[Cite as *State v. Green*, 2012-Ohio-2355.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-037**
- vs -	:	
DARRYL P. GREEN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000579.

Judgment: Affirmed in part, reversed in part, and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Matthew C. Bangerter, 38109 Euclid Avenue, Willoughby, OH 44094 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Darryl P. Green, appeals his convictions for two counts of Burglary, Grand Theft, Receiving Stolen Property, Possessing Criminal Tools, and Petty Theft, following a jury trial in the Lake County Court of Common Pleas. The charges arise from the burglary of homes in Eastlake and Madison, Ohio. Green was sentenced to an aggregate prison term of four years. The issues before this court are: whether Green's convictions for Burglary, Grand Theft, and Receiving Stolen Property,

based on the theft and subsequent sale of a gun, constituted allied offenses of similar import; whether Green was entitled to a continuance to prepare for trial after asserting his right to represent himself pro se; whether Green was denied effective assistance of counsel on account of counsel's inadequate trial preparation; and whether his convictions are sustained by sufficient evidence and/or the weight of the evidence. For the following reasons, we affirm in part and reverse in part the Judgment of the court below, and remand the matter for merger and resentencing.

{¶2} On October 29, 2010, Green was indicted by the Lake County Grand Jury for Burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2) (Count One); Grand Theft, a felony of the third degree in violation of R.C. 2913.02(A)(1) (Count Two); Receiving Stolen Property, a felony of the fourth degree in violation of R.C. 2913.51(A) (Count Three); Burglary, a felony of the second degree in violation of R.C. 2911.12(A)(2) (Count Four); Possessing Criminal Tools, a felony of the fifth degree in violation of R.C. 2923.24 (Count Five); and Petty Theft, a misdemeanor of the first degree in violation of R.C. 2913.02(A)(1) (Count Six). The first three Counts arose from the burglary of a Benelli Nova shotgun and Bushmaster rifle from the home of Brandon Franklin, located at 1762 Heather Road, Madison, Ohio, and carried firearm specifications pursuant to R.C. 2941.141. The last three Counts arose from the burglary of miscellaneous coins from the home of Angelo and Donna Vaccaro, located at 34102 Waldmer Drive, Eastlake, Ohio.

{¶3} On November 4, 2010, Green was arraigned and entered a plea of not guilty.

{¶4} On November 8, 2010, counsel was appointed to represent Green.

{¶5} On November 12, 2010, Green, through counsel, filed a Motion to Continue the trial scheduled for November 16, 2010.

{¶6} On November 15, 2010, the trial court rescheduled the trial to December 14, 2010.

{¶7} On November 26, 2010, Green, acting pro se, filed motions for Change of Venue, Reduction of the Charges, and Dismissal of Criminal Tools Charge.

{¶8} On December 2, 2010, Green, acting pro se, filed a Motion [for] Transcript of Audio Recordings, in which he refers to appointed counsel as co-counsel.

{¶9} On December 7, 2010, Green, acting pro se, filed the following motions: Motion to Compel Access to Law Library and Resources; Motion to Fire Counsel; and Motion [to] Appoint New Co-Counsel. The basis for Green's Motion to Fire Counsel was appointed counsel's failure to act in a timely manner with respect to trial preparation and failure to communicate with him regarding the case.

{¶10} Green also filed a Motion, seeking to continue the December 14, 2010 trial date: "the extra time is needed in light of Mr. Green's dismissal of counselor."

{¶11} On December 13, 2010, Green, acting pro se, filed a Motion for Bifurcation. Also on this date, Green, through counsel, filed a Motion in Limine with respect to audio recordings held by the State.

{¶12} On December 13, 2010, the trial court rescheduled the trial to January 19, 2011.

{¶13} On December 29, 2010, Green, acting pro se, filed a Motion: Urgent Need of Transcripts of Audio Recordings.

{¶14} On January 6, 2011, the State filed notice with the trial court that it had received the transcripts of the audio recordings on January 5, 2011, and had delivered the same to defense counsel on January 6, 2011.

{¶15} On January 12, 2011, the trial court entered a Judgment Entry, ruling on various motions before it. The court denied Green's Motion to Fire Counsel "as moot because defendant withdrew his request at the hearing on December 13, 2010."

{¶16} On January 19, 2011, the first day of trial, Green waived his right to be represented by counsel and elected to proceed pro se. The trial court ordered Green's attorney to serve as standby counsel.

{¶17} Green then moved to continue the trial, on the grounds that he had only received the transcripts of the audio recordings from appointed counsel on January 18, 2011, and did not have an opportunity to read them. The court ascertained from defense counsel that Green had previously had an opportunity to listen to the recordings, and from the State that the transcript constituted about an hour and a half of reading material. The court then denied Green's motion to continue trial:

> **{¶18}** Again, you're going to be in trial for the next couple of days, but I would hope in the evenings or during breaks you'll have an opportunity to go through that. If there's something in particular you need a little bit more time we can break a little bit earlier on a given day so you can spend a little more time going through them. It sounds to me like you've had the opportunity to go through them with counsel. You've had the audio tapes available to you for more than a month. And if they can be read through in an hour and a

half's time, I just don't see that that's a legitimate reason at this point to continue trial.

{¶19} Trial on the charges against Green was held between January 19 and January 21, 2011. The following witnesses gave testimony at trial and on behalf of the State:

{¶20} Phyllis Nelisse testified that she lives on Waldmer Drive, in Eastlake, and is a neighbor of Angelo and Donna Vaccaro. On September 5, 2010, at about 12:45 p.m., she noticed a vehicle ("what I call a station wagon") backed into the Vaccaro's driveway "with a girl sitting in it." She also noticed a man "by the back window by the back of their house * * * prying the screen away." The man "walked back over by the car and got a blanket or a throw from the car and took it over by the window, and * * * remove[d] the screen from the window and place[d] it on the ground and proceeded to climb into the window."

{¶21} Nelisse knew that the Vaccaros were not home at the time and called the police.

{¶22} Patrolman Marc Christian of the Eastlake Police Department testified that, on September 5, 2010, he was dispatched with an Officer Lewis to 34102 Waldmer Drive to investigate a break-in. Patrolman Christian approached the woman sitting in the car, identified as Jessica Vaccaro. She told him that her uncle lives at the residence but that he was at the air show in Cleveland. She said she had left her Chase debit card inside the house. At the back of the house, Patrolman Christian found a blanket, a hammer, and the screen off the window.

{¶23} Meanwhile, Officer Lewis had handcuffed Green as he exited from a different part of the house. Patrolman Christian described Green as drunk, with alcohol on his breath, glassy eyes and slurred speech. Green claimed he was doing construction work for his uncle who lives there. When asked why he entered through the back window, Green replied, "ask my uncle." Patrolman Christian noted that Green appeared surprised at his arrest and "didn't understand why we arrested him."

{¶24} While Green was being booked at the jail, six coins were found in his front pocket. "They weren't rare coins but they were coins that normally a person wouldn't carry, a silver dollar, a half dollar, * * * a copper coin, two quarters, and a Canadian two dollar coin."

{¶25} Angelo Vaccaro testified that he lives at 34102 Waldmer Drive, and that Jessica Vaccaro is his niece (brother's daughter) and that Green is his sister's stepson. He testified that he had agreed to pay Green $150 to fix his garage roof and door. Initially, his wife, Donna Vaccaro, had offered Green $200 but they had agreed on $150. He paid Green $100 in advance. On September 4, 2010, he paid the balance of the money owed ($50) to Jessica Vaccaro, who asked for the extra $50 offered by Donna Vaccaro. He refused to pay the extra. At this time, he told Green and Jessica that he was going to the air show the next day and that he would be taking his dog.

{¶26} Angelo Vaccaro testified that Green did not have permission to be in his house. He testified that the coins found on Green came from a cup kept in a drawer in the bedroom. He testified that several drawers in the bedroom were opened, and that a knife kept in one of the drawers was found on the stairs.

{¶27} Donna Vaccaro testified that Green agreed to accept $150 for the work performed, and that he performed some additional work without asking to be paid for it.

{¶28} Detective Donald Seaman of the Lake County Sheriff's Department testified that he manages the recordings of inmate telephone calls at the Lake County Jail. Recordings of several conversations between Green and his father were played for the jury, in which Green complains that "Angelo robbed me, you know."

{¶29} Jessica Vaccaro testified that she had entered into a plea agreement in exchange for her testimony. According to the agreement, she would plead guilty to Complicity to Burglary and Attempted Burglary and the State would recommend that she be sentenced to probation.

{¶30} Jessica Vaccaro testified that, on St. Patrick's Day 2010, she was groped by a friend of Green's, Brandon Franklin. When she told Green about this several months later, Green became irate. She testified that Green was also upset with Franklin because he had used Franklin as a reference on a job application, was not hired, and suspected Franklin had not given a favorable recommendation.

{¶31} Jessica Vaccaro testified that on August 26, 2010, she drove Green out to Franklin's house in Madison, Ohio, to discuss the groping incident and job reference. When they arrived at Franklin's house, he was not home. Shortly after leaving, Green told her that he "wanted [her] to turn back around, he said along the lines of I want to take his gun." They returned to Franklin's home and she backed the vehicle into the driveway. Green "got out of the car and went around to the back of the house, was gone for maybe five minutes, came back carrying a case and stuck it in the back seat of my car, he threw a sheet over it." She described the case as "very long" and "dark."

Green told her that the back door was unlocked. Thereupon, they drove to Green's brother's (David's) home on the west side of Cleveland. There, Green busted the case open and arranged to sell two guns to his brother for $700. She described one gun as "medium size * * * bigger than a handgun," and of a dark green color. The other gun was longer and the same color as the first, "dark gray."

{¶32} Jessica Vaccaro testified that, on September 4, 2010, she and Green went to the Vaccaros' to collect money owed for work Green performed. They expected to receive $100 as Donna Vaccaro told Green she would pay him $200 for all the work performed. After Angelo only paid $50, Green "brought up that he wanted to rob them to pay them back." The next day, September 5, 2010, she drove Green back to the Vaccaros', specifically so that Green could take a gun Angelo owned.

{¶33} Jessica Vaccaro testified that, on September 5, 2010, she drove Green to the Vaccaros', so that Green could steal her uncle's gun, which he kept "upstairs somewhere," and take it to his brother (David) in Cleveland. She admitted telling the police that she had lost her debit card and that the hammer Green used to pry the screen off came from a tool box in her car.

{¶34} Jessica Vaccaro testified that, on September 29, 2010, Franklin called her demanding the return of his guns. She denied having the guns. She testified that the only person she told about the theft of Franklin's guns was Green's other brother (Sam). Eventually, she admitted to law enforcement that she and Green had stolen guns from a home in Madison. At the request of Detective Timothy Doyle, she recorded two conversations she had with Green at the Lake County Jail, which were played for the

jury. She also contacted Green's brother (David) to try to recover the guns, but was not successful.

{¶35} Jessica Vaccaro testified, on cross-examination, that her "story" changed several times. In her initial statement, she claimed that she and Green received $500 for the guns, rather than $700. She admitted that she variously described the color of the guns as gray, green, black, or silver. She admitted she suffers from Bipolar disorder and anxiety and that, in October 2010, she was hospitalized for having suicidal thoughts.

{¶36} Brandon Franklin testified that he lives at 1762 Heather Road, Madison, and has known Green since his youth. He testified that on August 26, 2010, he received several phone calls from Green regarding the groping incident. On that date, he was running errands near his home, and his back door may have been unlocked. While running these errands, he twice passed Green and Jessica Vaccaro driving on streets near his home.

{¶37} Franklin testified that, on September 29, 2010, he realized that his Bushmaster AR15 and Benelli Nova shotgun were missing from his home. He kept these in a locked case underneath his bed. He described the guns as "charcoal" and "dark gray" in color. He testified that Green knew where the guns were located. That day, he contacted law enforcement to report the theft and Jessica Vaccaro to question her about the theft.

{¶38} Franklin testified that, on October 2, 2010, he received a call from Green's brother (Sam), who offered to provide him information about the missing guns for $80. He reported this phone call to law enforcement.

{¶39} Detective Timothy Doyle, of the Madison Township Police Department, testified that, as part of his investigation of these crimes, he spoke with both of Green's brothers. Sam stated that he had learned from Jessica Vaccaro that she and Green were involved in the theft of Franklin's guns. David admitted that he was a convicted felon and, therefore, would have nothing to do with Franklin's stolen guns.

{¶40} At the close of the State's case, Green moved the trial court for acquittal, which motion the court denied.

{¶41} On January 25, 2011, the jury found Green guilty of all charges, except for the firearm specification to Count One (Burglary).

{¶42} On February 22, 2011, the sentencing hearing was held. At the conclusion of the hearing, the trial court imposed a two-year prison term for Count One (Burglary); a one-year prison term for Count Two (Grand Theft); a six-month prison term for Count Three (Receiving Stolen Property); a two-year prison term for Count Four (Burglary); a six-month prison term for Count Five (Possessing Criminal Tools); and a ninety-day prison term for Count Six (Petty Theft). All sentences were ordered to be served concurrently with each other, except for the one-year prison sentence for Count Two (Grand Theft), which was required, pursuant to former R.C. 2929.14(E)(3), to be served consecutive to the other sentences, for an aggregate prison term of three years. Additionally, the court imposed a mandatory, consecutive one-year prison term for the firearm specification, pursuant to former R.C. 2929.14(D)(1) (now R.C. 2929.14(C)(1)), for an aggregate prison term of four years. The court ordered Green to pay restitution to the Vaccaros in the amount of $50 and to Franklin in the amount of $1,326. The

court advised Green that he would be subject to three years of post-release control following his release from prison.

{¶43} On February 23, 2011, the trial court issued its written Judgment Entry of Sentence.

{¶44} On April 1, 2011, Green, through counsel, filed his Notice of Appeal and Motion for Leave to Appeal.

{¶45} On August 30, 2011, this court granted Green leave to file a delayed appeal.

{¶46} On appeal, Green raises the following assignments of error.

{¶47} "[1.] The trial court erred to the prejudice of the defendant-appellant by failing to merge allied offenses of similar import."

{¶48} "[2.] The trial court erred when it delayed defendant-appellant's request to terminate counsel and failed to grant appellant a reasonable continuance to prepare his case for trial thereby violating his Fourteenth Amendment right to due process."

{¶49} "[3.] Defendant-appellant was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution."

{¶50} "[4.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶51} "[5.] The trial court erred to the prejudice of the defendant-appellant in denying his motion for acquittal made pursuant to Crim.R. 29(A)."

{¶52} In his first assignment of error, Green maintains that the trial court erred by failing to merge allied offenses of similar import. Specifically, Green asserts that the first three counts of the Indictment, charged in connection with the burglary of Franklin's

home, should have been merged; and the last three counts, charged in connection with the burglary of the Vaccaros' home, should have been merged.

{¶53} Ohio's multiple counts statute or allied offenses of similar import statute provides:

> **{¶54}** (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.
>
> **{¶55}** (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.

{¶56} R.C. 2941.25.

{¶57} The trial court is not required to merge the offenses until after the jury has returned its verdicts. "Allied offenses of similar import do not merge until sentencing, since a conviction consists of verdict and sentence." *State v. McGuire*, 80 Ohio St.3d 390, 399, 686 N.E.2d 1112 (1997); *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, ¶ 47 ("[u]nder R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct").

{¶58} The Ohio Supreme Court has described the application of R.C. 2941.25 as follows:

{¶59} In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is 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. *Blankenship,* 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

{¶60} If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." *Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

{¶61} If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

{¶62} Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate

animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge.

{¶63} *Johnson* at ¶ 48-51.

{¶64} The State concedes that the charges associated with the burglary of the Vaccaros' home (Counts Four, Five, and Six) should have been merged at sentencing.

{¶65} The State maintains, however, that the convictions for Burglary, Grand Theft, and Receiving Stolen Property should not merge. The State argues that the trial court could not have merged Green's conviction for Grand Theft, because the "express language" of former "R.C. 2929.14(E)(3) *mandates* that said prison term be served consecutively to any other prison term." The State argues that the conviction for Receiving Stolen Property should not merge, because that offense was committed with a separate animus by Green disposing of the property by selling it to his brother for $700.

{¶66} We reject the State's argument with respect to the convictions for Burglary and Grand Theft. The Indictment for Burglary charged that Green "did * * * trespass in an occupied structure * * * with purpose to commit in the habitation a criminal offense, to-wit: Grand Theft." Without question, the Burglary and the Grand Theft committed in Franklin's home constituted the same conduct and/or a single act. *State v. James*, 5th Dist. No. 11 CAA 05 045, 2012-Ohio-966, ¶ 39 (cases cited therein).

{¶67} The State's claim that former R.C. 2929.14(E)(3) mandates a separate prison sentence for Grand Theft is incorrect. Former R.C. 2929.14(E)(3) (now R.C. 2929.13(C)(3)) provided that, "[i]f a prison term is imposed for * * * a violation of division (A) of section 2913.02 [Grand Theft] of the Revised Code in which the stolen property is

a firearm or dangerous ordnance * * * the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender." The imposition of a mandatory consecutive sentence for Grand Theft is conditional upon the offender's conviction for Grand Theft. As noted above, the merger of allied offenses occurs at the time of sentencing, i.e., prior to conviction "since a conviction consists of verdict and sentence." *McGuire*, 80 Ohio St.3d at 399, 686 N.E.2d 1112. In the present case, the trial court should have merged the verdicts for Burglary and Grand Theft prior to sentencing.

{¶68} We agree with the State that Green's conviction of Receiving Stolen Property stands independent of the conviction for Burglary/Grand Theft. The receiving and retention of Franklin's guns associated with the Burglary/Grand Theft was a distinct act, occurring in a different time and a different place, from the disposing of the guns by sale to Green's brother. Likewise, Green's animus or intention in depriving Franklin of the guns (revenge) is distinguishable, or at least incidental, to his intention in selling the guns (profit). Moreover, the independence of the charge of Receiving Stolen Property is reflected in the Indictment, which charged Green with disposing of Franklin's property in an act "originating in Lake County * * * and ending in Cuyahoga County." *See State v. Bowman*, 10th Dist. Nos. 10AP-403 and 10AP-553, 2010-Ohio-6351, ¶ 16 (conviction for multiple counts of Receiving Stolen Property is proper where "the defendant did not retain and dispose of the stolen property in the same transaction").

{¶69} Green's first assignment of error has merit to the extent indicated above.

{¶70} In the second assignment of error, Green argues the trial court erred by denying his request for a continuance to allow him to prepare his defense for trial.

{¶71} The decision to grant or deny a continuance is within the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), syllabus. An appellate court will not reverse a trial court's denial of a continuance absent a finding that the trial court abused its discretion. *Id.* at 67. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.*, quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L.Ed.2d 921, 84 S.Ct. 841 (1964).

{¶72} In the present case, we find no abuse of discretion. This was Green's third request to continue the date of trial. Green made his request the morning that the trial was scheduled to begin. Green sought a continuance "primarily" to review the transcripts of certain audio recordings that he had just received on the previous day. However, Green had previously had the opportunity to listen to the actual recordings, the length of the transcripts was relatively short (a few hours of reading), and the trial court offered to accommodate Green if he needed more time to review them. Even accepting that Green's request was legitimate and would not have caused an excessive delay, these factors alone do not create a situation in which the court is compelled to grant the request. *See State v. Henderson*, 11th Dist. No. 2010-T-0095, 2012-Ohio-740, ¶ 61 (it was within the court's discretion to deny a continuance where the "sole basis for the continuance request was so that appellant could review the discovery materials, that he acknowledged he received at the very least a few days before his trial").

{¶73} The case of *State v. Brown*, 10th Dist. No. 01AP-587, 2002-Ohio-2802, relied upon by Green, is distinguishable. In *Brown*, the court of appeals reversed the denial of a continuance, made on the day of trial, to a defendant who wished to proceed pro se and needed additional time to prepare a defense. *Id.* at ¶ 16-19. In contrast to Green, the defendant in *Brown* was facing a capital murder charge, "the most serious punishment Ohio law provides." *Id.* at ¶ 22. In *Brown*, the "[d]efendant consistently and repeatedly complained to the trial court that counsel was not diligently pursuing their investigation or the preparation of his defense," and wished to proceed pro se. *Id.* It was the trial court that "unreasonably" delayed in ruling on the defendant's request until the day of trial. *Id.* at ¶ 29. In the present case, Green consistently believed that he was acting as his own counsel and that appointed counsel was merely serving as "co-counsel." Green sought "to fire" appointed counsel on December 7, 2010, but withdrew that request on December 13, 2010. While Green expressed dissatisfaction with appointed counsel, his relationship with counsel was not characterized by the high level of mistrust and inability to work together experienced by the defendant in *Brown* with his counsel. *Id.* at ¶ 23. Finally, the defendant in *Brown* demonstrated a need to obtain medical records and test blood samples as part of his trial preparation, whereas Green primarily sought time to review transcripts of recordings with which he was already familiar. *Id.* at ¶ 24-25.

{¶74} The second assignment of error is without merit.

{¶75} In the third assignment of error, Green claims he received ineffective assistance of counsel.

{¶76} To reverse a conviction for ineffective assistance of counsel, the defendant must prove "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding." *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.E.2d 674 (1984).

{¶77} Green argues that, although he represented himself at trial, his ability to do so effectively was compromised by appointed counsel's deficient pretrial preparation. Green cites to his lack of access to a law library, the delay in obtaining transcripts of the audio recordings, and the trial court's denial of a personal recognizance bond which would have facilitated his ability to prepare for trial. We note that none of these complaints constitute a deficiency on the part of appointed counsel. Rather, they demonstrate the difficulties Green faced while trying to serve as his own counsel while having appointed counsel.

{¶78} Green fails to demonstrate prejudice as a result of appointed counsel's alleged deficiencies. Since appointed counsel did not represent Green at trial, it is impossible to evaluate the extent or the quality of his pretrial preparations. After successfully moving the trial court to allow him to proceed pro se, Green stated that the "main reason" he needed additional time to prepare was to review the transcripts. Green did not identify any witnesses that needed to be subpoenaed or interviewed or any evidence that he felt was necessary to present his defense. Most significantly, Green did not identify any particular failure on the part of appointed counsel, apart from

the delay in delivering the transcripts, which prejudiced him in his ability to present a defense.

{¶79} The third assignment of error is without merit.

{¶80} In his fourth and fifth assignments of error, Green argues his convictions are against the manifest weight of the evidence and/or supported by insufficient evidence.

{¶81} The manifest weight of the evidence and the sufficiency of the evidence are distinct legal concepts. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 44. With respect to the sufficiency of the evidence, "[t]he 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶82} Whereas "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.* An appellate court considering whether a verdict is against the manifest weight of the evidence must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and 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* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶83} Green argues, generally, that his convictions are against the manifest weight of the evidence, and unsupported by sufficient evidence, based on the "very inconsistent" trial testimony of Jessica Vaccaro. Green particularly emphasizes her varied description of the color and the size of the guns taken from Franklin's home, her inconsistency with respect to the amount of money received from the sale of the guns, and her mental instability, which was aggravated by her use of alcohol. While the points Green raises reflect negatively on Jessica Vaccaro's credibility as a witness, they do not render her testimony wholly unbelievable. In many important respects regarding the theft of the guns, Jessica Vaccaro's testimony was corroborated by the testimony from Franklin. Franklin testified that he observed Jessica Vaccaro and Green in his neighborhood on the date she claimed the guns were stolen and that Green was one of the few people who knew where he kept the guns.

{¶84} Green also argues that the State's case with respect to the burglary of the Vaccaros' home is "highly unlikely." If he was so upset about the monetary disagreement with Angelo Vaccaro, as argued by the State, Green asks why did he only take "miscellaneous coins," why was he so careful in removing the screen, and why was he surprised at being arrested. Contrary to Green's position, however, there was evidence in the record that he was looking for more than just coins, and that the burglary was interrupted by the arrival of the police. Green described himself as being "robbed" and "ripped off" by Angelo Vaccaro; Jessica Vaccaro testified that Green had

talked about stealing a gun from Angelo Vaccaro; the Vaccaros' described their bedroom as being in disarray caused by Green searching through their drawers and closet; and Green was still in the residence when the police arrived. Considering all the evidence in the record, credulity is not stretched "to the breaking point" by Green's convictions.

{¶85} The fourth and fifth assignments of error are without merit.

{¶86} For the foregoing reasons, the Judgment of the Lake County Court of Common Pleas, sentencing Green for the First (Burglary), Second (Grand Theft), Fourth (Burglary), Fifth (Possessing Criminal Tools), and Sixth (Petty Theft) Counts of the Indictment is reversed and this matter is remanded for further proceedings consistent with this opinion. In all other respects, the lower court's Judgment is affirmed. Costs to be taxed against the parties equally.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.