

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-0861

STATE OF OHIO,

PLAINTIFF-APPELLEE,

VS.

WARREN LOVE,

DEFENDANT-APPELLANT.

ON APPEAL FROM  
THE HOCKING  
COUNTY COURT OF  
APPEALS, FOURTH  
APPELLATE DISTRICT

COURT OF APPEALS  
CASE NO.13-AP-0016

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT WARREN LOVE

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ARGUMENT IN SUPPORT OF PROPOSITION OF LAW  
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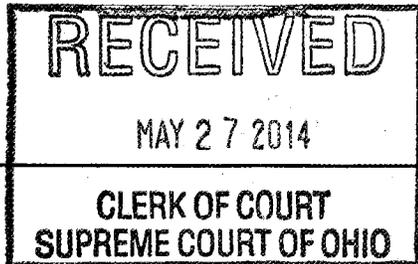
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ARGUMENT IN SUPPORT OF PROPOSITION OF LAW  
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ARGUMENT IN SUPPORT OF PROPOSITION OF LAW  
PROPOSITION OF LAW NO.2: THE TRIAL COURT COMMITTED HARMFUL ERROR IN THE SENTENCING  
OF THE DEFENANT-APPELLANT. [Tr.347-48]

**Issue Presented**

WHETHER THE STATE OF OHIO INTRODUCED CREDIBLE EVIDENCE SUFFICIENT TO SUSTAIN A CONVICTION FOR THE OFFENSE CHARGED IN THE COMPLAINT.

WHETHER THE TRIAL COURT COMMITTED HARMFUL ERROR IN THE SENTENCING OF THE DEFENDANT-APPELLANT.

Did the trial court properly determine that offense should not merge in connection with the instant case?

Did the sentencing of the defendant-appellant constitute harmful error?

May a trial court order consecutive sentences with respect to firearm specifications under circumstances found herein?



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### Statement of the Case

Mr. Warren Love was indicted on several, related felony counts: Count One: Aggravated Robbery with a firearm specification, Count Two: Felonious Assault with a firearm specification, Count Three: Tampering with Evidence, Count Four: Aggravated Trafficking in Drugs, Count Five: Having Weapons While Under a Disability, and Count Six: Receiving Stolen Property. The matter came on for a trial by jury before the Hocking County Common Pleas Court on June 12, 2013. After considering the arguments of counsel and the evidence presented, the jury returned Guilty verdicts on counts One through Five of the indictment and a Not Guilty verdict on Count Six. The matter then came on for sentencing on July 25, 2013. At that time, the trial court imposed an aggregate prison sentence of twenty-three years. The court imposed a ten year sentence as to Count One, plus a three year firearm specification, and a seven year sentence as to Count Two, plus a three year firearm specification. These sentences - including the specifications - were ordered to run consecutive to one another. The remaining terms of imprisonment from counts Three, Four and Five were ordered to run concurrent with the first count. No sentence was imposed on Count Six as Mr. Love was found Not Guilty of that offense.

Notice of Mr. Love's intention to appeal the conviction and sentence were then timely filed. The record in the case was transmitted to this Honorable Court on September 30, 2013. A request for the extension of time to file the merit brief herein was filed on behalf of the appellant on October 21, 2013. This appeal now follows.



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### Statement of the Facts

The instant case involves an incident that occurred January 18, 2013. All of the offenses arise from the one incident. On the date alleged, Sarah Williamson arranged to purchase narcotics from a friend. [Tr. At 148-50.] The transaction did not go as planned. According to Ms. Williamson, she, Thomas Baily and Michael Herrold went to meet Ms. Williamson's friend to complete the transaction. [Tr. At 160.] It was alleged that Mr. Love exited the vehicle transporting the drugs and attempted to rob the drug buyers. [Tr. At 160-161.] In the course of the attempted robbery, the vehicle began to drive away. [Tr. At 162.] Mr. Herrold jumped on the hood of the car in an effort to keep it from fleeing. [Tr. At 162.] Mr. Love, still outside the vehicle, chased the car as it was pulling away. [Tr. At 163.] As Mr. Love was fleeing, it was alleged he discharged a firearm. [Tr. At 164.] The shot hit Mr. Herrold and caused an injury to his leg. [Tr. At 164.] The vehicle then stopped and Mr. Love was able to get back into the car which then fled the scene. [Tr. At 164.]



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ARGUMENT IN SUPPORT OF PROPOSITION OF LAW  
PROPOSITION OF LAW NO 1: THE CONVICTION OF THE DEFENDANT-APPELLANT WAS BASED ON  
INSUFFICIENT EVIDENCE TO SUSTAIN THE SAME. [Tr. At223-26,321]

Mr. Love continues to maintain that the evidence presented herein is simply insufficient to sustain the convictions entered by the trial court. While the record clearly is sufficient to prove beyond a reasonable doubt many of the elements of the offenses charged, it falls short of showing that Mr. Love was guilty of the offenses charged specifically in the indictment of the case. In failing to reach this conclusion, the trial court lost its way herein and harmful error occurred.

As an initial matter, it is important to note that a motion for a directed verdict was made on behalf of the appellant at the close of the government's case in chief. [Tr. At 223.] This motion was denied by the trial court and the matter was submitted to the jury. [Tr. At 226.] In weighing an appeal wherein the appellant argues the challenged conviction is not supported by sufficient evidence, the standard of review for the appellate court is well settled:

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt **beyond a reasonable doubt**. The relevant inquiry 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* (1991), 61 Ohio St.3d 259, at syllabus paragraph two, citations omitted, emphasis added.

In the instant case, what is at issue is whether the prosecution introduced sufficient evidence to carry its burden with respect to the specific allegations contained in



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the indictment. More specifically, Mr. Love maintains that the record in the case is insufficient to prove beyond a reasonable doubt the offense of Robbery charged in Count One of the indictment.

What is at issue with respect to this charge is the nature of the alleged offense. As is evidenced by the jury verdict and the indictment herein, there is much ambiguity related to the allegations herein. The government maintains that this was a drug transaction and the indictment includes the offense of Drug Trafficking. It is claimed that this transaction went "bad" and resulted in the shooting, which forms the basis of the Felonious Assault charge against Mr. Love. The alleged robbery lies somewhere in the middle – the government claiming that a drug transaction occurred, a robbery was then committed and a felonious assault was then committed. It is in this ambiguity that Mr. Love maintains the evidence is insufficient to support a conviction.

Mr. Love stands convicted of a violation of R.C. §2911.01(A)(1) which provides: "No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following... Have 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..." What is at issue is whether the use of the firearm was in furtherance of a drug transaction or a "theft offense."

It is therefore necessary to analyze the evidence and testimony offered by the government herein. It is clear from the government's witnesses that what happened here was a drug trafficking offense. The guilty verdict of the jury as to Count Four reflects this conclusively. The government argued and the jury agreed that Mr. Love was selling



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drugs to Sarah Williamson and her acquaintances. In the course of that transaction, it is claimed that things went "wrong" and Mr. Herrold was shot. The drug trafficking offense described by Ms. Williamson during her testimony and the actions of Mr. Love were directly related to that transaction. There was, simply put, no theft offense herein.

According to the prosecution witnesses, Mr. Love was present to sell drugs to Ms. Williamson. Ms. Williamson gave Mr. Love's confederates money in exchange for drugs. Mr. Love then shot the firearm in his flight after the drug transaction. His actions were not related to a theft offense as the money in question was freely given by Ms. Williamson to Mr. Love's codefendant. Without a predicate theft offense, there can be no robbery. Where, as here, the evidence as it relates to any theft is lacking, it cannot be said that the robbery conviction is supported by sufficient evidence to sustain the same. As such, the trial court committed harmful error below in failing to find Mr. Love Not Guilty at the conclusion of the government's case and his conviction for that offense cannot withstand appellate scrutiny.



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ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW NO. 2: THE TRIAL COURT COMMITTED HARMFUL ERROR IN THE SENTENCING OF THE DEFENANT-APPELLANT. [Tr. 347-48]

Mr. Love's sentence consists of four components – the sentence imposed for the robbery conviction in count One of the indictment, the sentence imposed for the Felonious Assault conviction from Count Two of the indictment, the firearm specifications that attached to each of these counts and the consecutive nature of the sentences imposed. It is the position of Mr. Love that the trial court committed harmful error in ordering that the sentences run consecutive for an aggregate term of twenty-three years.

Initially, Mr. Love maintains that the two counts at issue should have merged for purposes of sentencing. While frequently litigated and argued before both the Ohio and United States supreme courts, merger, allied offenses of similar import and Double Jeopardy Clause jurisprudence lacks much in the way of clarity. “The apparent clarity of both the federal and state constitutional proscriptions against former jeopardy notwithstanding, the Double Jeopardy Clause has spawned a series of judicial interpretations that comprise a veritable labyrinth which would confound even the brightest jurisprudential scholars.” *State v. Moss* (1982), 69 Ohio St.2d 515, at 517. It is into this “labyrinth” that this Honorable Court must now descend.

Although the instant matter concerns itself only with merger rather than the successive prosecutions element of the Double Jeopardy Clause, this does little to ease the path. Much of the recent judicial consideration paid to double jeopardy issues has focused on the cumulative punishments aspect of the Clause. See, generally, *State v. Rance* (1999), 85 Ohio St.3d 632, 634; overruled by *State v. Johnson*, 942 N.E.2d 1061,



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128 Ohio St.3d 153, 2010-Ohio-6314. What this Court must now determine is (1) what manner of analysis should be applied to the charges at issue in this motion and (2) if the offenses in question must merge for purposes of sentencing.

It is now, at least until again visited by either the Ohio or United States Supreme Court, well settled that for determining if offenses are the "same" for purposes of analysis under the cumulative punishments portion of the Clause, the offenses at issue must be analyzed with attention paid to the facts and circumstances of the actual case. *State v. Johnson*, supra at syllabus. What is clear is that both charges involve a single incident. Mr. Love only had one encounter with the victims of any of the offenses charged and the indictment of both offenses identifies a single "act" by the defendant. In both prosecutions, the victim is the same, the date of offense is the same, the location is the same, the modus operandi is the same, the alleged criminal conduct is the same and Mr. Love's animus is the same. When viewed subjectively with an eye towards the specific allegations herein, it is apparent that the offenses are allied offenses of similar import and, therefore, merger is appropriate.

R.C. 2941.25 itself instructs us to look at the defendant's conduct when evaluating whether his offenses are allied. As Justice Lanzinger explained in her dissenting opinion in *Williams*: "In spite of the \* \* \* [statutory] language emphasizing the importance of the defendant's conduct, our current cases analyzing allied offenses instruct us to jump immediately to the abstract comparison of offenses charged without first considering the defendant's actual conduct as established by the evidence."

*State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. (Ohio 2010) at 42, citing *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, at 34 (Lanzinger, J., dissenting).



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In *State v. Sanders*, 2012-Ohio-3566, the court considered a nearly identical situation to that now before the bar. The *Sanders* court properly determined, under very similar facts to those presented herein, that Aggravated Robbery and Felonious Assault were allied offenses of similar import and, thus, must merge for purposes of sentencing. *Id.* at 18-26. It should be noted that this conclusion was reached based on “plain error” analysis as the issue was not properly preserved below. *Id.* at 17.

Simply put, Mr. Love has been found guilty of committing a single act involving the victims herein. The offenses at issue were committed with a single animus and within a single course of conduct. Given the nature of the charges at issue, it is the position of the defendant-appellant that counts One and Two of the indictment should have merged for purposes of sentencing. In failing to reach this conclusion, the trial court committed harmful error in the sentencing of Mr. Love as to running counts One and Two consecutive to one another.

Turning then to the gun specifications that attach to the relevant counts, Mr. Love continues to maintain that failing to run these specifications together constitutes further error. Both Count One and Count Two carry an identical firearm specification. It is conceded that the specification must run consecutive to the underlying counts, but Mr. Love avers that imposing two three year sentences, running consecutive to one another, constitutes harmful error.

The issue of running multiple firearm specifications consecutive to one another is governed first by statute, specifically R.C. §2929.14(D)(1)(b), which states that “[a] court shall not impose more than one prison term on an offender under division (D)(1)(a) of



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this section for felonies committed as part of the same transaction." The analysis of this issue differs from that related to allied offenses of similar import.

The Supreme Court of Ohio has defined the term "transaction, " as used in the firearm specification statutes, as a "series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills*, 69 Ohio St.3d 690, 691 (1994). "Transaction, " as defined by this court, "contemplates a series of criminal offenses which develop from a single criminal adventure, bearing a logical relationship to one another, and bound together by time, space, and purpose directed toward a single objective." *State v. Crawford*, 10th Dist. No. 85AP-324 (Feb. 6, 1986). We note that the "separate animus" test applicable to R.C. 2941.25 does not apply when determining whether firearm specifications merge. *State v. Jones*, 10th Dist. No. 98AP-639 (Mar. 18, 1999).

*State v. Worth*, 2012-Ohio-666, at paragraph 93, citations in the original.

In applying the *Wills* test to the facts and circumstances contained herein, it is clear that both specifications are from series of criminal offenses which develop from a single criminal adventure. There was but one set of circumstances that occurred herein. The two specifications bear a logical relationship to one another as they involve the same date and time of offense and, as importantly, the same firearm. They are bound together by time, space and purpose and involve a single objection – the flight from the underlying offense. Indeed, it is wholly alleged that the firing of the weapon was in the furtherance of the flight from the alleged robbery.

As such, even if it is determined that the underlying offenses do not merge, the firearm specification must be seen as coming from a single transaction and may not be ordered to run consecutive to one another. In failing to reach this conclusion, the trial court committed harmful error herein.



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Conclusion

For each of the reasons expressed above, Mr. Love respectfully requests that this Honorable Court reverse the ruling of the trial court, vacate his conviction and sentence, and remand the matter for further proceedings. The conflicting evidence offered by the prosecution below was so muddled as to require a reversal of the Aggravated Robbery conviction in Count One of the indictment. The trial court committed harmful error and prejudiced the defendant-appellant by failing to grant his Rule 29 motion, and the jury's conviction of Mr. Love cannot withstand appellate scrutiny. This error was compounded by the trial court's failure to properly determine that the offenses of Felonious Assault and Aggravated Robbery must merge under the facts and circumstances of the instant case. Finally, it was clear and plain error for the trial court to run the firearm specifications attached to counts One and Two of the indictment consecutive to one another as the two specifications clearly arise from a single "transaction." As a result, the trial court committed further error by sentencing the defendant-appellant to twenty-three years of imprisonment. It is for all of these reasons that Mr. Love maintains that his conviction cannot stand and his sentence must be vacated.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the office of Hocking County Prosecuting Attorney by U.S. mail, postage prepaid, on this 22nd day of may, 2014.

*Warren #*  
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WARREN LOVE #A687-683  
(PRO SE FOR APPELLANT)

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
HOCKING COUNTY

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HOCKING COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

WARREN L. LOVE,

Defendant-Appellant.

Case No. 13CA16

DECISION AND JUDGMENT  
ENTRY

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APPEARANCES:

Andrew T. Sanderson, Burkett & Sanderson, Inc., Newark, Ohio, for Appellant.

Laina Fetherolf, Hocking County Prosecutor, and William L. Archer, Jr., Assistant Hocking County Prosecutor, Logan, Ohio, for Appellee.

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McFarland, J.

{¶1} This is an appeal from a Hocking County Common Pleas Court judgment convicting Appellant after a jury found him guilty of five felony offenses, which included aggravated robbery and felonious assault, both with firearm specifications, tampering with evidence, aggravated trafficking in drugs, and having weapons while under a disability. Appellant was sentenced to an aggregate sentence of twenty-three years as a result of his convictions. On appeal, Appellants raises two assignments of error,

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contending that 1) his conviction was based upon insufficient evidence; and 2) the trial court committed harmful error in imposing sentence.

{¶2} Because we conclude that a rational trier of fact could have found all of the essential elements of aggravated robbery were proven beyond a reasonable doubt and, as such, that Appellant's conviction for aggravated robbery was supported by sufficient evidence, Appellant's first assignment of error is overruled. Further, in light of our conclusion that Appellant's aggravated robbery and felonious assault convictions involved two separate victims, we cannot conclude that the trial court erred in failing to merge these convictions for purposes of sentencing. Finally, because the trial court was required, under R.C. 2929.14(B)(1)(g) to impose consecutive sentences for both firearm specifications, we find no "harmful error" in the imposition of the sentences. As such, Appellant's second assignment of error is also overruled. Accordingly, the decision of the trial court is affirmed.

#### FACTS

{¶3} A multi-count indictment was brought against Appellant on February 22, 2013, charging Appellant with aggravated robbery with a firearm specification, a first degree felony in violation of R.C. 2911.01(A)(1) and 2941.145, felonious assault with a firearm specification,

a second degree felony in violation of R.C. 2903.11(A)(2) and 2941.145, tampering with evidence, a third degree felony in violation of R.C. 2921.12(A)(1), aggravated trafficking in drugs, a third degree felony in violation of R.C. 2925.03(A)(1), having weapons while under a disability, a third degree felony in violation of R.C. 2923.13(A)(2), and receiving stolen property, a fifth degree felony in violation of R.C. 2913.51(A). Appellant pled not guilty and the matter proceeded to a two-day trial, beginning on June 11, 2013.

{¶4} The State's theory at trial was that a drug transaction was arranged as a "subterfuge" to commit robbery. The State presented three witnesses that were present the night the incident occurred: Sarah Williamson, Thomas Bailey, and Michael Herrold. Williamson testified that she had been in contact with an old friend, Amanda Thompson, that had asked her if she could "get rid of any Perc 30s[,] or 30 mg. Percocet pills. She testified that her friend, Thomas Bailey, wanted some, so she essentially set up the transaction, the plan being for Thompson to bring the drugs to a local Speedway. Apparently, however, when it was all said and done, Thompson arrived in town with two other adults and a baby in her vehicle, and came to Williamson's house instead of Speedway.

{¶5} Williamson testified that Thomas Bailey and Michael Herrold were with her on the night of the incident. She testified that after she handed the money for the drugs to an occupant named Sharvonne, who was seated in the front seat of the vehicle, Appellant, who was seated in the back of the vehicle, jumped out with a gun, told Bailey and Herrold to get on the ground, and then went through Bailey's pockets. Williamson then detailed the events that led to a shooting, which formed the basis of the felonious assault charge, which is not at issue on appeal.

{¶6} Bailey and Herrold also testified, however, both denied any knowledge of a drug transaction. Their testimony will be detailed more fully below, however, both testified in accordance with Williamson, with respect to Appellant jumping out the vehicle with a gun, ordering them to the ground, and robbing Bailey. The defense theory at trial seemed to be that this was simply a drug deal that went wrong, and that no theft offense, and thus, no aggravated robbery occurred. However, Appellant did not testify at trial, nor present any witnesses in his defense. At the close of the State's evidence, Appellant moved for acquittal pursuant to Crim.R. 29(A), which was denied by the trial court, and the matter was submitted to the jury for determination.

{¶7} The jury convicted Appellant of aggravated robbery, felonious assault, aggravated trafficking in drugs, tampering with evidence, having a weapon while under a disability, and both firearm specifications. Appellant was acquitted on the charge of receiving stolen property. The trial court sentenced Appellant to a ten-year term of imprisonment on the aggravated robbery conviction and a seven-year term of imprisonment on the felonious assault conviction, to be served consecutively to one another. The trial court also sentenced Appellant to three-year terms of imprisonment on each firearm specification, to be served consecutively to one another and consecutively to the underlying charges, for an aggregate prison term of twenty-three years. The sentences for the remaining convictions were ordered to be served concurrently to these sentences.

{¶8} It is from the trial court's August 6, 2013, judgment entry of sentence that Appellant now brings his timely appeal, assigning the following errors for our review.

#### ASSIGNMENTS OF ERROR

- I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS BASED UPON INSUFFICIENT EVIDENCE TO SUSTAIN THE SAME.
- II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN THE SENTENCING OF THE DEFENDANT-APPELLANT."

#### ASSIGNMENT OF ERROR I

{¶9} In his first assignment of error, Appellant contends that the trial court erred in failing to direct a verdict in his favor at the conclusion of the State's case, and that his conviction for aggravated robbery was not supported by sufficient evidence.<sup>1</sup> More specifically, Appellant argues that evidence of a predicate theft offense was lacking, and without such, there can be no aggravated robbery. Appellant also suggests that the use of the firearm was in furtherance of a drug transaction, rather than a theft offense.

{¶10} "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386 (2006), ¶ 37. When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997) (stating that "sufficiency is a test of adequacy"); *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991). The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the

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<sup>1</sup> Upon the close of the State's case, Appellant made a motion for acquittal under Crim.R. 29(A), which was denied by the trial court.

offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, (1979); *Jenks* at 273. Furthermore, a reviewing court is not to assess “whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *Thompkins* at 390.

{¶11} Thus, when reviewing a sufficiency-of-the-evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency-of-the-evidence claim unless reasonable minds could not reach the conclusion that the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶12} On appeal, Appellant challenges his conviction for aggravated robbery, a first degree felony in violation of R.C. 2911.01(A)(1), as well as the firearm specification attached thereto. R.C. 2911.01 provides, in pertinent part, as follows:

“(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in

fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have 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[.]”

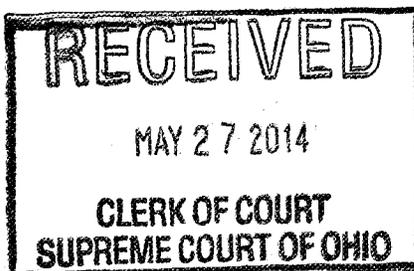
The firearm specification at issue was brought pursuant to R.C. 2941.145.

{¶13} Here, a review of the trial transcript indicates that three different witnesses testified on behalf of the State, claiming that Appellant emerged from the back seat of a vehicle with a gun and ordered both Thomas Bailey and Michael Herrold to the ground. Sarah Williamson testified that this occurred in the midst of a drug transaction, after she had handed cash for drugs to someone in the front seat of the car. She testified that after she handed over the money to an occupant in the front seat, Appellant, who was seated in the back, jumped out with a gun. Thomas Bailey testified that he randomly stopped by Williamson's house, denying that he was involved in a drug transaction, and that Appellant jumped out of the backseat of a vehicle, approached him with a gun, ordered him to the ground, searched his pockets and took his money. Michael Herrold testified that although he was ordered to the ground he did not get down, but instead

stood as Appellant went through Bailey's pockets. Subsequently, as Appellant fled and tried to catch up with the vehicle as it was driving off, and as Bailey and Herrold tried to chase Appellant, there was testimony that Appellant turned and shot the gun, hitting Herrold in the leg. Much like Bailey, Herrold also denied any knowledge of a drug transaction.

{¶14} Despite the fact the testimony differed with respect to whether a drug transaction was taking place, all three witnesses testified that Appellant emerged from the vehicle, with a gun, and robbed Bailey. Thus, the State presented evidence which, if believed, would indicate that an aggravated robbery occurred, and that each element of the crime, as set forth above, was met. We now turn to Appellant's argument regarding the use of the firearm, and whether it was used in furtherance of a theft offense.

Although there is some question as to whether the firearm subsequently recovered from the vehicle was the same gun Appellant used during the commission of the crime, and although there appeared to be some questions raised as to who actually shot Herrold based upon the expert testimony that there was no gun residue on Appellant's hands, three people testified that Appellant possessed and brandished a gun with a silver handle as he robbed Bailey.



{¶15} We, as a Court, are not called upon to determine the credibility of these witnesses, nor weigh the evidence that was presented. Rather, in considering a sufficiency of the evidence challenge, as set forth above, we must assess whether the State's evidence, if believed, would support a conviction. *Thompkins*, supra, at 390. Further, in making this assessment, we "must construe the evidence in a light most favorable to the prosecution." *Hill* at 205 and *Grant* at 477, supra. Because we conclude, based upon the evidence presented, that reasonable minds could conclude that all of the essential elements of the offense of aggravated robbery had been proven beyond a reasonable doubt, we will not overturn Appellant's conviction based upon a sufficiency of the evidence challenge. Accordingly, Appellant's first assignment of error is without merit and is, therefore, overruled.

#### ASSIGNMENT OF ERROR II

{¶16} In his second assignment of error, Appellant contends that the trial court committed harmful error in sentencing him. More specifically, Appellant raises three issues: 1) did the trial court properly determine that the offenses of aggravated robbery and felonious assault should not merge; 2) did the trial court's sentencing of Appellant constitute harmful error; and 3) may a trial court order consecutive sentences with respect to firearm

specifications under the circumstances found herein? The State responds by arguing that the trial court properly found that the sentences did not merge because the offenses had separate victims, and that the trial court properly imposed two consecutive three-year terms of imprisonment for the firearm specifications pursuant to and as required by R.C. 2929.14(B)(1)(g). For the following reasons, we agree with the State.

{¶17} Appellate courts apply a de novo standard of review in reviewing a trial court's application of the merger statute, R.C. 2941.25. *State v. Williams*, 134 Ohio St.3d 482, 488, 2012-Ohio-5699, 983 N.E.2d 1245, ¶¶ 25-28. “Appellate courts apply the law to the facts of individual cases to make a legal determination as to whether R.C. 2941.25 allows multiple convictions.” Id.

{¶18} R.C. 2941.25 “codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, which prohibit[ ] multiple punishments for the same offense.” *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 23. The statute states:

“(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the

indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.”

{¶19} In *State v. Nguyen*, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, ¶ 103, we set forth the analysis that applies when determining if offenses should merge under R.C. 2941.25:

“Through a series of opinions the Supreme Court of Ohio has advised and re-advised lower courts on the difficult task of applying Ohio's multiple-count statute to determine which criminal convictions require merger.’ [ *State v. Delawder*, 4th Dist. Scioto App. No. 10CA3344, 2012-Ohio-1923, ¶ 39]. In the plurality decision of *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Court expressly overruled its then current test for merger. Under the new test, the trial court must first determine ‘whether it is possible to

commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other.’ (Emphasis sic). *Johnson* at ¶ 48. If the offenses are so alike that the same conduct can subject the accused to potential culpability for both, they are ‘of similar import’ and the court must proceed to the second step. The court must then determine whether the offenses in fact were committed by the same conduct, i.e., committed as a single act with a single animus. *Id.* at ¶ 49. If so, merger is necessary. However, if the offenses resulted from separate acts or were performed with a separate animus, or if the commission of one offense will never result in the commission of the other, the offenses will not merge. *Id.* at ¶ 51.”

{¶20} Here, a review of the record reflects that although the aggravated robbery and felonious assault charges stemmed from the same course of conduct, each charge involved a different victim. Thomas Bailey was the victim of aggravated robbery while Michael Herrold was the victim of felonious assault. Ohio courts have routinely recognized that separate convictions and sentences are permitted when the same course of conduct affects multiple victims. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-

5304, 776 N.E.2d 26, ¶ 48 (finding the court could impose multiple punishments for aggravated arson as defendant “caused six offenses of dissimilar import because six different people were placed at risk” when defendant set one structure on fire); *State v. Jones*, 18 Ohio St.3d 116, 480 N.E.2d 408 (1985) (determining that defendant could be sentenced for two convictions of aggravated vehicular homicide, even though the convictions arose out of the same conduct, when the conduct resulted in the death of two individuals); *State v. Crisp*, 4th Dist. Scioto No. 10CA3404, 2012-Ohio-1730, ¶ 36 (finding that “[i]n situations where a defendant has knowledge that more than one victim could be harmed, courts have concluded there is a separate animus for each victim at risk”); *State v. Tapscott*, 7th Dist. Mahoning No. 11 MA 26, 2012-Ohio-4213, ¶ 41; quoting *Jones* at 118 (“multiple sentences for a single act committed against multiple victims is permissible where the offense is defined in terms of conduct toward ‘another as such offenses are of dissimilar import; the import being each person affected.’ ”); *State v. Angus*, 10th Dist. No. 05AP-1054, 2006-Ohio-4455, ¶ 34 (“Where a defendant's conduct injures multiple victims, the defendant may be convicted and sentenced for each offense involving a separate victim.”).

which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.”

(Emphasis added)

{¶25} In *State v. Isreal*, 12th Dist. Warren No. CA2011-11-115, 2012-Ohio-4876, ¶ 73, the court recognized that R.C. 2929.14(B)(1)(g) creates an exception to the general rule prohibiting multiple punishments for firearm specifications arising out of a single transaction. The *Isreal* court explained as follows:

“[R.C. 2929.14(B)(1)(g) ] carve[s] out an exception to the general rule that a trial court may not impose multiple firearm specifications for crimes committed within a single transaction. The mandatory language of the statute (“the court shall impose”) also indicates the General Assembly's intention that the defendant serve multiple sentences for firearm specifications associated with the enumerated crimes, such as murder or felonious assault. Had the Legislature intended a per se rule that sentences for firearm specifications must be served concurrent with one another, it could have stated as much. Or, the Legislature could have chosen not to codify R.C.

2929.14(B)(1)(g), which serves as an exception to the rule that multiple firearm specifications must be merged for purposes of sentencing when the predicate offenses were committed as a single criminal transaction.” *Id.*

{¶26} Appellant was convicted of two felonies that are specified in R.C. 2929.14(B)(1)(g): aggravated robbery and felonious assault. Additionally, Appellant was convicted of two firearm specifications as described in R.C. 2929.14(B)(1)(a) in connection with these two felonies. Thus, according to R.C. 2929.14(B)(1)(g), the court was required to impose on Appellant mandatory prison terms as described in 2929.14(B)(1)(a) for the two most serious specifications of which Appellant was convicted, even if, as Appellant argues, the crimes resulted from a single transaction. *Israel*, at ¶ 71; accord *Ayers* at ¶ 24; *Sheffey* at 28; *State v. Vanderhorst*, 8th Dist. Cuyahoga No. 97242, 2013-Ohio-1785, ¶¶ 10-11. Consequently, the trial court did not err by ordering Appellant to serve the firearm specification prison terms consecutively to one another. Likewise, we reject the argument that the trial court erred by requiring Appellant to serve the firearm specification prison terms consecutively to the aggravated robbery and felonious assault prison terms. R.C. 2929.14(C)(1)(a) plainly requires an offender to serve a mandatory prison term imposed for a firearm

specification “consecutively to any other mandatory prison term imposed [for a firearm specification] \* \* \* [and] consecutively and prior to any prison term imposed for the underlying felony.”

{¶27} In light of the foregoing, we cannot conclude that the trial court committed harmful error in sentencing Appellant. As such, Appellant’s second assignment of error is without merit and is, therefore, overruled. Having found no merit to either assignment of error raised by Appellant, we affirm the decision of the trial court.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

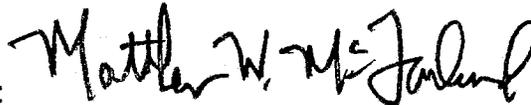
IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J. & Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY:



Matthew W. McFarland, Judge

**NOTICE TO COUNSEL**

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.