THE STATE OF OHIO, APPELLEE, *v.* BLANKENSHIP, APPELLANT.

[Cite as State *v.* Blankenship (1988), 38 Ohio St. 3d 116.]

Criminal law—Kidnapping and felonious assault during course of escape are not allied offenses of similar import, when—R.C. 2941.25.

(No. 87-1746—Submitted June 8, 1988—Decided August 3, 1988.)

CERTIFIED by the Court of Appeals for Wayne County, No. 2248.

Thomas M. Blankenship, defendant-appellant, was an inmate of the Wayne County Jail on August 14, 1986. As part of an escape plan, appellant and three other inmates assaulted a jail guard who had taken them to the jail's gymnasium for exercise. Appellant and one of the other inmates pushed the guard to the floor. The guard was choked until he was unconscious. The guard's legs were then tied. Some time later, one of the inmates struck the guard's head with a piece of body-building equipment. The guard sustained serious injuries as a result of the blow.

The four inmates broke a window and exited the gym through that opening. One inmate escaped the facility by falling from or leaping off a fifteen-foot wall. The others decided not to jump and returned to the gym. Upon their return to the gym, one of the inmates radioed for assistance for the guard.

Appellant was indicted on one

count of felonious assault in violation of R.C. 2903.11(A)(1), one count of kidnapping in violation of R.C. 2905.01 (A), and one count of escape in violation of R.C. 2921.34. After trial by jury, a verdict of guilty on all counts was returned. The trial court sentenced appellant on all three charges.

Upon appeal, the court of appeals affirmed, rejecting appellant's argument that the kidnapping and felonious assault were allied offenses of similar import. The court found that the elements of the two offenses did not correspond to such a degree that the commission of one offense would necessarily result in the commission of the other. Therefore, the court held, conviction of both crimes was proper under R.C. 2941.25.

The court of appeals, finding its judgment to be in conflict with the judgment of the Court of Appeals for Cuyahoga County in *State* v. *Austin* (July 28, 1983), No. 45267, unreported, certified the record of the case to this court for review and final determination.

Keith A. Shearer, prosecuting attorney, and *Martin Frantz*, for appellee.

J. Dean Carro, for appellant.

DOUGLAS, J. While appellant raises other issues before this court, the conflict certified to us by the court of appeals involves only the question of whether the offenses of felonious assault and kidnapping are allied offenses of similar import under R.C. 2941.25. We decline to address appellant's other issues and find that under the facts of the case before us the offenses of felonious assault and kidnapping are *not* allied offenses of similar import and, accordingly, we affirm the judgment of the court of appeals.

R.C. 2941.25 provides:

"(A) Where the same conduct by defendant can be construed to con tute two or more allied offenses of s ilar import, the indictment or infor tion may contain counts for all such fenses, but the defendant may be c victed of only one.

"(B) Where the defendant's c duct constitutes two or more offer of dissimilar import, or where his c duct results in two or more offense the same or similar kind commi separately or with a separate ani as to each, the indictment or infor tion may contain counts for all sucl fenses, and the defendant may be victed of all of them."

This court has set forth a t tiered test to determine whether crimes with which a defendan charged are allied offenses of sin import. In the first step, the elem of the two crimes are compared. I elements of the offenses correspon such a degree that the commissio one crime will result in the commis of the other, the crimes are allie fenses of similar import and the c must then proceed to the second s In the second step, the defend *conduct* is reviewed to deter whether the defendant can be victed of both offenses. If the c finds either that the crimes were mitted separately or that there w separate animus for each crime, defendant may be convicted of bot fenses. *State* v. *Mughni* (1987), 33 St. 3d 65, 67, 514 N.E. 2d 870, *State* v. *Talley* (1985), 18 Ohio S 152, 153-154, 18 OBR 210, 211 480 N.E. 2d 439, 441; *State* v. *Mi* (1983), 6 Ohio St. 3d 416, 418, 6 463, 464, 453 N.E. 2d 593, 594; *St* *Logan* (1979), 60 Ohio St. 2d 126, 14 O.O. 3d 373, 374, 397 N.E. 2d 1348.

Accordingly, we first must pare the elements of the two offe In the case at bar, appellant was victed of kidnapping, R.C. 2905.0

felonious assault, R.C. 2903.11.
:. 2905.01 provides:
"(A) No person, by force, threat, deception, * * * shall remove an-er from the place where he is found estrain him of his liberty, for any of following purposes:
"* * *
"(2) To facilitate the commission ıny felony or flight thereafter[.]"
R.C. 2903.11 provides:
"(A) No person shall knowingly:
"(1) Cause serious physical harm ınother[.]"

Kidnapping requires proof that a endant (1) knowingly, (2) by force, restrained another of his liberty. To ıblish the offense of felonious ault there must be proof that a endant (1) knowingly (2) caused ious physical harm to another.

Comparing the elements of the two nes, we do not find that the ele-nts correspond to such a degree t the commission of kidnapping nec-arily results in the commission of nious assault. A kidnapping may ur without a felonious assault. Like-e, a felonious assault may occur ab-t the existence of a kidnapping. A son may seriously injure another hout restraining the victim of his or liberty.

Applying the foregoing to the facts ore us, the kidnapping occurred en the guard was rendered uncon-ous and then bound with a rope. The nious assault (the guard's being ıck on the head) occurred after the napping had taken place. Thus, the nious assault cannot be said to be t of the kidnapping offense.

Therefore, on the specific facts of s case, we hold that the offenses of napping, R.C. 2905.01(A)(2), and nious assault, R.C. 2903.11(A)(1), not allied offenses of similar im-t.

The judgment of the court of ap-ıls is affirmed.

Judgment affirmed.

MOYER, C.J., LOCHER, HOLMES, WRIGHT and H. BROWN, JJ., concur.

WHITESIDE, J., concurs separately.

ALBA L. WHITESIDE, J., of the Tenth Appellate District, sitting for SWEENEY, J.

WHITESIDE, J., concurring. Although I concur in the affirmance of the judgment of the court of appeals, I cannot concur in the opinion because it fails to resolve the certified issue.

Defendant-appellant contends that the offenses of kidnapping and felonious assault constitute allied offenses of similar import and, as such, his conviction of both is precluded by R.C. 2941.25, which provides that:

"(A) Whether the same conduct 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) Whether 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."

Although sometimes referred to as a two-part test, in reality, there is a three-part test in determining applicability of R.C. 2941.25 in a particular case. The three tests are: (1) whether the offenses are allied offenses of similar import, (2) whether they were committed by the same conduct, and (3) whether they were committed with the same animus.

In determining whether the two offenses are allied offenses of similar import, a comparison of the elements of the two offenses must be made. However, in making this comparison, it is not a comparison as to whether one offense cannot possibly be committed without committing the other, but rather whether the nature of the elements of the offenses is such that in some instances they may overlap, that is, that in certain instances, both crimes may be committed by the same conduct. It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses. See *State* v. *Mughni* (1987), 33 Ohio St. 3d 65, 514 N.E. 2d 870; *State* v. *Mitchell* (1983), 6 Ohio St. 3d 416, 6 OBR 463, 453 N.E. 2d 593; *State* v. *Logan* (1979), 60 Ohio St. 2d 126, 14 O.O. 3d 373, 397 N.E. 2d 1345; *State* v. *Talley* (1985), 18 Ohio St. 3d 152, 18 OBR 210, 480 N.E. 2d 439; and *State* v. *Donald* (1979), 57 Ohio St. 2d 73, 11 O.O. 3d 242, 386 N.E. 2d 1341.

The second test, obviously, is based upon the conduct involved in a particular case, and the issue is whether in fact both offenses were committed by the same conduct. To constitute commission of both offenses, the conduct must be such as to constitute the commission of all of the elements of one offense and at least one of the elements of the other.

The third test is whether the two crimes were committed with the same animus. This means with the same purpose, intent, or motive since this is the meaning of the word "animus." Only when all three tests are satisfied does R.C. 2941.25 prevent a conviction of both offenses in a given case.

As noted in the opinion, in this case, the conduct constituting the felonious assault was not the conduct constituting the force or restraint element of the kidnapping since the guard had been rendered unconscious and bound with the rope prior to defendant's conduct constituting the felonious assault, namely, striking the guard on the head with the piece of body-building equipment.

Under these circumstances, the two offenses were committed separately and defendant could be convicted of both offenses under R.C. 2941.25 even though the two offenses may be allied offenses of similar import under different circumstances.

Accordingly, the court of appeals reached the correct result even though for the wrong reason and its judgment is properly affirmed.