061, 2010–Ohio–6314, the Ohio Supreme Court set forth the following two-part test to determine if offenses are allied offenses of similar import under R.C. 2941.25:

> "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.
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> * * * [I]f 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."[1]

The court finds that it is possible to commit all three offenses at issue with the same conduct. Therefore, the question before the court is whether the offenses were committed by the same conduct, i.e., a single act committed with a single state of mind.

Chronologically, the first crime that occurred on the date in question was the aggravated burglary. R.C. 2911.11, which codifies the offense of aggravated burglary, states in relevant part as follows:

> "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:
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> * * *

[1] *State v. Crosby* (Sept. 26, 2011), 12th Dist. Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, ¶¶ 18-19, quoting *Johnson* at ¶¶ 48-51.

> (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

In *State v. Crosby* (Sept. 26, 2011), 12th Dist. Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, the defendant was convicted of safecracking, grand theft and aggravated burglary.[2] When discussing the issue of merger of the aggravated burglary offense, the court found as follows:

> "Similarly, Crosby committed burglary with different conduct and a separate animus from safecracking and grand theft because in order to violate R.C. 2911.12(A)(1), Crosby had to, by force, stealth, or deception, trespass in an occupied structure with the purpose to commit any criminal offense. While Crosby chose to carry out the theft offense, he could have entered the residence with any criminal purpose and abandoned it before actually completing the criminal act. For example, Crosby could have entered the Alvarado home with the purpose to steal something, but then fled when he saw that Alvarado and her children were present. Obviously, once Crosby was inside the home, he had an opportunity to commit various criminal offenses, without attempting to break into the safe or steal guns. Although he ultimately stole the guns, Crosby knowingly tampered with the safe, in an effort to enter it, and then took the guns without consent of the owner, and therefore had a separate animus for each crime he committed."[3]

In *State v. Seymore* (July 9, 2012), 12th Dist. Nos. CA2011-07-131 and CA2011-07-143, 2012-Ohio-3125, the Twelfth District Court of Appeals found that the offenses of aggravated burglary and domestic violence merged.[4] The defendant in *Seymore* was convicted under subsection (A)(1) of the aggravated burglary statute, which requires that the offender inflict, attempt to inflict, or threaten to inflict physical harm to another. In the *Seymore* case, the court reasoned that because the aggravated burglary was not

[2] *Crosby* at ¶ 3.
[3] Id. at ¶ 22.
[4] *State v. Seymore* (July 9, 2012), 12th Dist. Nos. CA2011-07-131 and CA2011-07-143, 2012-Ohio-3125, ¶ 24.

complete until the defendant actually struck the victim in the face, the aggravated burglary and the domestic violence were committed with the same conduct.[5]

In the case at bar, the defendant was convicted under the (A)(2) section of the aggravated burglary statute which requires that the defendant have a deadly weapon or dangerous ordnance on or about his person or under his control.

The defendant in the case at bar forced the victim into her apartment, pushed her into the kitchen, grabbed a knife, and threatened the victim with it. Therefore, he trespassed by force in an occupied structure when another person was in the occupied structure with the purpose to commit a criminal offense in the structure and at the time had a deadly weapon under his control. Once the defendant grabbed the knife in the kitchen, the aggravated burglary was complete. Like the defendant in *Crosby*, the defendant could have entered the residence with any criminal purpose and abandoned it before actually completing the criminal act. Therefore, the court finds that the reasoning in *Crosby* applies to the case at bar, that the offense of aggravated burglary was committed by different conduct than the other two offenses, and, consequently, that the aggravated burglary offense in the case at bar is not an allied offense of similar import to the offenses of attempted rape and kidnapping.

The next offense which occurred on the date in question was the attempted rape. Pursuant to R.C. 2907.02(A)(2), the offense of rape is committed when one "engage[s] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." For the purposes of the case at bar, a defendant attempts to commit an offense when he "purposely, and when * * * purpose is sufficient

[5] Id.

culpability for the commission of an offense, [engages] in conduct that, if successful, would constitute or result in the offense."[6]

The attempted rape was committed in the present case when the defendant, after forcing the victim into the master bedroom and undressing her, attempted to insert his penis into her vagina. Once this occurred, the attempted rape was complete.

With respect to the kidnapping offense, pursuant to R.C. 2905.01(A)(2), "[n]o person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter."

The Ohio Supreme Court has set forth the following relevant test to determining whether a kidnapping and other offenses merge:

> "In establishing whether kidnapping and another offense of the same or similar kind are committed with a separate animus as to each pursuant to R.C. 2941.25(B), this court adopts the following guidelines:
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> (a) Where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, 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;
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> (b) Where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."[7]

[6] R.C. 2923.02(A).
[7] *State v. Logan* (1979), 60 Ohio St.2d 126, 397 N.E.2d 1345, syllabus.

One of the concurring opinions in the *Johnson* case addresses the offenses of rape and kidnapping specifically and states as follows:

> "Consider the crimes of rape and kidnapping, for example. The elements of each are different. Rape, as defined in R.C. 2907.02(A)(2), is committed when a defendant engages in sexual conduct with another and the defendant purposefully compels the other person to submit by force or threat of force. Kidnapping, as defined in R.C. 2905.01(A)(4), is committed when by force, threat, or deception, or, in the case of a victim under the age of 13 or mentally incompetent, by any means, a defendant removes another from the place where the other person is found or restrains the liberty of the other with the purpose to engage in sexual activity with the victim against the victim's will.
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> Inevitably, every rapist necessarily kidnaps the victim, because the conduct of engaging in sexual conduct by force results in a restraint of the victim's liberty. Thus, in those circumstances, the conduct of the defendant can be construed to constitute two offenses—rape and kidnapping—and an indictment may contain counts for each, but the defendant may be convicted of only one.
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> In a different factual situation, however, if the state presented evidence that a defendant lured a victim to his home by deception, for example, and then raped that victim, an indictment may contain separate counts for the rape and for the kidnapping. In this hypothetical, *different* conduct—the luring of the victim by deception and the separate act of rape—results in two offenses being committed separately; therefore, the indictments may contain counts for both offenses and the defendant may be convicted of both. See, e.g., *State v. Ware* (1980), 63 Ohio St.2d 84, 17 O.O.3d 51, 406 N.E.2d 1112 (the defendant could be convicted of both kidnapping and rape because he lured the victim to his home by deception before raping her)."[8]

In *State v. Pore* (Aug. 13, 2012), 5th Dist. No. 2011-CA-00190, 2012-Ohio-3660, the court found that the aggravated burglary was complete once the defendant entered

[8] *State v. Pore* (Aug. 13, 2012), 5th Dist. No. 2011-CA-00190, 2012-Ohio-3660, ¶ 27, quoting, *Johnson* at ¶¶ 79-81 (O'Donnell concurring in judgment and syllabus).

the home by deception and, consequently, that count did not merge.[9] However, the court found that the offenses of kidnapping and rape were allied offenses of similar import in that case because the kidnapping was merely incidental to the rape and the restraint of the victim's movement had no significance apart from facilitating the rape.[10] In that case, the defendant pulled a knife on the victim while in her home, ordered her to the bedroom, held her in the bedroom for approximately 30 minutes while he committed the rape, and then left the home when he was finished.[11]

Unlike in the *Pore* case, in the case at bar, after the attempted rape was complete, the defendant then forced the victim to take a shower, put on clothes, and return to the master bedroom, where she had to stay for at least an hour before the defendant finally left the apartment. His restraint of the victim was no longer to facilitate the commission of the attempted rape and was no longer merely incidental to the attempted rape. Instead, he moved her to the bathroom, where he forced her to shower, then to her room, where he told her to get dressed, and then back to the master bedroom where she was forced to remain for at least an hour.

The restraint of the victim's movements after the attempted rape appears from the facts to have had at least two motivations. One motivation would be to keep the victim from reporting the events of the morning in question to the authorities, since she could not do so as long as the defendant remained in the apartment. Significantly, the second clear motivation was to destroy physical evidence of the attempted rape by forcing the victim to take a shower. At least one Ohio court has found that a defendant committed the felony offense of tampering with evidence when he forced the victim to

[9] Id. at ¶ 31.
[10] Id. at ¶ 35.
[11] Id. at ¶ 4.

bathe after he raped her, "thus washing away crucial evidence."[12] This court agrees with this analysis and further finds that the defendant may be a complicitor in the commission of the offense of tampering with evidence when he, as in this case, "acting with the kind of culpability required for the commission of the offense, [causes] an innocent * * * person to commit the offense."[13]

The restraint of movement after the attempted rape was committed by separate conduct and had a separate animus from the attempted rape. The defendant restrained the victim's liberty for several reasons after the attempted rape, one of which was to facilitate the commission of the felony offense of tampering with evidence when he moved her into the bathroom and forced her to take a shower, thus washing away crucial physical evidence of the attempted rape.

CONCLUSION

Based on the above analysis, the court finds that the offenses of aggravated burglary, attempted rape, and kidnapping are not allied offenses of similar import under the facts of the case at bar. As a result, the defendant shall be convicted of all three offenses and the offenses shall not merge for the purposes of sentencing.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

[12] *State v. Ward* (March 22, 2012), 8th Dist. No. 97219, 2012-Ohio-1199, ¶ 22.
[13] R.C. 2923.03(A)(4).

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 9th day of October 2012 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride