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

STATE OF OHIO,	:	APPEAL NO. C-100707 TRIAL NO. B-0907444
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
HOWARD JOHNSON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar. This judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

Following a jury trial, defendant-appellant Howard Johnson appeals his convictions and sentences for the rape and kidnapping of Angela Richards and the rape of J.W., a female minor. We affirm.

In December 2008, Johnson accosted Richards on a public street. When she refused his advances, he lifted his shirt to reveal a handgun in his waistband. He took Richards against her will to a building where he talked to her and smoked a cigar. He then took her to a second, abandoned building where he forced her to undress and to submit to both cunnilingus and vaginal rape. Johnson then threatened Richards with death because she had seen his face. He ultimately released her. Richards summoned the police. She was examined at a hospital. DNA samples obtained from that examination matched Johnson's DNA.

In October 2009, Johnson again accosted a young woman on the street. He walked with J.W. until the two arrived at an abandoned building. After J.W. refused to

have sex with him, Johnson pulled her into the abandoned building, pulled down her pants, informed her that he had a gun, and forced her to submit to cunnilingus and oral contact with her anus. Afterwards, J.W. was able to escape from Johnson. She left one shoe and her purse behind in her flight.

Johnson was apprehended and made a number of statements to police investigators. The trial court denied his motion to suppress those statements, and the matter proceeded to trial. The jury returned guilty verdicts on each of the charged offenses: two counts of rape and one count of kidnapping for each victim. The trial court afforded Johnson the protection of the multiple-counts statute and did not impose a conviction for the kidnapping of J.W. The court imposed maximum, consecutive sentences for the remaining counts, including the kidnapping of Richards. The aggregate sentence imposed was 38 years in prison.

In his first assignment of error, Johnson argues that the trial court erred in denying his motion to suppress various statements made to police investigators. This assignment must fail because the asserted error is not demonstrated in the record. The statements were never introduced at trial. Thus, Johnson cannot demonstrate any prejudice flowing from the trial court's pretrial ruling. See, e.g., *State v. Were* (Sept. 30, 1998), 1st Dist. No. C-950908.

Johnson next asserts that the assistant prosecuting attorney committed prejudicial misconduct in his opening and closing argument when he informed the jury that Johnson had confessed to the crimes in his statements to police. The relevant inquiry for a claim of prosecutorial misconduct is whether the prosecutor's conduct was indeed improper and, if so, whether a substantial right of the accused was adversely affected. See *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283, 709 N.E.2d 484. Improper conduct by the prosecutor does not give rise to prejudicial error unless the conduct deprives the

defendant of a fair trial. See *State v. Fears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111, 715 N.E.2d 136. And if, as here, the defendant fails to lodge a contemporaneous objection to instances of alleged prosecutorial misconduct, this failure waives all but plain error. See Crim.R. 52(B).

At trial, the prosecutor quickly corrected himself, declaring that Johnson had made only a statement and not a confession to the police. Johnson failed to object. And there is ample evidence of guilt. Thus, we cannot say that the prosecutor's comments affected a substantial right of the defendant and denied him a fair trial. The second assignment of error is overruled.

In his third assignment of error, Johnson asserts that the trial court erred in imposing a sentence for both the rape and the kidnapping of Richards. He asserts that these offenses were allied offenses of similar import.

Under R.C. 2941.25, in a single proceeding, a trial court may convict and sentence a defendant for two offenses " 'having as their genesis the same criminal conduct or transaction' " if the offenses were committed with a separate animus as to each offense. See *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 65-66, 461 N.E.2d 892, quoting *State v. Moss* (1982), 69 Ohio St.2d 515, 519, 433 N.E.2d 181; see, also, *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶51. While the commission of rape necessarily entails the restraint of the victim for a brief time, where, as here, the restraint was prolonged, the confinement was secretive, and the movement of the victim from the street into two separate buildings was so substantial as to demonstrate a significance independent of the rape, there is a separate animus to support the kidnapping conviction. See *State v. Logan* (1979), 60 Ohio St.2d 126, 131, 397 N.E.2d 1345, syllabus. The third assignment of error is overruled.

In his fourth assignment of error, Johnson argues that the trial court erred in imposing an excessive sentence. The sentence imposed was not contrary to law. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14. It was within the statutory range specified for the offenses under R.C. 2929.14. See *State v. Boggs*, 1st Dist. No. C-050946, 2006-Ohio-5899, ¶6. Further, the trial court was not obligated to engage in judicial fact-finding prior to imposing consecutive sentences. See *State v. Love*, 1st Dist. No. C-100563, 2011-Ohio-2224, ¶11, citing *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, paragraphs two and three of the syllabus.

In light of the seriousness of the offenses, Johnson's extensive criminal record, and the fact that he committed these offenses while on community control for a prior gross-sexual-imposition conviction, we cannot say that the trial court abused its discretion in imposing sentence. See *State v. Kalish* at ¶17. The assignment of error is overruled.

In his final assignment of error, Johnson challenges the weight and sufficiency of the evidence adduced to support his convictions. Our review of the entire record fails to persuade us that the jury, acting as the trier of fact, clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. The state adduced ample evidence, including the testimony of Johnson's victims and DNA evidence, to demonstrate that Johnson had restrained his victims by force or threat of force and had engaged in sexual conduct with them. He had also restrained Richards for a prolonged period in a remote location where she could not easily summon assistance and had not released her unharmed in a safe place. Since the weight to be given to the evidence in this case and to the credibility of the witnesses were for the jury, sitting as the trier of fact, to determine, the jury was entitled to reject Johnson's theory that the victims

were disgruntled former lovers seeking revenge on Johnson. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

Moreover, the record reflects substantial, credible evidence from which the trier of fact could have reasonably concluded that all elements of the charged crimes had been proved beyond a reasonable doubt. See *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶36. The fifth assignment of error is overruled.

Therefore, the trial court's judgment is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and **CUNNINGHAM, JJ.**

To the Clerk:

Enter upon the Journal of the Court on September 16, 2011

per order of the Court _____.
Presiding Judge