

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-210679
	:	TRIAL NO. B-2002224
Plaintiff-Appellee,	:	
	:	
vs.	:	<i>OPINION.</i>
	:	
ANTONIO HENDRIX,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: January 6, 2023

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Mary Stier*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

The Law Office of John D. Hill and John D. Hill, for Defendant-Appellant.

CROUSE, Judge.

{¶1} Defendant-appellant Antonio Hendrix was convicted of aggravated robbery, three counts of kidnapping, and having weapons under disability following the armed robbery of Hendrix’s acquaintance, Chandler Smith, at Smith’s apartment. Hendrix argues that the trial court should have merged the aggravated-robbery count with one of the kidnapping counts. Hendrix also argues that the indefinite sentencing scheme under the Reagan Tokes Law is unconstitutional. We agree with Hendrix’s argument for merger of the aggravated-robbery and kidnapping counts, but we reject his argument that the Reagan Tokes Law is unconstitutional.

I. Procedural History

{¶2} Hendrix was indicted on one count of aggravated robbery, a first-degree felony, in violation of R.C. 2911.01(A)(1), with two firearm specifications; three counts of kidnapping, all first-degree felonies, in violation of R.C. 2905.01(A)(2), with two firearm specifications on each count; and one count of having weapons while under disability, a third-degree felony, in violation of R.C. 2923.13(A)(2). After a trial, the jury returned guilty verdicts on all counts and specifications.

{¶3} The trial court merged the first firearm specification on each of the first four counts with the second firearm specification on each of those counts. The court ordered the sentences for the firearm specifications to each of the first four counts to be served consecutively to, and prior to, the sentences for the underlying counts. The trial court then ordered the sentence for the aggravated-robbery count to be served consecutively to the first kidnapping count, and the sentences for the remaining counts to be served concurrently with each other and with the first two counts.

{¶4} The trial court imposed a sentence of ten years’ incarceration for each of the first four counts, two years’ incarceration for the fifth count, and three years’

incarceration for each of the firearm specifications. The trial court applied the indefinite sentencing standard prescribed by the Reagan Tokes Law, R.C. 2929.144, to determine a maximum sentence on the first count of 15 years' incarceration. Hendrix's aggregate sentence was 26 to 31 years' incarceration.

{¶5} Hendrix timely appealed the trial court's sentences. In his first assignment of error, Hendrix argues that the trial court erred by failing to merge the aggravated-robbery count with the first kidnapping count. In his second assignment of error, Hendrix argues that the trial court erred by imposing an indefinite sentence under the Reagan Tokes Law, which he argues is unconstitutional. For the reasons stated below, we sustain Hendrix's first assignment of error, overrule his second assignment of error, and remand the matter to the trial court for resentencing on these counts.

II. Factual History

{¶6} Prior to April 2020, Hendrix and Smith met each other through a mutual acquaintance. Hendrix would occasionally visit Smith to buy and smoke marijuana. On one occasion, Smith sold Hendrix a pistol. On the evening of April 14, 2020, Hendrix purportedly went to Smith's apartment to smoke marijuana with him. Smith was at home with his girlfriend, Mirical Knight, and C.S., Smith and Knight's infant son. Hendrix and Smith went to a convenience store together to buy cigarillos and returned to Smith's apartment. After they returned, Hendrix asked Smith to call his cell phone, claiming that he couldn't find it. When neither heard the sound of a phone ringing, Hendrix left Smith's apartment, apparently to search further for the phone.

{¶7} Approximately 10 to 15 seconds after Hendrix left Smith's apartment,

four men wearing black ski masks and carrying guns burst through Smith's door. Smith was standing near the door, intending to lock it after Hendrix left. Smith shouted for Knight to get a gun because they were being robbed. Two of the men pinned Smith behind the door while one of the robbers beat Smith with a gun. The robber demanded to know where Smith kept his money and guns.

{¶8} Knight emerged from the bedroom of the apartment with a pistol, intending to drive off the robbers, but the gun malfunctioned. She went back into the bedroom to find a different gun. One of the robbers threatened to kill C.S. unless Knight came out of the bedroom and showed the robbers where to find money and guns. Knight ran out of the bedroom to get C.S., who was still in his baby swing in the living room. Knight and C.S. then huddled in the kitchen while the robbers ransacked the apartment. Smith crawled away from the door and joined Knight and C.S. in the kitchen.

{¶9} Shortly after Smith, Knight, and C.S. reunited in the kitchen, Hendrix returned to the apartment. Although Hendrix initially tried to act like he was also being robbed, it quickly became apparent that he was directing the other robbers as to where to find valuables. Hendrix was brandishing the pistol that Smith had previously sold him. Hendrix also admonished the masked robbers to hurry up, while demanding that Smith and Knight stay quiet.

{¶10} After collecting three firearms, \$300 in cash, and some cell phones, Hendrix and the masked robbers left. According to surveillance video, the entire robbery took about five minutes.

III. First Assignment of Error

{¶11} In his first assignment of error, Hendrix argues that the trial court erred

by failing to merge the aggravated-robbery count with the first kidnapping count, both identifying Chandler Smith as the victim. An appellate court reviews a trial court's merger determination de novo. *State v. Dixon*, 1st Dist. Hamilton No. C-210614, 2022-Ohio-2219, ¶ 3.

{¶12} Hendrix argues that these charges arise out of the same course of conduct, the home-invasion robbery of Smith in his apartment. Hendrix argues that the robbery and kidnapping did not cause separately identifiable harm, and that the offenses shared a common animus.

{¶13} In response, the state argues that the robbery and kidnapping offenses were committed with separate animus. The state suggests that Hendrix's restraint of Smith during the robbery exceeded what was necessary to effectuate the robbery. The state argues that Smith's confinement in the kitchen at gunpoint substantially increased the risk of his injury beyond what was inherent in the robbery, and this increased risk of harm shows sufficient separate animus to justify convictions on both the robbery and kidnapping counts.

{¶14} The Double Jeopardy Clauses of both the United States and Ohio Constitutions protect individuals from being punished twice for the same offense. *State v. Merz*, 1st Dist. Hamilton No. C-200152, 2021-Ohio-2093, ¶ 6, citing the Fifth Amendment to the United States Constitution ("No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb * * *.") and the Ohio Constitution, Article I, Section 10 ("No person shall be twice put in jeopardy for the same offense.").

{¶15} To avoid subjecting a defendant to multiple penalties for the same offense under different statutes, we assume statutory provisions outlawing the same

offense do not authorize cumulative punishments unless the General Assembly dictates otherwise. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 11. The General Assembly codified this double-jeopardy protection in R.C. 2941.25, which requires trial courts “to merge allied offenses when they are of similar import, were committed together, and were motivated by the same animus.” *Merz* at ¶ 6; see *Ruff* at paragraph three of the syllabus.

{¶16} Thus, offenses are not subject to merger if “(1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation.” *Ruff* at ¶ 25. If any one of these three circumstances applies, then the offenses are not subject to merger. *Id.* The focus of the analysis must be on the defendant’s conduct “because an offense may be committed in a variety of ways and the offenses committed may have different import.” *State v. Savage*, 1st Dist. Hamilton No. C-190756, 2022-Ohio-3653, ¶ 27, citing *Ruff* at ¶ 30.

{¶17} Here, Hendrix was found guilty of aggravated robbery under R.C. 2911.01(A)(1) and kidnapping under R.C. 2905.01(A)(2). The kidnapping statute provides, in relevant part, that, “No person, by force, threat, or deception * * * 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.” R.C. 2905.01(A)(2).

{¶18} The kidnapping count in this case states that Hendrix “purposely, by force, threat or deception, removed CHANDLER SMITH from the place where he was found or restrained him of his liberty for the purpose of facilitating the commission of a felony, to wit: AGGRAVATED ROBBERY * * *.” Thus, the kidnapping charge was

predicated on the aggravated-robbery charge.

{¶19} The aggravated robbery and kidnapping were committed together, so the second test supports merger of the offenses unless one of the remaining tests permits conviction for both offenses. Whether the aggravated robbery and kidnapping are offenses of similar import or were committed with separate animus requires further analysis.

A. Similar Import

{¶20} Offenses are of dissimilar import when (1) the offenses involve separate victims, or (2) the harm from each offense is separate and identifiable. *Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at paragraph two of the syllabus. Counts one and two both relate to the same victim, Smith. Therefore, we must determine whether the harm from the aggravated robbery is separate and identifiable from the harm from the kidnapping. On this point, Hendrix argues that because aggravated robbery was an essential element of the kidnapping count, the harm from both offenses is the same. The state does not dispute Hendrix’s similar-import argument and instead contends that there was a separate animus.

{¶21} Hendrix’s kidnapping charge is predicated on the underlying felony of aggravated robbery. But for the aggravated robbery, Hendrix could not be convicted of kidnapping under R.C. 2905.01(A)(2). Therefore, we agree that the offenses are of similar import. *See, e.g., Ruff* at ¶ 18 (“Where the conduct that constitutes one offense causes a harm that is not separate and identifiable from the harm caused by the aggravating element of another offense, then the offenses are of a similar import.”).

B. Separate Animus

{¶22} The state argues that the offenses should not be merged because they

were committed with separate animus. As used in the merger statute, “animus” means “purpose” or “immediate motive” and “must be inferred from the surrounding circumstances.” *State v. Logan*, 60 Ohio St.2d 126, 131, 397 N.E.2d 1345 (1979).

{¶23} Although the Supreme Court’s holding in *Ruff* represented a shift in how courts must analyze the first two prongs of the merger test, earlier cases are relevant to the animus analysis. *State v. Grate*, 164 Ohio St.3d 9, 2020-Ohio-5584, 172 N.E.3d 8, ¶ 108. Particularly instructive is the Supreme Court’s analysis of separate animus in *Logan*.

{¶24} A brief restraint of the victim is present in every aggravated robbery. *State v. Jackson*, 1st Dist. Hamilton No. C-180341, 2019-Ohio-2027, ¶ 10. To decide whether kidnapping and aggravated robbery are subject to merger, we must determine whether the restraint or movement of the victim is “merely incidental” to the aggravated robbery or, instead, whether it has a significance independent of the aggravated robbery. *Id.*, citing *Logan* at 135. Where the restraint of the victim is prolonged, the confinement of the victim secretive, or the movement of the victim is substantial, there exists a separate animus for each offense. *Id.*, citing *Logan* at syllabus. A separate animus also exists 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.” *Id.*, quoting *Logan* at syllabus.

{¶25} In this case, the restraint of Smith lasted for the duration of the robbery, which was about five minutes. Smith was confined within his apartment, but according to his testimony, he was permitted to move from where he initially encountered the masked robbers, near the door of the apartment, to the kitchen, where he joined Knight and their son. Smith testified that after Knight had fled from the back room

and had gone into the kitchen, “I literally just started crawling towards them and they just let us come together.” Smith testified that the robbers beat him with their guns, but while they did so, “They were asking me where money was, where guns were. They’re asking me to show them everything – to show them where things were * * *.” Thus, the harm inflicted on Smith by the robbers was in furtherance of the robbery, attempting to ascertain the location of valuable targets for theft, rather than to facilitate the restraint of Smith’s liberty.

{¶26} The state argues that holding Smith at gunpoint during the robbery substantially increased the risk of harm beyond the risk inherent in the robbery. However, Hendrix was charged with aggravated robbery under R.C. 2911.01(A)(1). That statute provides that, “No person, in attempting to commit a theft offense * * * shall * * * [h]ave a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.” R.C. 2911.01(A)(1). It is inherent in the charged offense that the offender employs a deadly weapon in furtherance of the theft offense. Thus, holding Smith at gunpoint during the aggravated robbery, where the firearm itself constitutes the aggravating factor, does not increase the risk inherent in the offense. *See State v. Cooper*, 1st Dist. Hamilton Nos. C-110027 and C-110028, 2012-Ohio-555, ¶ 21-23 (holding that the kidnapping of a bank employee by moving the employee around the bank at gunpoint to facilitate the robbery of the bank did not constitute a substantial increase in harm over the commission of an aggravated robbery).

{¶27} The restraint on Smith’s liberty was no longer than necessary to carry out the underlying robbery, the robbers’ movement of Smith was insubstantial, and the physical injuries inflicted on Smith were in furtherance of the robbery rather than

to facilitate asportation or restraint. Furthermore, Hendrix actually showed up after Smith was assaulted by the robbers and after Smith, Knight and C.S. were in the kitchen. Hendrix brandished a pistol and told Smith and Knight to stay quiet while he directed the masked robbers to hurry up. In this case, there is no separate animus for the kidnapping from the underlying felony of aggravated robbery.

{¶28} Because the aggravated robbery and kidnapping of Smith were allied offenses of similar import, committed together, and with no separate animus, the trial court erred in failing to merge these offenses. We therefore sustain Hendrix’s first assignment of error.

IV. Second Assignment of Error

{¶29} In his second assignment of error, Hendrix argues that the trial court erred in sentencing him to an indefinite sentence pursuant to the Reagan Tokes Law because the law is unconstitutional as violative of the separation-of-powers doctrine and procedural-due-process protections. Because Hendrix adequately raised his constitutional challenge in the trial court, we review his claim de novo. *Andreyko v. City of Cincinnati*, 153 Ohio App.3d 108, 2003-Ohio-2759, 791 N.E.2d 1025, ¶ 11 (1st Dist.).

{¶30} We have previously addressed a similar challenge to the Reagan Tokes Law in *State v. Guyton*, 1st Dist. Hamilton No. C-190657, 2022-Ohio-2962. In *Guyton*, we determined that the Reagan Tokes Law is constitutional on its face, rejecting claims that the law violates the separation-of-powers doctrine and due process. *Id.* at ¶ 69. Based on our holding in *Guyton*, we overrule Hendrix’s second assignment of error.

V. Conclusion

{¶31} For the foregoing reasons, we sustain Hendrix’s first assignment of

error and overrule Hendrix's second assignment of error. The trial court improperly sentenced Hendrix on two counts that were allied offenses. We therefore vacate Hendrix's sentences on the aggravated-robbery count and the kidnapping count with respect to victim Chandler Smith. On remand, the state must elect which of the allied offenses to pursue against Hendrix. We affirm the trial court's judgment in all other respects. We remand the cause to the trial court for resentencing on these counts consistent with the law and this opinion.

Judgment affirmed in part, sentences vacated in part, and cause remanded.

ZAYAS, P.J., and **BERGERON, J.**, concur.

Please note:

The court has recorded its entry on the date of the release of this opinion.