

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

13-0842

VS.

ON APPEAL FROM THE LUCAS
COUNTY COURT OF APPEALS,
SIXTH APPELLATE DISTRICT

JORGE ROJAS

Court of Appeals

Appellant

Case No. L 11-1263

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT JORGE ROJAS

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Opinion of denial of pro se "Motion To Intervene",of Oct.18.2012.

EXPLANATION OF WHY THIS CASE IS OF PUBLIC INTEREST AND

INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This cause presents several substantial constitutional questions, of even "structural errors" (constitutional-dimensions), and centers upon the very fundamental right to have every single element of each criminal charge proven beyond a reasonable doubt, AND INNOCENCE PRESUMED UNTIL THEN. Sixth and Fourteenth Amendments, U.S. Constitution; Ohio Constitution, Article I; O.R.C. §2901.05(A).

Appellant also proposes to this court, the question of whether, when Ohio Evidence Rules mandates a procedure, and then those rules are plainly violated by the court and/or counsel, that such a circumstance turns that issue into purely a question [of LAW] for the reviewing court. And that, as such, the appellate court may not rely upon the "trier of FACT" (jury), to determine the weight to be given to the credibility of the witness or evidence. Cf. STATE V. DeHASS, 10 Ohio St.2d 230 (1967). Instead it is submitted that the appellate court is REQUIRED to analyze that evidence issue as a question of pure "LAW", and likewise sit as the "13th Juror", pursuant to STATE V. THOMPSON, 78 Ohio St.3d 380, 387 (1997). To say anything other would be to misplace the facts versus the law, in turn ignoring the error as if it were a factual issue limited to jury determination. However, as a matter of law, the jury MAY NOT EVER determine or apply the "LAW"; and the jury's task is a purely "FACTUAL" determination.

Determination of (application of) Evidence Rules is a question of "LAW", and nothing but. Yet in this case on review, the Sixth District improperly treated it all as being only within the purview of the jury. In actuality, these violations of Evidence Rules served to undermine the entire case, and facilitate a finding of GUILTY, without

the prosecution having to prove each and every element beyond a reasonable doubt, which is mandated before a verdict can be proper and valid. Otherwise a directed-verdict of acquittal must be rendered by the Judge. See eg., Oh. Crim. R. 29; and LaFAVE, Criminal Law §1.8 (4th. ed. 2003); McCORMICK, EVIDENCE §§336-37 (6th. ed. 2006); and SULLIVAN V. LOUISIANA, 508 U.S. 275, 278 (1993); McKENZIE V. SMITH, 326 F.3d 721, 728 (6th. Cir. 2003); U.S. V. O'BRIEN, 130 S.Ct. 2169, 2174 (2010).

Therefore the Sixth District, sitting as the "13th Juror", was required to issue such a verdict pursuant to O.R.C. §2953.07(A), and it erred in failing to do so, as "a matter of law" (Oh. App. R. 12(B)).

The history of common-law evidence practice was spotty, and cases were litigated largely in accordance with the random and diverse customs and prejudices of the various judges and lawyers of the day. Misconceptions were common place. Modern evidence codes have gone a long way to eliminate those errors and abuses, and challenges the judiciary to apply the Evidence Rules with reasoned fairness. In such a circumstance, the public at large, clients, and advocates of judicial efficiency will be the ultimate beneficiaries.

This Honorable Supreme Court of Ohio must grant jurisdiction, hear this case on the merits, and set down precedent with a state-wide [mandate] to adhere to Ohio Evidence Rules in all cases of the courts of Ohio.!!!

STATEMENT OF THE CASE AND FACTS

This case originates from a jury-trial in the Common Pleas Court of Lucas County, Ohio, (Case No. CR-11-1378), on Sept. 29, 2011, with a guilty verdict being issued for five counts of Agg. Robbery and complicity to those Agg. Robberies (with gun spec.'s attached to each); Feloneous Assault and complicity to those Feloneous Assault

(with gun spec.);and an additional felonious assault as a lesser offense of Att.Murder (with a gun spec.).The jury returned a Not guilty verdict,as to the Att.Murder charge.

The co-defendant of the joint trial (Edgar Ramirez),was found guilty in the same fashion on the counts he was charged as Appellant, with the exception of the single count of Agg.Robbery (with gun spec.) concerning the events of July 15,2010,which was directed as dismissed by the court at the conclusion of the previous days trial.

The total aggregate sentence is for seventy-one (71) years.

This case then proceeded to a direct appeal-of-right in the Sixth District Court Of Appeals of Ohio,(Case No. U-11-1276),of which is now the subject of this Motion For Jurisdiction.

While aMotion To Reopen is forthcoming in the appeals court, Appellant,Mr.Rojas,has in fact [already] "presented" the herein errors to the Sixth District by way of "Motion To Intervene".

The court of appeals "affirmed" the judgment,without ruling on the merits of the pro se errors,instead merely denying the right to be considered pro se.

Please view related-appeal/Motion for Jurisdiction pending in the Ohio Supreme Court (Case No. 13-0607),and make it's contents wholly inclusive to this instant Motion.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION NO. 1. / THE TRIAL COURT ERRED IN FAILING TO GRANT

APPELLANTS MOTION TO SEVER.Oh.Crim.R.14;6th.and14th.Amendments,U.S. Constitution.

The trial court erred in failing to provide relief from joinder pursuant to Oh.Crim.R. 14...resulting in a firestorm of perjured statements,condemning evidences,objections and denial of objections, to the prejudice of Appellant.Where Appellant "did not open that

door", as noted by the court (Vol. III, TR 720, lines 14-15), and noted in Appellants Brief (pages 19-20). Therefore to deny severance, and thus allow the improper evidences was a clear abuse of discretion under Oh. Evid. R. 404. See eg., STATE V. FEATHERS, ___ Ohio App. 3d ___, 2007 Ohio App. LEXIS 2778 (2007); STATE V. GANELLI, 2005 Ohio App. LEXIS 741 (2005). Severance is REQUIRED when a joint trial could compromise a specific right of one of the defendants, (or) prevent the jury from making a reliable judgment about guilt or innocence, U.S. V. WALLS, 293 F.3d 959, 966 (6th Cir. 2002), quoting, ZAFIRO V. U.S., 506 U.S. 534, 539 (1993). Further, evidence that is probative of a defendants guilt, but technically admissible ONLY against a co-defendant, presents a risk of prejudice. STATE V. BRENSON, 2010-Ohio-4645. Antagonistic defenses prejudiced Appellant to the degree of denying a fair trial, requiring severance. STATE V. PRICE, 2003-Ohio-1840, at ¶14, citing STATE V. DANIELS, 92 Ohio App. 3d 473, 476 (1993).

The failure of counsel to renew the motion to sever at the close of all evidence, constituted ineffective assistance of counsel. However, even in the absence of a renewal, appellate review of the severance issue can still be deemed appropriate... especially given that ineffective counsel is the cause for any failures. See eg., U.S. V. CHAVIS, 296 F.3d 450, 456 (6th Cir. 2002); Oh. Crim. R. 8(A), 14. See also U.S. V. PEVETO, 881 F.2d 844, 856-58 (10th Cir. 1989)... (denial of severance an abuse of discretion, when co-defendants defense also casts defendant in a light of guilt); U.S. V. BAKER, 98 F.3d 330, 335 (8th Cir. 1996)... (abuse of discretion because evidence could not have been admitted against defendant if tried separately (and) risk could not be overcome by jury instructions).

PROPOSITION NO. 2. / TRIAL COURT ABUSED IT'S DISCRETION IN FAILING TO
DECLARE A MISTRIAL, VIOLATING DUE PROCESS AND THE RIGHT TO A FAIR
TRIAL, 5th., 6th. and 14th. Amendments, U.S. Constitution; Ohio Constitution
§§10 and 16.

In the first assignment of error above, the basis for severance from prejudicial joinder is, (which damaging and perjured testimony of co-defendant-turned-states-evidence Raul Moya is the CAUSE of said prejudicial/perjured statements), is set forth with particularity (above). While severance was denied, and counsel failed to renew the motion for severance constituted ineffectiveness, the trial court could have, on it's own motion, provided relief from it anyway. Moreover, the trial court should have granted the motion for mistrial, which would have remedied the error to not sever. And the failure was an abuse of discretion.

The cause for the motion for mistrial was, inter alia, due to evidence presented, tending to show that defendant committed another crime independent of that for which he was on trial...which is prohibited. STATE V. McCLAIN, 2002-Ohio-5342, at ¶32; STATE V. BREEDLOVE, 26 Ohio St.2d 178, 183 (1971)...(because it could cause the jury to convict based upon perceived prior acts or crimes).id.

Despite the opinion issued by the Sixth District, that "the jury is presumed to have understood and correctly followed the courts instructions" to them, (citing, STATE V. GOERNDT, 2007-Ohio-4067, ¶24 (8th. Dist.) (unreported))...the fact remains that Moya's tainted testimony, including the admissions of alleged other acts not related to the charges on trial, served to mislead the jury's decision making process in a web of confusion. And the Limine Instructions only further convoluted and tortured the juror's mind's, causing them to be at a loss to gauge proper application and weight of evidences. As such, the Limine Instructions were useless. See eg., U.S. V. NESS,

665 F.2d 248,250-51 (8th.Cir.1981); KIM V. COPPIN STATE COLLEGE, 662 F.2d 1055,1066 (4th.Cir.1981).

Balancing Appellant's rights to a fair trial, facing 71 years, certainly outweighed any need for societies interests in the efficient dispatch of justice. The Appellant's rights to a fair trial are paramount. In the case at bar, the court clearly abused it's discretion in failing to declare a mistrial. Clearly "arbitrary, unreasonable", and a "perversity of will and prejudice". STATE V. ADAMS, 62 Ohio St.2d 151,157 (1980); STATE EX REL. COMMERCIAL LOVELAGE V. LANCASTER, 22 Ohio St.3d 191,193 (1986). Jurors are NOT lawyers.

~~PROPOSITION NO. 5~~: TRIAL COURT ERRED WHEN IT DENIED APPELLANT THE RIGHT TO AID IN HIS DEFENSE AND DISMISS TRIAL COUNSEL AND PROVIDE NEW COUNSEL. 6th. and 14th. Amendments, U.S. Constitution; Ohio Constitution Article I, §10.

Under the 6th. Amendment, there is an absolute right in a criminal trial for a defendant to "conduct" and/or aid in his defense. This is not at the judges discretion, but is a "choice" which lies with the defendant. See, FARETTA V. CALIFORNIA, 422 U.S. 806,821 (1975); MCKASKLE V. WIGGINS, 465 U.S. 168,174-84 (1984); JONES V. JAMROG, 414 F.3d 585, 592 (6th.Cir.2005); ROBINSON V. IGNACIO, 360 F.3d 1044,1061 (9th.Cir. 2004); U.S. V. TAYLOR, 933 F.2d 307,311 (5th.Cir.1991). Cf. also, SCHWARTZ, CONSTITUTIONAL LAW §7.11 (2nd.ed.1979).

Appellants attorney was not complying nor assisting in that right, and in fact was OBSTRUCTING that right. As such, it is an error of "constitutional dimensions". Having been set-forth and established to the appeals court in prima facie fashion, the burden then shifts back to the state to prove that error "harmless beyond a reasonable doubt", and that it made "no contribution to the conviction". See, CHAPMAN V. CALIFORNIA, 386 U.S. 18,23-26 (1967); STATE V. TABASCO, 22

STATE V. TABASCO, 22 Ohio St.2d 36 (1970); STATE V. SIBERT, 98 Ohio App. 3d 412 (4th.Dist.1994). This constitutes plain-prejudicial-error, affecting substantial rights. Cf. STATE V. NOLING, 98 Ohio St.3d 44 (2002), Cert. Denied, 123 S.Ct. 2256; STATE V. NOGGLE, 140 Ohio App.3d 733 (3rd.Dist.2000); STATE V. BROWN, 70 Ohio App.3d 113 (10th.Dist. 1982).

In light of all the errors presented, it is obvious that this is not about "trial tactics", nor about a "meaningful relationship with his attorney", as was asserted by the Sixth District, but instead involved the very fundamental right to make ones own decisions about a defense to criminal charges against oneself. With counsel refusing to honor that right, the court erred in not appointing NEW counsel (or to at least, admonish counsel to comply with law).

PROPOSITION NO. 4 / APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL. 6th. and 14th. Amendments, U.S. Constitution.

In a criminal trial, counsel has a duty to bear such skill and knowledge as will render the trial as a reliable adversarial testing process. STRICKLAND V. WASHINGTON, 466 U.S. 668, 688 (1984). A two-prong test is used to determine ineffectiveness: 1.) counsels performance fell below an objective standard of reasonable representation INVOLVING A VIOLATION OF SUBSTANTIAL RIGHTS. STATE V. DRUMMOND, 111 Ohio St.3d 14, ¶14 (2006), citing STRICKLAND supra.

* Amongst the violations filed about, trial counsel failed to register numerous objections to ordinary inadmissable evidences, failed to challenge admissability of testimony and evidence, failing to require the state to prove all elements beyond a reasonable doubt to secure a conviction, failing to adequetely research the record, and failing to protect the rights of the accused... as if that is not enough to establish ineffective assistance of trial counsel.?

The second prong must show, 2.) that Appellant was prejudiced by the ineffectiveness. DRUMMOND and STRICKLAND, supra. Undisputably, 71 years of incarceration is quite a [prejudice] indeed. Essentially a death-sentence.

Prejudice is "presumed", when: counsel fails to subject prosecutions case to a meaningful adversarial testing, U.S. V. CRONIC, 466 U.S. 648, 659 (1984); counsel fails to make a motion to suppress a witness's testimony, THOMAS V. VARNER, 428 F.3d 491, 502 (3rd.Cir.2005); for an irreconcilable conflict, PRUMLEE V. DEL PAPA, 465 F.3d 910, 922 (9th.Cir.2006); failure to conduct investigation, ADAMS V. BERTRAND, 453 F.3d 428, 437 (7th.Cir.2006); and for failure to object to prosecutorial misconduct, HODGE V. HURLEY, 426 F.3d 368, 386 (6th.Cir.2005).

In the opinion (Sixth District, ¶45), that court submits that, "the burden of proof is high, given Ohio's presumption that a properly licensed attorney is 'competent'", STATE V. NEWMAN, 2008-Ohio-5139, ¶27 (6th.Dist.2008). However, "presumptions" can be [rebutted], Oh.Evid.R. 301. The above bursts the bubble of presumption, and that presumption accordingly disappears. Cf. AYERS V. WOODARD, 166 Ohio St.2d 138 (1957).

PROPOSITION NO. 51: THE VERDICTS OF THE JURY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WITH ALL ELEMENTS OF EACH OFFENSE NOT BEING PROVEN BEYOND A REASONABLE DOUBT. O.R.C. §2901.05(A), (E); 6th and 14th Amendments, U.S. Constitution.

There is an absolute right to have every single element of each offense proven beyond a reasonable doubt, and the failure on even one element is a "structural-error" requiring reversal. See, APPRENDI V. NEW JERSEY, 530 U.S. 466, 488-92 (2000); U.S. V. O'BRIEN, 130 S.Ct. 2169, 2174 (2010). Proof beyond a reasonable doubt is totally precluded, as a matter of law, when the state fails to prove [ALL] elements, O.R.C. §2901.05(A).

The failure to prove all elements beyond a reasonable doubt, is a question of [law]. STATE V. THOMPkins, 78 Ohio St.3d 380,386 (1997).

This error is fully elaborated upon, herein the EXPLANATION OF WHY THIS CASE IS OF PUBLIC INTEREST...pages 1-2, above.

Without [EVIDENCE], the case has no foundation and must fall. As has been previously stated, the uncorroborated, perjured, inconsistent testimony of accomplice (Raul Moya), provided the basis for the states entire case. There was no-one present at any of the crime scenes that identified the Appellant. There was no scientific or D.N.A. evidence that placed Appellant at the scenes where the robberies took place. The testimony of one witness was clear, that [if] a shot was fired, it was not in thier direction, but up and away from them...casting great doubt upon convictions for Feloneous Assaults. The testimony was clear from the manager of the Key Bank, he was in the basement, far away from the shots fired. There simply was no testimony that anyone caused or attempted to cause physical harm to another with a deadly weapon. And the jury clearly got carried away, losing thier way, because of irregular and false presentations of evidence.

Testimony of an accomplice "should be viewed with grave suspicion and weighed with great caution". O.R.C. §2923.03(D); STATE V. COCHRAN, 2007-Ohio-435, ¶38-39 (11th. Dist. 2007).

PROPOSITION NO. 6.) / THE CUMMULATIVE EFFECT OF THE ERRORS VIOLATED THE DUE PROCESS RIGHT TO A FAIR TRIAL. 6th. and 14th. Amendments, U.S. Constitution.

Appellant submits that the cummulative effect of all the errors presented here, violated the Due Process guarantee of fundamental fairness, and requires reversal. See eg. TAYLOR V. KENTUCKY, 436 U.S. 478, 488, n.15 (1978); U.S. V. CANALES, 744 F.2d 413, 430 (5th. Cir. 1984).

It also constitutes "cummulative prejudice", violating Due Process.
ENGLE V. ISAAC, 456 U.S. 107, 109, 135 (1982); WAINWRIGHT V. SYKES, 433
U.S. 72, 91.

PROPOSITION NO. 7.) / THE TRIAL COURT ERRED IN FAILING TO MERGE
ALLIED OFFENSES OF SIMILAR IMPORT, VIOLATING THE DOUBLE JEOPARDY
CLAUSE. D.R.C. §2921.45(A); 5th. Amend., U.S. Constitution.

Counts two and three (Agg. Robberies at "Circle K Carryout"), were
both clearly the result of a singleness of thought, purpose, or action
... a "single state of mind". See, U.S. V. UNIVERSAL CREDIT CORP., 344
U.S. 218, 221-24 (1952); STATE V. BROWN, 119 Ohio St. 3d 447, ¶50 (2008).

Under clear Ohio Law, applicable now and at the time of Appellant's
trial, offenses [MUST] be merged, if: 1.) it is possible to commit one
offense and commit the other with the same conduct, and 2.) the
offenses WERE committed with the same conduct. STATE V. JOHNSON, 128
Ohio St. 3d 153, 162-63 (2010), citing BROWN supra. That is quite plain
and simple. The Sixth District disregarded that Ohio Supreme Court
mandate in their opinion. Yet, "courts of appeals are bound by and
must follow decisions of Ohio Supreme Court, which are regarded as
[LAW]... and has no power to overrule Supreme Court decisions". See,
SCHLACHET V. CLEVELAND CLINIC, 104 Ohio App. 3d 160 (8th. Dist. 1995).

D.R.C. §2941.25(A), is a statute that is designed to protect a
defendants rights under the Double Jeopardy Clause. JOHNSON, supra at
162; 5th. Amendment, U.S. Constitution. It makes no difference under
JOHNSON, that there were more than one victim. Multiple victims does
not in turn equate to separate animus, (as the Sixth District ruled).
In fact the "animus" is no longer the true issue under JOHNSON.
Rather the key is, "a single state of mind".

PROPOSITION NO. 8.) / TRIAL COURT COMMITTED PREJUDICIAL ERROR BY
ADMITTING PERJURED TESTIMONY IN CRIMEN FALSI BY CO-DEFENDANT, AND

FALSE EVIDENCES UNDER OHIO EVID.R.103(C),402,404(B),608(B)(1),613(B),
and 616...WHICH CONSTITUTED A FRAUD UPON COURT TO OBTAIN A
CONVICTION.6th.and 14th.Amendments,U.S.Constitution.

The heaviest weight of evidences that the state used to sustain the ENTIRE conviction,was had by once-co-defendant-turned-states-evidence (Raul Moya), Raul Moya admitted in open court that,several times he had lied regarding the crimes in question.(Vol.III,TR 716, lines 1-11).This was the basis for a motion for acquittal.(TR 991-92), It was testified by a Detective Gast,that Moya lied to him on several occesions.(TR 939,lines 8-11)...this was on direct exam by prosecution.Moya had [ALL] criminal charges dismissed against him,in exchange for his prosecutorial-designed-fairy-tales,(TR 939,lines 19-23 to TR 940,lines 1-20).Reversal is required when prosecution fails to correct a government witness's false testimony.SHIH V. FILION,335 F.3d 119,129 (2nd.Cir.2003).In fact it constitutes "fraud"
DISIPLINARY COUNSEL V. JONES,66 Ohio St.3d 369,369-71 (1993).

Perjury (O.R.C.§2921.11(A))..."e falsification is material, regardless of it's admissability in evidence,if it can affect the course of the outcome or proceeding"(part (B)... "contradictory statements" is enough to satisfy elements of perjury (part (D),it is in turn enough to turn the entire issue into purely a question of [LAW],which is not within the purview or domain of the jury.

The result was inadmissable evidences via prosecutorial misconduct's,and alluding to matters not supported,which is error.STATE V. BRAXTON,102 Ohio App.3d 28,42 (8th.Dist.1995),citing STATE V. SMITH,14 Ohio St.3d 13,14 (1984).Further supporting ineffective counsel claims,as counsel "sat mute" through it all.STATE V. WILLIAMS,

99 Ohio St.3d 493,516 (2003).Under Oh.Evid.R.402,"evidence which is not relevant is not admissible".Compare eg.,STATE V. BOYD,18 Ohio St. 3d 30 (1985);SWING V. ROSE,75 Ohio St. 355,367-68 (1906);HOLZ V. DICK,42 Ohio St.23 (1884);BASSET V. AVERY,15 Ohio St. 299 (1864). Oh.Evid.R.608(B)(1),governs prior acts,such as lies,of a principle witness.WEISSENBERGER'S OHIO EVIDENCE,§608.7,citing STATE V. GREER, 39 Ohio St.3d 236 (1988).The accomplice factor,as well as the dismissal of ALL charges in exchange for testimony,establishes "Bias" of Raul Moya,under Oh.Evid.R.616...requiring impeachment.STATE V. KEHN,50 Ohio St.2d 11 (1977);OHIO DEPT. OF MENTAL HEALTH V. MILLIGAN, 39 Ohio App.3d 178 (1988);U.S. V. ABEL,469 U.S. 45 (1984).Bombarding the jury with "other wrongs or acts",violating Oh.Evid.R.404(B) and 103(C).STATE V. MANN,19 Ohio St.3d 34 (1985);STATE V. HIPKINS,69 Ohio St.2d 80,83 (1982);SIBER V. U.S.,370 U.S. 717 (1962).Resulting in a conviction based upon fabrication,perjury,and confusion----and nothing more.Further, the inconsistent statements of Moya,violates Oh.Evid.R.613(A),where "any material variance between the testimony and the previous statement will suffice"WEISSENBERGER'S,at §613.8; McCORMICK ON EVIDENCE, §34 at 74.

The Evidence Rules "govern proceedings in the courts of this state",pursuant to Evid.R.101(A);SUMMONS V. STATE,5 Ohio St. 325 (1856).The egregious violations of the evidence rules,amounts to "fraud upon the court" as defined in,COULSON V. COULSON,5 Ohio St.3d 12,15 (1983).

PROPOSITION NO. 9.) / TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING IRRELEVANT EVIDENCE VIOLATING Oh.Evid.R.401,402,and 404(B), 6th.and 14th.Amendments,U.S.Constitution.

In B.C.I. Report #10-22192 (item 12),is a D.N.A.swab of a cloth, which is shown to be collected from the scene of the Att.Murder

of Police Officer [Shaughnessy] spoke of in (TR 924), of which Appellant was not on trial for. Violating Oh. Evid. R. 402... as totally inadmissible. The juror's are human, and were confused by this added non-sense, which served absolutely no purpose other than to convict with false evidence, inflame the jury, and paint Appellant as a dangerous and deadly character. And succeed it did, as evidenced by the verdicts (which are all counter to law). The same is said for prosecutions continuous references to "gang affiliations"... of which [all] gang-spec's were dismissed nolle prosequi before trial even began.

PROPOSITION NO. 10.): / THE SIXTH DISTRICT COURT OF APPEALS VIOLATED THE SIXTH AND FOURTEENTH AMENDMENTS, U.S. CONSTITUTION BY FAILING TO ALLOW A PRO SE "MOTION TO INTERVENE" (INTERVENTION OF RIGHT). Oh. Crim. R. 57(B); Oh. Civ. R. 24(A); 14th. Amendment, U.S. Constitution.

The Sixth District denied the right to even file or be heard pro se, of which opinion is attached as Appendix. On appeal, the appellate court has discretionary authority to hear pro se works. MARTINEZ V. COURT OF APPEAL, 528 U.S. 152, 158 (2000). This extends to "hybrid representation". STATE V. EVANS, No. 05-CA-3002 (Entry, Dec. 15, 2005), 2006 WL 1409812, at 5 (4th. Dist. 2006).

In the opinion (6th. Dist., Oct. 18, 2012), the court misapplies several cases, going far out of boundaries from them, and asserting there is NO RIGHT TO FILE PRO SE, AT ALL. STATE V. KEENAN, 81 Ohio St. 3d 133, 138 (1998), as example, was cited by that court, when KEENAN was not about pro se works on [appeal], but during TRIAL... and further was a completely different set of circumstances and law, far removed from the case at bar.

Pursuant to Oh. Crim. R. 57(B), if no criminal procedure exists for a given issue, the Civil Rules shall be looked to. A perfectly fitting rule is found in Oh. Civ. R. 24(A)(2)... "Intervention of Right".

The Appellate Rules are silent, and Oh.Civ.R.24(A)(2), is [not] "clearly inapplicable" under Civ.R.1(C), and should apply where: 1.) the applicant claims an interest, and 2.) is so situated that the disposition of the action may impair or impede that interest, unless it is adequately represented by existing parties. All one has to show is that current representation ["may be"] inadequate. TRBOVICH V. UNITED MINE WORKERS OF AMERICA, 404 U.S. 528, 538, n.10 (1972). Clearly a criminal defendant on appeal meets that criteria. There is no [adequate] corrective process provided... because Oh.App.R.26(B), comes all too late (the appeal denied and CLOSED). Which it is asserted, it violates Due Process. Cf. SANDIN V. CONNER, 515 U.S. 472, 484 (1995); BAZZETTA V. MCGINNIS, 430 F.3d 795, 801 (6th.Cir.2005).

PROPOSITION NO. 11: APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF APPEALS COUNSEL. 6th. and 14th. Amendments, U.S. Constitution.

In light of all the above errors presented herein, it is patently obvious that Mr. Rojas' Appeals counsel was ineffective pursuant to both prongs of, STRICKLAND V. WASHINGTON, 466 U.S. 668 (1986). The right to effective counsel extends equally to [Appeals]. EVITTS V. LUCEY, 469 U.S. 387, 396 (1985); DOUGLAS V. CALIFORNIA, 372 U.S. 353, 355-57 (1963); HAMMON V. WARD, 466 F.3d 919, 927-31 (10th.Cir.2006). Failure to assign obvious errors on appeal, or properly argue such, which could have caused reversal, constitutes ineffectiveness. HAMMON *ibid.*; RAMCHAIR V. CONWAY, 601 F.3d 66, 72-77 (2nd.Cir.2010).

CONCLUSION

For all the above reasons, this case involves matters of public interest and [several] substantial constitutional questions. Wherefore Appellant requests that this Honorable Court accept jurisdiction in this case, appoint counsel, and review this case on the merits.

RESPECTFULLY SUBMITTED,

May 15, 2013 / *X Jorge Rojas*

JORGE ROJAS

APPELLANT, PRO SE

PROOF OF SERVICE

I certify that on this 15 day of May, 2013, I sent a copy of
the foregoing by U.S. Mail, at:

DAVID F. COOPER---

Assistant Lucas County Prosecutor

711 Adams St., 2nd Floor

Toledo, Ohio 43604

COUNSEL FOR APPELLEE-OHIO

X Jorge Rojas

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COMMON PLEAS COURT
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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1276

Appellee

Trial Court No. CR0201101378

v.

Jorge Rojas

DECISION AND JUDGMENT

Appellant

Decided:

MAY 03 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial held on September 26 through September 29, 2011, in which appellant, Jorge Rojas, was convicted of five counts of complicity to commit aggravated robbery, each with a firearm specification, and two counts of complicity to commit

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felonious assault, each with a firearm specification. Following a sentencing hearing on October 14, 2011, the trial court sentenced appellant to serve a total of 71 years in prison.

On appeal, appellant sets forth the following seven assignments of error:

Assignment of Error Number One: The trial court erred in failing to grant appellant's motion to sever.

Assignment of Error Number Two: The trial court erred to the prejudice of the appellant for failing to declare a mistrial upon appellant's request, thereby denying appellant due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and sections 10 and 16 of the Ohio Constitution.

Assignment of Error Number Three: The trial court erred to the prejudice of the appellant when it denied his right to dismiss his attorney and provide new counsel as contrary to the Sixth Amendment of the United States Constitution and Section 10, Article 1 of the Ohio Constitution.

Assignment of Error Number Four: Appellant was denied effective assistance of trial counsel.

Assignment of Error Number Five: The verdicts of the jury were against the manifest weight of the evidence.

Assignment of Error Number Six: The cumulative effect of the errors committed by the trial court violated the appellant's right to a fair trial.

Assignment of Error Number Seven: The trial court should have merged several of the sentences as part of the same transaction or occurrence [sic].

{¶ 2} In June and July 2010, a group of eight or nine young men committed robberies throughout the Toledo area. The first was on June 15, 2010, at 4:45 a.m., when six men, riding in a blue Chevrolet Impala, went into the carryout of a Marathon service station on Alexis Road. Two of the intruders, armed with shotguns, threatened the owner, Saravana Somasundaram, into giving them money from the cash drawer, as well as beer, cigarettes and other merchandise. On the way out of the store, one of the men fired a shot at the store's security camera.

{¶ 3} Similarly, on June 27, 2010, at 6:15 a.m., the group robbed a Circle K carryout on West Alexis Road in the same fashion. The only difference was that the members of the group exchanged articles of clothing and stole a blue van which they used to ride up to the carryout. After the robbery, they drove several blocks in the van before switching to the Impala and driving away. No shots were fired; however the same two men, armed with shotguns, threatened both the store clerk and a customer.

{¶ 4} During both of the above robberies, the men wore cut-off T-shirt sleeves on their heads to disguise their facial features. A witness stated, and the security cameras showed, one of the men wore a gray hoodie with red and white stripes on its sleeves. One of the robbers left a handprint on the door of the Circle K.

{¶ 5} On July 7, 2010, the group robbed a KeyBank on West Central Road in Sylvania at 11:00 a.m. At the time, three or four employees were in the bank. Upon arriving in a stolen van, the men ran into the bank. One of them fired a shot over the head of teller Heidi Birkenkamp. Another jumped over the counter and removed \$1,002.50 from Birkenkamp's drawer. When assistant manager Shawn Flaherty and another employee ran to the basement, one of the men fired the shotgun at the door as it closed behind them.

{¶ 6} On July 15, 2010, at 6:00 a.m., the group, minus two of its members, robbed a Sunoco station on Monroe Street in Toledo. Using a stolen Jeep, they drove up to the station. One of the men pointed a handgun at the clerk, Tim Green, and forced him to the floor. A total of \$600 was taken from the cash register, along with some merchandise. In addition, the men took Green's wallet and cellphone. After abandoning the Jeep several blocks away, the robbers got into the Impala and drove to a garage located at 857 Kingston. After searching the abandoned Jeep, police found a shirt sleeve containing DNA consistent with two of the men.

{¶ 7} On March 4, 2011, the Lucas County Grand Jury indicted appellant on 11 counts and specifications, all constituting felonies, arising from various robberies that occurred in 2010 on June 15, June 27, July 7, and July 15. The eleven counts included one count of aggravated burglary, six counts of aggravated robbery, one count of attempted murder, two counts of felonious assault, and one count of breaking and

entering. Also charged in the four robberies were co-defendants Martin Cheno, Edgar Ramirez and Javier Garcia.

{¶ 8} On September 23, 2011, appellant, through court-appointed counsel, filed a motion to sever pursuant to Crim.R. 14, in which appellant asserted that he would not receive a fair trial if he was not tried separately from his other co-defendants. In support, appellant argued that unfair prejudice would result because statements made by or about appellant's co-defendants could be wrongly applied to appellant and, in addition, such statements may contain prejudicial information about appellant. Appellant asked the trial court for a hearing on the motion to sever.

{¶ 9} A jury trial was held on September 26 to 29, 2011. On the first day of the trial, defense counsel renewed the motion to sever, which the trial court denied, and memorialized in a judgment entry issued on September 29, 2011. On that same day, the trial court, pursuant to the state's request, entered a nolle prosequi as Counts 1, 2, 3 and 10 of the original indictment, and the attending firearm specifications, as well as the gang specifications attached to the remaining Counts 4, 5, 6, 7, 8, 9 and 11.¹

{¶ 10} At trial, the state presented witnesses to the actual robberies as follows: Marathon station owner Saravana Somasundaram testified that five men, two of which carried guns, entered the store and ordered him to open the register. After taking \$800 in

¹ The remaining counts were referred to as follows at trial: Former Count 4 became Count 1, former Count 5 became Count 2, former Count 6 became Count 3, former Count 7 became Count 4, former Count 8 became Count 5, former Count 9 became Count 6, and former Count 11 became Count 7. All counts retained the firearm specification.

cash plus beer and cigarettes, they fired one shot at the ceiling and left. They wore masks, which covered everything except their eyes. They appeared to be white. One gunman wore a brown jacket and the other wore a black hoodie.

{¶ 11} Circle K assistant manager Gloria Case testified that five men got out of a green van and entered the store. They carried a “big like book bag.” One put a shotgun to the back of Case’s head. Case also testified that one man wore a gray hoodie and a red mask, one wore a “dark” hoodie with a red mask, two wore gray hoodies, and one wore a hoodie with red and white stripes on it. As the men left, one left the print of his left palm on the glass door. Circle K customer Tammy Davis testified that she saw five guys with ski masks and shotguns, and gave \$20 to one of the guys with a gun. Davis did not see the men take anything from the store. She saw a dark minivan.

{¶ 12} KeyBank teller Heidi Birkenkamp testified that five men wearing masks exited a dark blue or green Dodge Caravan and entered the bank. One was wearing a Carhartt jacket and a red bandanna, and two or three had large guns. Birkenkamp stated that the man in the Carhartt jacket fired one shot into the ceiling over her head to stop her from setting off the silent alarm. They also fired at the bank’s back door. Birkenkamp stated that all the men wore hoodies, masks and gloves, spoke “good English” and were possibly of “Arabic” descent. KeyBank employees Carmen Whityam and Shawn Flaherty both testified that they were in the bank’s copy room when they heard a gunshot. Flaherty opened the copy room door and they saw five men wearing dark clothes and

masks. One wore a Carhartt jacket and carried a gun. Whityam and Flaherty both stated that the man in the Carhartt jacket fired a shot at the door as Flaherty closed it.

{¶ 13} Sunoco cashier Timothy Green testified that five men came into the store. Two wore Carhartt jackets, and one carried a revolver. Green said the men took \$600 in cash and merchandise from the store. He also gave them his wallet, which contained credit cards and \$200 in cash. On cross-examination, Green said one of the men may have been “black;” however, they all wore masks that covered their faces up to the bridge of their noses.

{¶ 14} The state also presented testimony by Toledo Police Detectives Scott Smith, Jay Gast and Terry Cousino. Smith testified that the print on the glass door at Circle K, which appeared to be fresh, belonged to Raul Moya. Cousino testified that police searched a home and garage at 847 Kingston Ave on July 21, 2010, pursuant to a search warrant. Items found in the garage were black “dot” gloves, red and blue bandannas, a tan Carhartt jacket, blue and black T-shirt sleeves, a gray ECHO hoodie with stripes on the sleeves, a light blue ECHO hoodie, and a gray T-shirt with the sleeves cut off. Cousino stated that evidence collected at the garage was depicted in photos taken from the different robberies. On cross-examination, Cousino testified that the clothing and gloves could have been worn while repairing automobiles at the garage. On redirect, Cousino testified that the gray hoodie with red and white stripes was similar to one shown in the video of the Circle K robbery.

{¶ 15} Sylvania Township officer Jim Rettig testified that he found gloves and a dark hoodie in the KeyBank parking lot after the robbery. He also found a KeyBank business card, a dark cloth and a book bag in the Dodge Caravan, which was parked two to three blocks away from KeyBank. On cross-examination, Rettig testified that the blue T-shirt sleeve had a mix of DNA from Victor Cheno, appellant's co-defendant, Ramirez, and an unknown individual.

{¶ 16} Raul Moya testified at trial that he was part of the group that robbed the Marathon station, the Circle K, KeyBank and the Sunoco station. Moya stated that, at the time of trial, he was 17 years old. Moya further stated that he was identified by the palm print he made on the glass door of the Circle K, and he was initially charged along with appellant, Ramirez and several other men; however, he was granted immunity in exchange for his testimony at trial.

{¶ 17} Moya testified that all the robberies were planned in the garage of appellant's home, at 847 Kingston. Moya said that appellant and Ramirez were armed, and that all the men were disguised with hoodies, long sleeves, sweats, and face masks made from T-shirt sleeves. Moya also stated they all wore latex gloves with dots that were also used by appellant to fix cars at his garage. Moya said they went to the robberies in appellant's navy blue Impala, and that a driver would stay in the Impala while the rest of the men robbed the stores and the bank. Moya testified that appellant shot at the security camera in the Marathon store. It was appellant's job to hold a shotgun while the others took money and placed other items in a bag. Moya further stated that,

after each robbery, the group went back to 847 Kingston to divide up the money and the stolen merchandise.

{¶ 18} Moya stated that the men “switched up” their clothes between the various robberies. He described each of the four robberies and the differences between them in detail. He said that appellant pointed a shotgun at the Circle K clerk and told her to open the cash register. He said that sometimes the group would get into a stolen vehicle and drive several blocks to meet Garcia in the Impala before going back to 847 Kingston. Moya identified appellant as the person who shot at the ceiling and the back door during the KeyBank robbery. He also said that appellant had a handgun during the Sunoco robbery, but did not fire the weapon. Moya identified items used during the robberies, i.e., masks, jackets, and various bags, from photographs of evidence recovered from the crime scenes and the garage at 847 Kingston. Moya stated that he left a palm print on the door of the Circle K because he only had one glove that day.

{¶ 19} On cross-examination, Ramirez’s defense attorney began to question Moya concerning the robbery of an ATM machine on July 18, 2010. At that point, the prosecutor objected, on the basis that the ATM robbery, and the attempted shooting of a Toledo police officer during that robbery, was unrelated to the charges pending against appellant and Ramirez. Ramirez’s counsel replied that he intended to question Moya’s credibility because Moya testified under oath that he was with Ramirez on that day when, in fact, there is evidence that Ramirez was in jail at that time. Appellant’s counsel then

stated that she would not object to questioning Moya's credibility in general. The court then overruled the prosecutor's objection, and questioning continued.

{¶ 20} Ramirez's counsel read into the record a portion of Moya's testimony concerning events surrounding the ATM robbery, to refresh his memory. In that testimony, Moya stated under oath that he was with Ramirez on July 18, 2010. Moya further stated that he, Ramirez, appellant, and several others were "hanging out" at 847 Kingston, smoking marijuana and drinking beer. Moya also recalled being interviewed by Gast for three to five hours on January 6, 2011, during which Moya repeatedly lied to protect Martin Cheno, another member of the group who was the father of Moya's sister's baby. Moya also stated that he lied during a second interview for that same reason. However, Moya said that he changed his mind later and began telling the truth to investigators, to keep them from involving his younger brother in the investigation.

{¶ 21} On cross-examination by appellant's counsel, Moya testified that he was arrested on July 19, 2010, and that appellant was with him at that time. Moya stated that he was charged with attempted murder, felonious assault and aggravated robbery in relation to the ATM robbery, and that he was offered a shorter sentence in return for his testimony concerning the other four robberies.

{¶ 22} Moya also testified that the charges were made because he shot at a cop during the ATM robbery. At that point, appellant's counsel objected; however, the trial court found that the door was open for that line of questioning and overruled the objection. Thereafter, Moya recounted the ATM robbery in detail, and named appellant

as a participant in that robbery. Appellant's counsel did not object to the detailed account of the robbery; however, the trial court interrupted the testimony twice to question its relevance, and noted that no objections were made to this line of questioning. The trial court also gave the jury an instruction limiting the application of Moya's testimony as to the ATM robbery as follows:

As to other acts, that evidence is received for only a limited purpose, it is not received and you may not consider it to prove the character of the individual defendants in order to show that they acted in conformity or in accordance with the character relative to the allegations contained in the seven counts of the indictment for which each stands. You can only use it for purposes of testing the credibility of this witness [Moya] and for no other purpose.

{¶ 23} After the trial court's limiting instruction, Moya testified as more details regarding another co-defendant, Martin Cheno, with whom Moya's sister had a baby. The trial court again questioned the relevance of the questioning, and asked the jury to disregard it. Thereafter, the prosecutor questioned Moya about the planning of the ATM robbery. The trial court again interrupted and questioned the relevance, noting that no objection was made to the question. Appellant's counsel responded: "I'll object, judge, if you want me to." Moya then testified that, even though he lied before about details of the four robberies, he eventually decided "it was best at the end to come forward" and tell the truth.

{¶ 24} After Moya's testimony, appellant's counsel moved for a mistrial. In support of her motion, counsel referred to her motion to sever, in which she mentioned the potential for evidence to be elicited in Ramirez's defense that would be harmful to appellant. Defense counsel stated that she would not have moved for a mistrial but for Moya's testimony. After reviewing appellant's motion to sever, the trial court noted that no objections were made to Moya's testimony and, in fact, the court stopped the questioning on its own initiative and gave a limiting instruction because it was not relevant to the charges against appellant and Ramirez. Thereafter, the motion for a mistrial was denied.

{¶ 25} When the trial resumed, testimony as to DNA analysis was presented by Ohio Bureau of Criminal Identification and Investigation ("BCI") employee Cassandra Agosti, who testified that she tested a black shirt sleeve, a black hoodie, and a Carhartt jacket taken in connection with the Sunoco robbery and compared them to "standards" given by Ramirez and appellant. Agosti stated that appellant's DNA was not on any of those items. She also testified that a blue and black cloth taken in connection with the Marathon robbery contained a mixture of DNA; however, appellant was the major contributor.

{¶ 26} Toledo Police Detective William Jay Gast testified that he investigated all four robberies, as well as the ATM robbery attempt on July 19, 2010, and he was able to tie all the robberies together using cell phone records, analysis of the video evidence, and items seized during the search of 847 Kingston, along with DNA evidence that was

submitted later. Gast stated that the “MOs” employed in all the robberies “sure seemed to match.” Gast also stated that Moya provided much information, and that police went to “great lengths” to “try to substantiate his information that [Moya] provided in his statements.” Gast acknowledged that Moya initially lied to police to protect another co-defendant to whom Moya had family ties; however, enough evidence was obtained to substantiate Moya’s claims.

{¶ 27} Testimony regarding the collection and analysis of video evidence was presented by Sylvania Township Detective William Hunt and Toledo Police Officers John Mattimore, Mark Johnson and Randall Navarro. After they were authenticated, videos of all four robberies were played for the jury.

{¶ 28} As part of Ramirez’s defense, Lucas County Sheriff’s Department Lieutenant James Williams then testified that Ramirez was arrested on an outstanding traffic warrant on July 18, 2010, and was booked into the Lucas County jail at 12:25 p.m. on that date. Williams stated that Ramirez remained in police custody until he was released at 7:55 p.m. on July 19, 2010. Julie Heinig, laboratory director for the DNA Diagnostic Center in Cincinnati, testified that items she tested for DNA contained a mixture of various contributors and that, although Ramirez could be excluded some of the items, neither he nor appellant could be excluded from all of them.

{¶ 29} Appellant and Ramirez chose not to testify on their own behalf. Appellant did not call any witnesses to testify in his defense, and appellant’s defense counsel did not renew the motion for an acquittal or the motion to sever. After closing arguments, the

trial court instructed the jury as to the elements of the crimes charged and the applicable law. After a period of deliberation, the jury found appellant guilty of five counts of complicity to commit aggravated robbery (Counts 1, 2, 3, 4, and 7), with a firearm specification for each count, and two counts of complicity to commit felonious assault (Counts 5 and 6),² with firearm specifications for each count.

{¶ 30} A sentencing hearing was held on October 14, 2011, after which the trial court sentenced appellant to serve 4 years in prison for each of the 5 aggravated robbery convictions, and 9 years for each of the two felonious assault convictions, plus an additional mandatory 3 year sentence for each of 4 firearm specifications.³ The sentences were ordered to be served consecutively, for a total prison sentence of 71 years. A timely notice of appeal was filed in this court on November 28, 2011.

* {¶ 31} In his first assignment of error, appellant asserts that he did not receive a fair trial because the trial court did not grant his motion to sever. In support, appellant argues that Moya's testimony regarding appellant's involvement in the ATM robbery is an example of the prejudice that arose because the trial court refused to grant his motion to sever. We disagree, for the following reasons.

{¶ 32} Crim.R. 8(B), which governs joinder of defendants, provides, in relevant part, that:

² As to Count 6, the jury found appellant not guilty of complicity to commit attempted murder, but guilty of the lesser included offence of felonious assault.

³ The firearm specifications for Counts 5 and 6 were merged.

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or the in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. * * *

{¶ 33} Crim.R. 14, which governs relief from joinder, provides that a separate trial may be held upon motion, “if it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints * * *.”

{¶ 34} It is well-settled in that joinder is favored and is to be “liberally permitted.” *State v. Scott*, 6th Dist. No. S-02-026, 2003-Ohio-2797, ¶ 13, quoting *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992). If a motion to sever is made at the outset of a trial, it must be renewed at the close of the state’s case or at the conclusion of all of the evidence so that a Crim.R.14 analysis may be conducted in light of all the evidence presented at trial. *State v. Hoffman*, 9th Dist. No. 26084, 2013-Ohio-1021, ¶ 8. The consequence of failure to renew the motion to sever is loss of the issue on appeal. *Id.*

{¶ 35} It is undisputed that, in this case, appellant and Ramirez participated in the same or similar acts that constituted the charged offenses, and that were part of the same course of criminal conduct. The only references to appellant’s motion to sever occur when the motion is discussed and denied at the outset of the trial and again after Moya’s testimony, while appellant’s counsel is arguing in favor of a mistrial. The record does

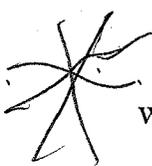
not show that appellant's counsel renewed the motion to sever at the conclusion of all the evidence. In addition, the record shows that the trial court, on its own initiative, questioned the relevance of Moya's testimony regarding the details of the ATM robbery and instructed the jury^(limine) that it was to be considered only as to the issue of Moya's credibility. Under these circumstances, we cannot say that the trial court either abused its discretion by allowing Moya to testify, or prejudiced appellant, and therefore committed plain error, by not ordering appellant to be tried separately. Appellant's first assignment of error is not well-taken.

 ¶ 36 In his [second assignment of error], appellant asserts that the trial court erred when it denied his motion for a mistrial. In support, appellant argues that the attempt to elicit testimony from Moya concerning the attempted murder of a police officer during the ATM robbery prejudiced appellant so that a fair trial was impossible.

¶ 37 On appeal, the trial court's decision to grant or deny a motion for a mistrial will not be overturned absent an abuse of discretion. *State v. Goerndt*, 8th Dist. No. 88892, 2007-Ohio-4067, ¶ 20. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983). Generally, the granting of a mistrial is proper only in cases where a fair trial has become impossible. *Goerndt*, 2007-Ohio-4067, ¶ 21. "[T]he essential inquiry on a motion for mistrial is whether the substantial rights of the accused are adversely or materially affected." *Id.*

{¶ 38} As set forth above, the trial court issued a limiting instruction to the jury as to the use of Moya's testimony. In such cases, the jury is presumed to have understood and correctly followed the trial court's instruction. *Id.* at ¶ 24.

{¶ 39} On consideration, we find that the trial court did not abuse its discretion when it denied appellant's motion for a mistrial. Appellant's second assignment of error is not well-taken.



{¶ 40} In his [third assignment of error], appellant asserts that the trial court erred when it did not dismiss his appointed attorney and provide him with new counsel on the first day of trial. In support, appellant argued that his relationship with appointed counsel was broken down to the point that it jeopardized his right to effective assistance of counsel.

{¶ 41} It is well-settled that the right to competent appointed counsel does not "require that a criminal defendant develop and share a 'meaningful relationship' with his attorney." *State v. Swogger*, 5th Dist. No. 2011-CA-007, 2011-Ohio-5607, ¶ 12, citing *Morris v. Slappy*, 461 U.S. 1, 13, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). In that regard, a showing of hostility, tension, or even personal conflict between an attorney and his client are not sufficient to justify a change in appointed counsel, unless there is a showing that such conflict interferes with the preparation or presentation of a competent defense. *Id.* at ¶ 14. A mere disagreement between attorney and client as to trial tactics is not sufficient to justify a change in appointed counsel. *Id.*, citing *State v. Glasure*, 132 Ohio St.3d 227, 239, 724 N.E.2d 1165 (1999).

{¶ 42} The record shows that, prior to trial, appellant asked the trial court to replace his appointed counsel because she “no longer has my best interest in mind.” Specifically, appellant stated that he was not ready to go to trial because counsel did not give him all of the discovery in the case, and she did not sufficiently confer with him regarding his defense. Counsel responded that she visited appellant in prison at least 12 times, and that she gave him the discovery that was in her possession prior to trial. At the conclusion of the exchange, the trial court denied appellant’s request for new appointed counsel.

{¶ 43} On consideration, we find that the record does not demonstrate a conflict between appellant and his appointed counsel that is sufficient to interfere with the preparation of a competent defense, or that would otherwise prejudice appellant and keep him from having a fair trial. Accordingly, the trial court did not abuse its discretion by denying appellant’s request for new counsel. Appellant’s third assignment of error is not well-taken.

 {¶ 44} In his fourth assignment of error, appellant argues that he was denied the effective assistance of trial counsel. In support, appellant argues that trial counsel made numerous errors during the trial, such as failure to object to testimony and to challenge inadmissible evidence, and failure to otherwise adequately protect his right to a fair trial. Specifically, appellant claims that counsel did not adequately pursue the motion to sever, did not maintain communication with appellant prior to trial, failed to consult with appellant prior to trial regarding the plea offer, did not object to the prosecutor’s

improper statements during voir dire, did not object to Moya's testimony, failed to renew the Crim.R. 29 motion at the conclusion of trial, and generally conducted an inadequate defense.

{¶ 45} In *State v. Roberts*, 6th Dist. No. L-11-1159, 2013-Ohio-1089, ¶ 23, this court stated:

[t]o prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-pronged test. First, appellant must show that the counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived error, the results of the proceedings would have been different. *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). See, also, *State v.*

Plassman, 6th Dist. No. F-07-036, 2008-Oho-3842. This burden of proof is high given Ohio's presumption that a properly licensed attorney is

✓ "competent." *State v. Newman*, 6th Dist. No. OT-07-051, 2008-Ohio-5139,

¶ 27.

{¶ 46} Based on our determinations as to appellant's first and third assignments of error, we find no evidence to support appellant's claim that counsel's performance was inadequate as to the motion to sever or communication with appellant before trial. As to

appellant's claim regarding counsel's failure to challenge the prosecutor during voir dire, appellant does not claim that counsel's failure to object was anything other than trial strategy. *See State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 206, citing *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir.2001). (In the context of a claim of ineffective assistance of counsel, "[c]ounsel's actions during *voir dire* are presumed to be matters of trial strategy.")

{¶ 47} As to appellant's claim that counsel failed to adequately consult with him regarding the plea offer, the record shows that the state offered to dismiss all but one charge against appellant in exchange for a guilty plea. When appellant's attorney indicated she had not adequately discussed the latest version of the state's offer with appellant, the trial court gave counsel and appellant time to consult. Thereafter, the court inquired of appellant as to whether he wanted to accept the plea. Part of that discussion was an explanation that, if convicted on all counts, appellant could be 101 years old when he was released from prison. After that discussion, appellant stated: "[I want to] go forward with trial. But I would like to address the court that I would like to go to trial on all counts for interest in justice." Under such circumstances, we cannot say that counsel's performance was prejudicial or ineffective in regard to the plea offer.

{¶ 48} As to counsel's failure to renew the Crim.R. 29 motion at the end of the trial, we note that:

[t]he standard of review for a Crim.R. 29(A) motion is generally the same as a challenge to the sufficiency of the evidence. *State v. Hollis*, 4th Dist.

No. 09CA9, 2010-Ohio-3945, 2010 WL 3294327, ¶ 19. See *State v. Hairston*, 4th Dist. No. 06CA3081, 2007-Ohio-3880, 2007 WL 2181535, at ¶ 16; *State v. Brooker*, 170 Ohio App.3d 570, 2007-Ohio-588, 868 N.E.2d 683, at ¶ 8. Appellate courts must determine whether the evidence adduced at trial, if believed, supports a finding of guilt beyond a reasonable doubt. See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). *State v. Grube*, 4th Dist. No. 12CA7, 2013-Ohio-692, ¶ 67.

{¶ 49} For the reasons set forth in our determination of appellant's fifth assignment of error, the failure to renew the Crim.R. 29 motion was not erroneous. Appellant's argument that counsel was ineffective on that basis is without merit.

{¶ 50} As to appellant's argument that counsel generally put on an inadequate defense, appellant has demonstrated nothing to rebut the presumption that trial counsel's performance was adequate, or that her failure to "jump through all the hoops," as defined by appellant, would have produced another result.

{¶ 51} For the foregoing reasons, appellant's fourth assignment of error is not well-taken.

 {¶ 52} In his fifth assignment of error, appellant asserts that the jury's verdict was against the manifest weight of the evidence and was not support by sufficient evidence.

In support, appellant argues that no eyewitness except Moya placed appellant at the scene of any of the four robberies, and no eyewitnesses testified that it was appellant that either

carried or shot a gun during any of the robberies. Appellant also argues that no evidence was presented to show that the robbers intended harm to their victims.

{¶ 53} The term “sufficiency” of the evidence presents a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry in such cases is “whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 54} “In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion.” *State v. Davis*, 6th Dist. No. WD-10-077, 2012-Ohio-1394, ¶ 17, citing *Thompkins, supra*, at 387. In making this determination, the court of appeals sits as a “thirteenth juror” and, after “reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins, supra*, at 386.

{¶ 55} After reviewing the trial court’s record, we find sufficient evidence was presented to demonstrate that deadly weapons were used in the Marathon, Circle K, KeyBank and Sunoco robberies. As to Moya being the only witness to identify appellant as one of the robbers, Ohio courts have repeatedly recognized that the jury is in the best

position to judge the credibility of witnesses because it “is best able to view witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *State v. Cook*, 9th Dist. No. 21185, 2003-Ohio-727, ¶ 30, quoting *Giurbino v. Giurbino*, 89 Ohio App.3d 646, 659, 626 N.E.2d 1017 (8th Dist.1993).

{¶ 56} On consideration, we find that the record contains sufficient evidence to support appellant’s convictions for complicity to commit aggravated robbery and complicity to commit felonious assault. In addition we find, after reviewing the entire record and weighing the evidence and all reasonable inferences, that the jury did not lose its way in reaching its verdicts. Appellant’s fifth assignment of error is not well-taken.

 {¶ 57} In his sixth assignment of error, appellant asserts that the cumulative effects of all the errors in the trial court deprived him of the right to a fair trial. The Supreme Court of Ohio has held that “a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial.” *State v. Hopkins*, 6th Dist. No. E-10-027, 2011-Ohio-5908, ¶ 60, citing *State v. DeMarco*, 31 Ohio St.3d 191, 196-97 (1987). Our review in of the record in this case shows that appellant has failed to establish any prejudice, either singularly or cumulatively.

Appellant’s sixth assignment of error is not well-taken.

 {¶ 58} In his seventh assignment of error, appellant asserts that his two aggravated robbery convictions that resulted from the Circle K robbery (Counts 2 and 3), and the two nine-year sentences that resulted, should have been merged into one sentence because

they arose from the same transaction and were therefore allied offenses of similar import. In support, appellant points out that the trial court merged the two firearm specifications for those counts. Appellant is mistaken, for the following reasons.

{¶ 59} R.C. 2941.25(A), Ohio's multiple-count statute, provides that, "[w]here 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." As set forth above, there were two victims of the Circle K robbery—the store clerk, Gloria Case, and her customer, Tammy Davis. Although appellant's offenses arose from a single course of conduct, i.e., the Circle K robbery, each offense involved a separate victim, Case and Davis. Therefore, they were not allied offenses of similar import, and the trial court did not err by imposing two nine-year prison terms. *See State v. Feller*, 1st Dist. Nos. C-110775, C-110776, 2012-Ohio-6016, ¶ 36. The merger of the two firearm specifications pursuant to R.C. 2929.14(B)(1)(b) has no effect on whether or not the underlying offenses are allied offenses of similar import. *See State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271, ¶ 36 ("Although the crimes may be part of the same transaction and therefore the firearms specifications merge, it does not mean that the base charges are allied offenses of similar import."); and *State v. Jones*, 6th Dist. No. L-07-1292, 2009-Ohio-6973, ¶ 9, citing *State v. Gregory*, 90 Ohio App.3d 124, 129, 628 N.E.2d 86 (1993). ("[W]here a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each offense.")

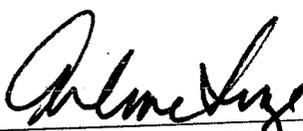
{¶ 60} For the foregoing reasons, appellant's seventh assignment of error is not well-taken. However, the state has brought to our attention the fact that the trial court erroneously sentenced appellant to serve a nine-year prison term for Count 6, complicity to commit felonious assault, a second degree felony when, pursuant to R.C. 2929.14(A)(2), the maximum sentence for a second degree felony is eight years.

{¶ 61} The judgment of the Lucas County Court of Common Pleas is hereby affirmed in part and reversed in part. Appellant's sentence as to Count 6 is hereby vacated, and the case is therefore remanded to the trial court for resentencing as to Count 6 only. All pending motions in this appeal are hereby rendered moot. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

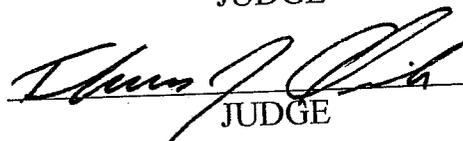
A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also 6th Dist.Loc.App.R. 4.*

Arlene Singer, P.J.



JUDGE

Thomas J. Osowik, J.



JUDGE

Stephen A. Yarbrough, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

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COMMON PLEAS COURT
BERNIE GUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1276

Appellee

Trial Court No. CR0201101378

v.

Jorge Rojas

DECISION AND JUDGMENT

Appellant

Decided: **MAR 01 2013**

This matter is before the court on a "Motion to Compel Production and Delivery of Entire Trial Discovery Record to Appellant pro se" filed on December 19, 2012, by appellant, Jorge Rojas. In his motion, appellant asks this court to provide him with copies of "affidavits, search warrants, criminal records of co-defendants, photographs to [sic] counts 4 and 11, bill of particulars, D.N.A. reports, privileged communication materials, and the criminal complaint" in criminal case no. CR11-1378. Attached to

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appellant's motion are copies of correspondence in which appellant asked his court-appointed defense attorney for copies of the same documents he now seeks to obtain directly from this court.

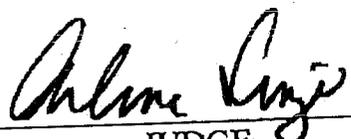
The Ohio Supreme Court has held that a defendant who is represented by appointed counsel is prohibited from filing documents pro se. *State v. Keenan*, 81 Ohio St.3d 133, 138, 689 N.E.2d 929 (1998). Accordingly, regardless of the purpose for which appellant seeks the documents in question, he may not ask for them directly from this court.

Appellant's motion is not well-taken and is denied. It is so ordered.

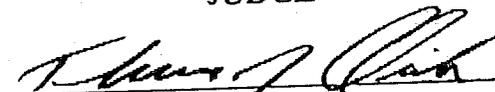
Arlene Singer, P.J.

Thomas J. Osowik, J.

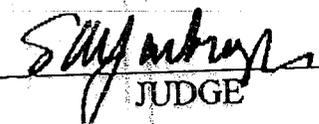
Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

Court of Appeals No. L-11-1276

Trial Court No. CR0201101378

v.

Jorge Rojas

Appellant

DECISION AND JUDGMENT

Decided: **NOV 07 2012**

Appellant, Jorge Rojas, has filed a pro se "Motion for Oral Argument with Information to the Court." Rojas is represented by counsel and cannot file documents pro se. *See State v. Keenan* 81 Ohio St.3d 133, 138, 689 N.E.2d 989, (1998), where the court states:

"A defendant has no right to a 'hybrid' form of representation wherein he is represented by counsel, but also acts simultaneously as his own counsel. *McKaskle*, 465

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U.S. at 183, 104 S. Ct. at 953, 79 L. Ed. 2d at 136; *State v. Thompson* (1987), 33 Ohio St. 3d 1, 6, 514 N.E.2d 407, 414.”

Accordingly, the motion for oral argument is denied.

Arlene Singer, P.J.

Arlene Singer, P.J.

JUDGE *galt*

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1276

Appellee

Trial Court No. CR0201101378

v.

Jorge Rojas

DECISION AND JUDGMENT

Appellant

Decided: **OCT 18 2012**

This matter is before the court on a "Motion for Leave to Intervene with Additional Errors" filed by appellant, Jorge Rojas, on September 14, 2012. In support of his motion, appellant states that numerous errors occurred during his trial which either were omitted or not adequately addressed in the appellate brief filed by his appointed counsel in this appeal. Consequently, appellant asks for leave to "intervene" and file his own supplemental appellate brief.

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OCT 18 2012

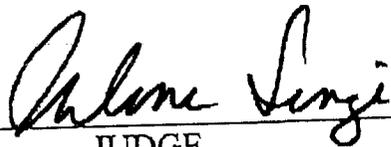
The Ohio Supreme Court has held that “[a] defendant has no right to a ‘hybrid’ form of representation wherein he is represented by counsel, but also acts simultaneously as his own counsel.” *State v. Keenan*, 81 Ohio St.3d 133, 138, 689 N.E.2d 929 (1998), citing *McKaskle v. Wiggins*, 465 U.S. 168, 183, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). See also *State v. Thompson*, 33 Ohio St.3d 1, 6, 514 N.E.2d 407, 414 (1987). (“Neither the United States Constitution, the Ohio Constitution nor case law mandates * * * hybrid representation.”) Ohio appellate courts, citing *McKaskle*, and *Thompson*, have held that an appellate court is not required to consider a request to allow an appellant who is represented by counsel to also raise issues on appeal *pro se*. *Toledo v. Dandridge*, 6th Dist. No. L-10-1333, 2011-Ohio-3712, ¶ 18, and *State v. Westley*, 8th Dist. No. 97650, 2012-Ohio-3571, ¶ 14. In addition, the Appellate Rules do not provide for such a request.

On consideration, this court finds that appellant’s request to file a supplemental appellate brief, *pro se*, in addition to the one filed by his appointed counsel, is not well-taken. Motion denied.

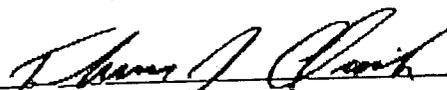
Arlene Singer, P.J.

Thomas J. Osowik, J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE