[Cite as *State v. May*, 2011-Ohio-5233.]

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. 2010-L-131**
- vs -	:	
LESEAN J. MAY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000034.

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

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

Timothy J. Fitzgerald, Gallagher, Sharp, Fulton & Norman, Sixth Floor, Bulkley Building, 1501 Euclid Avenue, Cleveland, OH 44115-2108 (For Defendant-Appellant).

MARY JANE TRAPP, J.

{¶1} LeSean J. May appeals from a judgment of the Lake County Court of Common Pleas which convicted and sentenced him pursuant to his guilty plea to burglary, aggravated robbery, robbery, and kidnapping. This matter implicates the concepts of allied offenses and merger, an area of law that has undergone constant changes in recent years. We affirm in part, reverse in part, and remand the matter to the trial court for the court to engage in the merger analysis recently articulated by the Supreme Court of Ohio in *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314.

{¶2} **Substantive Facts and Procedural History**

{¶3} From the indictment and change of plea hearing we learn that on December 24, 2009, Jason Rivers went into the Advance America Cash Advance in Madison Township to repay a loan. Two cashiers were working behind the counter that day. After Mr. Rivers laid his cash on the counter, Mr. May, with his sweatshirt hood over his head, walked into the store, pulled out a Raven Arms MP25 semi-automatic pistol, and pointed it at Mr. Rivers' head, demanding the money. According to Mr. Rivers, Mr. May threatened to "blow his head off" if he moved.

{¶4} Unbeknownst to Mr. May, Mr. Rivers was an off-duty police officer trained in martial arts. He engaged in a struggle with Mr. May, pushing him backwards to take the cashiers out of the line of fire. Mr. May fled on foot, and was picked up by his friends waiting in a car in the nearby Family Dollar parking lot. A passerby noted the vehicle's license plate number and provided it to the police. The police eventually stopped the vehicle and apprehended Mr. May. Inside the vehicle the police found a pair of Timberland boots, which matched the footprints in the snow at the crime scene, as well as the hooded jacket Mr. May had worn. Mr. May admitted to a detective later that he brought a gun inside the check cashing store and told the people inside not to move.

{¶5} Mr. May was indicted on the following 12 counts: one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1); three counts of aggravated robbery, a felony of the first degree in violation of R.C. 2911.01(A)(1); three counts of robbery, a second degree felony in violation of R.C. 2911.02(A); three counts of robbery, a second degree felony in violation of R.C. 2911.02(A)(2); one count of kidnapping, a felony of the first degree in violation of R.C. 2905.01(A)(2); and one count

of possessing a defaced gun, a misdemeanor of the first degree in violation of R.C. 2923.201(A)(2). The first eleven counts of the indictment were accompanied with a repeat violent offender specification because of Mr. May's 2004 conviction of aggravated robbery,

{¶6} Mr. May initially pled not guilty to all charges. After rejecting two prior plea bargains from the state, on the day of the trial, Mr. May accepted a plea bargain after inquiring about the "cap" of his prison term the state would recommend.[1] Under the written plea agreement, Mr. May pled guilty to the eleven felony counts in the indictment and the accompanying repeat violent offender specification. The court entered a nolle prosequi on the count of possession of a defaced gun at the state's request, and ordered a presentence report prior to sentencing.

{¶7} On May 26, 2010, the trial court held a sentencing hearing. While the defense asked for a total term of eight years, with all counts running concurrently, the state recommended a term of 15 years. The state pointed to Mr. May's lack of remorse as reflected in the presentence report: Mr. May claimed he entered Advance America Cash Advance "to flirt with" the cashiers, and he only pulled the gun after Mr. Rivers "gave him a look." The state also labeled Mr. May a career criminal, stressing his lengthy criminal history and the fact that he committed the instant offenses only 18 days

1. The record reflects that three weeks prior to the scheduled trial date on May 19, 2010, the parties began to negotiate a plea bargain. The state initially offered a plea bargain under which Mr. May would plead to one count of aggravated robbery with an accompanying RVO specification for a total imprisonment of 14 years. After he rejected the offer, a subsequent plea bargain was offered by the state which required him to plead to three counts of aggravated robbery for a total term of 15 years, a deal also rejected by Mr. May. The transcript reflects that on the day of trial, immediately before the trial was to begin, Mr. May's counsel indicated Mr. May was willing to entertain a plea bargain, but "was asking if there was a cap" and wanted to know the number of charges he would be required to plead to. As to the latter, the prosecutor indicated that it is a local rule that on the day of the trial a defendant must plead to the entire indictment. The transcript next reflects that a recess was taken and, after the recess, Mr. May indicated to the court that he would change his plea.

following the completion of postrelease control after having served prison time for aggravated robbery.

{¶8} While commending the defense counsel for zealously advocating for a more lenient prison term, the court placed great weight on Mr. May's extensive criminal history, remarking that his prior criminal record was not just "bad" but, in fact, "horrendous." The court noted that he was institutionalized four times before reaching the age of majority. He was released from the juvenile facility on April 28, 1990, and, eleven days later, was arrested and charged with receiving stolen property of a motor vehicle. He was subsequently charged with robberies, theft, and drug abuse, all within a year of the first offense. In 1996, he was charged with two robberies, with a firearm specification, as well as escape with a violence specification. In 2004, he was convicted of aggravated robbery and sentenced to three years of imprisonment. After his release on August 26, 2007, he was convicted of two theft offenses. He then committed the Advance America armed robbery on Christmas Eve in 2009, weeks after being released from postrelease control. The trial court also admonished Mr. May for claiming that he pulled his weapon on Mr. Rivers because of a "look" Mr. Rivers gave him. The court called the explanation "hogwash," indicating a lack of remorse.

{¶9} After stating it considered (1) the overriding purposes and principles of R.C. 2929.11 and the seriousness and recidivism factors set forth in R.C. 2929.12, (2) the defendant's extensive criminal record reflected in the presentence investigative report, (3) the victim impact statements, and (4) arguments made by the state and the defense counsel, the court sentenced Mr. May to six years for burglary, and three concurrent terms of eight years for the three counts of aggravated robbery. The court ordered the three aggravated robbery counts to be served consecutively to the burglary

count, but merged the six robbery counts into the three aggravated robbery counts. The court also sentenced Mr. May to eight years for kidnapping, to run concurrently with the 14-year term for the burglary and aggravated robbery counts.

{¶10} Mr. May now appeals, assigning the following errors for our review:

{¶11} "[1.] Defendant-Appellant LeSean May was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution when the trial court accepted an unknowing, unintelligent, and involuntary guilty plea.

{¶12} "[2.] Defendant-Appellant LeSean May's due process rights under the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution were violated by the prosecutorial misconduct in securing a plea of guilty to the crime of burglary which could not be established as a matter of law.

{¶13} "[3.] The ineffective assistance of trial counsel deprived Defendant-Appellant LeSean May of his constitutional right to the effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶14} "[4.] The trial court erred by convicting and separately sentencing Defendant-Appellant LeSean May for the crimes of burglary, three counts of aggravated robbery and kidnapping where those crimes should have been merged as allied offenses of similar import pursuant to Ohio Rev. Code 2941.25."

{¶15} For ease of analysis, we address the assignments of error out of order.

{¶16} **Burglary and the Element of Trespass in a Business Establishment**

{¶17} In the second assignment of error, Mr. May argues the prosecutor improperly "secured guilty pleas to all felonies in a multi-count indictment that required

the Defendant-Appellant to plead guilty to the crime of burglary where the facts recited by the prosecutor during the plea colloquy negated the sine qua non element of trespass pursuant to *State v. Barksdale* (1983), 2 Ohio St.3d 126."

{¶18} Mr. May was charged with committing burglary in violation of R.C. 2911.12(A)(1). R.C. 2911.12 states, in part:

{¶19} "(A) No person, by force, stealth, or deception, shall do any of the following:

{¶20} "(1) Trespass in an occupied structure *** when another person other than an accomplice of the offender is present, with purpose to commit in the structure *** any criminal offense[.]"

{¶21} The trespass element is the sine qua non of the offense of burglary. *Barksdale* at 127. R.C. 2911.21(A) defines criminal trespass as follows:

{¶22} "No person, without privilege to do so, shall do any of the following:

{¶23} "(1) Knowingly enter or *remain* on the land or premises of another ***." (Emphasis added.)

{¶24} "Privilege is the distinguishing characteristic between unlawful trespass and lawful presence on the land or premises of another." *State v. Russ* (June 26, 2000), 12th Dist. No. CA99-07-074, 2000 Ohio App. LEXIS 2759, *8. "Where no privilege exists, entry constitutes trespass." *State v. Lyons* (1985), 18 Ohio St. 3d 204, 206. Privilege is "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12).

{¶25} In *Barksdale*, the defendant entered an automobile dealer's car lot which was open to the public, and broke into a locked car. The Supreme Court of Ohio struck

down the defendant's conviction of breaking and entering because the state failed to prove the essential element of trespass. The court reasoned that the automobile dealer's tacit invitation to the general public to enter the lot was a grant of privilege, and that one who entered the lot with the purpose of committing a felony did not relinquish that privilege and therefore, no trespass had been demonstrated by the state's evidence.

{¶26} The Supreme Court of Ohio however has since narrowed its holding in *Barksdale*. In *State v. Steffen* (1987), 31 Ohio St. 3d 111, the victim invited a door-to-door salesman into her home for a product demonstration. Once inside the residence, the defendant assaulted and ultimately killed the victim. The Supreme Court of Ohio upheld the defendant's aggravated burglary conviction, reasoning that, although the victim initially allegedly gave the defendant permission to enter her home, that permission was terminated when he assaulted her.

{¶27} The court explained that, by the assault, a strong inference arose that the privilege was terminated and, further, the defendant knew so. The court distinguished *Barksdale*, noting in particular that the car lot in *Barksdale* was closed at the time of the defendant's entry, thus, it may safely be assumed that there was no one present to revoke the privilege of entry. Even if the defendant had been initially invited into the victim's home, that privilege was terminated and revoked upon the defendant committing a crime in the victim's home.

{¶28} We distinguish the instant case from *Barksdale* as well. Based on the facts recited by the state during the plea hearing, even assuming a lawful initial entry, Mr. May's privilege to *remain* in the cash advance store terminated the moment he brandished his weapon at its customer and demanded money. Thus, the facts recited

by the state were sufficient to prove the element of trespass, and therefore the charge of burglary was proper. Mr. May's guilty plea to all but one count of the indictment was, as reflected in the record, a result of extensive negotiations between the parties, not of any alleged prosecutorial misconduct relating to the burglary charge. The second assignment of error is without merit.

{¶29} **Merger**

{¶30} Under the fourth assignment of error, Mr. May argues the trial court erred by convicting and separately sentencing him for the offenses of burglary, three counts of aggravated robbery, and kidnapping. He maintains these counts should have been merged as allied offenses of similar import.

{¶31} We first note that although Mr. May's trial counsel did not challenge the trial court for its failure to merge, the imposition of multiple sentences for allied offenses of similar import constitutes plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶96-102. Consequently, Mr. May did not waive the error on appeal.

{¶32} **The Evolution of Allied Offenses Analysis**

{¶33} "The concept of merger originates in the prohibition against cumulative punishments as established by the Double Jeopardy clauses of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution." *State v. Miller*, 11th Dist. No. 2009-P-0090, 2011-Ohio-1161, ¶35, citing *State v. Williams*, 124 Ohio St.3d 381, 384, 2010-Ohio-147. The constitutional prohibition against multiple punishments for the same offense is codified in R.C. 2941.25. That statute states:

{¶34} "(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.

{¶35} "(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."

{¶36} As an initial matter, we note that merger is the process of combining multiple *offenses* for sentencing purposes. Allied offenses of similar import "must be merged for purposes of sentencing, and the defendant may be convicted of only one of the offenses, even though the defendant has been properly charged with and found guilty of both." *State v. Chaffer*, 1st Dist. No. C-090602, 2010-Ohio-4471, syllabus. For purposes of R.C. 2941.25, a "conviction" consists of a guilty verdict and the imposition of a sentence or penalty. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶135, citing *State v. Poindexter* (1988), 36 Ohio St. 3d 1 ("a defendant may be charged with multiple counts based on the same conduct but may be convicted of only one, and the trial court effects the merger at sentencing"). "[A]llied offenses must be merged for purposes of sentencing following the state's election of which offense should survive." *State v. Jackson*, 1st Dist. No. C-090414, 2010-Ohio-4312, ¶20, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2.

{¶37} The Supreme Court of Ohio has struggled with the proper analysis of allied offenses of similar import since its landmark decision on this issue in *State v.*

Rance (1999), 85 Ohio St.3d 632. In *Miller*, supra, we summarized the development of the law of allied offenses since *Rance:*

{¶38} "In *Rance*, the court held that offenses are of similar import if they 'correspond to such a degree that the commission of one crime will result in the commission of the other.' Id. at 636. To determine whether two offenses met this test, the court determined that the statutory elements of the offenses should be objectively compared in the abstract. Id. If the elements of the crime so correspond that the offenses are of similar import, the defendant may be convicted of both to the extent the offenses were committed separately or with a separate animus. Id. at 638-39.

{¶39} "Since its release, the decision in *Rance* has gone through various modifications and revisions. First, in *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, the court acknowledged that inconsistent and sometimes absurd results follow from a strict application of the 'abstraction' methodology set forth in *Rance*. *Cabrales*, supra, at 59. The court consequently determined that, in considering whether offenses are of similar import under R.C. 2941.25(A), courts need not exactly align the elements of the offenses. Rather, the court held: '*** if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import.' *Cabrales*, supra, paragraph one of the syllabus. If the offenses met this test, the court then proceeds to the second step and determines whether the two offenses were committed separately or with a separate animus. Id. at 57.

{¶40} "Subsequent to *Cabrales*, the court revisited the allied-offense issue in *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569. In *Brown*, the court formulated what was later described as a 'preemptive exception' to the *Rance*/*Cabrales* standard.

The court observed the *Rance*/*Cabrales* test for allied offenses of similar import is essentially a rule of statutory construction designed to assist a court in gleaning the intent of the General Assembly. *Brown*, supra, at 454. That is, "'by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes.'" Id., quoting *Whalen v. United States* (1980), 445 U.S. 684, 714, 100 S. Ct. 1432, 63 L. Ed. 2d 715. With this in mind, the court in *Brown* concluded that a court need not resort to comparing crimes when the legislative intent and societal interests protected by each are manifested in the clear language of the statutes under consideration. Id. The court consequently held that while the two offenses of felonious assault of which the defendant in *Brown* was convicted would not be allied offenses analyzed under the *Rance*/*Cabrales* framework, the societal interests protected in criminalizing each offense were the same. *Brown*, supra, at 455. Thus, the offenses were allied and should be merged for sentencing without need for further analysis.

{¶41} "Later, in *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, the court again considered the analysis of merger under R.C. 2941.25. In *Winn*, the court held that kidnapping and aggravated robbery were allied offenses, even though it was possible to imagine hypothetical scenarios in which aggravated robbery would not necessarily constitute a kidnapping. The court reasoned that exploring all potential hypotheticals represented a regression into a strict textual application of the allied-offenses test previously rejected in *Cabrales*. Still, the court found that the two offenses are so similar that the commission of one necessarily results in the commission of the other. Id. at 417. Notwithstanding the dissent's criticism that the majority was essentially ignoring the rule announced in *Cabrales*, the majority observed, '[w]e would

be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other.' *Winn*, supra, at 417." *Miller* at ¶40-43.

{¶42} **The *Johnson* Standard Emerges**

{¶43} Recognizing the law of allied offenses post *Rance* has become an unworkable and unpredictable quagmire of exceptions and near absurdity, the Supreme Court of Ohio revisited the allied offenses analysis yet again in 2010 and overruled *Rance,* in *State v. Johnson*, 128 Ohio St. 3d 153, 2010-Ohio-6314.[2] In *Johnson*, the court remarked on the difficulties of the application of *Rance*:

{¶44} "Our cases currently (1) require that a trial court align the elements of the offenses in the abstract — but not too exactly (*Cabrales*), (2) permit trial courts to make subjective determinations about the probability that two crimes will occur from the same conduct (*Winn*), (3) instruct trial courts to determine preemptively the intent of the General Assembly outside the method provided by R.C. 2941.25 (*Brown*), and (4) require that courts ignore the commonsense mandate of the statute to determine whether the same conduct of the defendant can be construed to constitute two or more offenses (*Rance*). The current allied-offense standard is so subjective and divorced from the language of R.C. 2941.25 that it provides virtually no guidance to trial courts and requires constant ad hoc review by this court." *Johnson* at ¶40.

{¶45} Under the new analysis, "[w]hen determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of

2. We note that although *Johnson* was released after Mr. May was sentenced, it would be applicable to his case, because a new judicial ruling may be applied to a conviction that has not become final. See *State v. Ali* (2004), 104 Ohio St.3d 328, 2004-Ohio-6592.

the accused must be considered." *Johnson* at the syllabus. The *Johnson* court provided the new analysis as follows:

{¶46} "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. *** If the offenses correspond to such a degree that the conduct of the defendant constituting the commission of one offense constitutes [the] commission of the other, then the offenses are of similar import.

{¶47} "If the multiple offenses can be committed by the same conduct, 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.'" ***

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

{¶49} "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 a separate animus for each offense, then according to R.C. 2941.25(B), the offenses will not merge." *Johnson* at ¶48-51.

{¶50} "In departing from the former test, the court developed a new, more context-based test for analyzing whether two offenses are allied thereby necessitating a merger. In doing so, the court focused upon the unambiguous language of R.C. 2941.25, requiring the allied-offense analysis to center upon the defendant's conduct, rather than the elements of the crimes which are charged as a result of the defendant's conduct." *Miller* at ¶47, citing *Johnson* at ¶48-52

{¶51} "The [*Johnson*] court acknowledged the results of the above analysis will vary on a case-by-case basis. Hence, while two crimes in one case may merge, the same crimes in another may not. Given the statutory language, however, this is not a problem. The court observed that inconsistencies in outcome are both necessary and permissible '*** given that the statute instructs courts to examine a defendant's conduct — an inherently subjective determination.'" *Miller* at ¶52, quoting *Johnson* at ¶52.

{¶52} **Merger Analysis is Lacking**

{¶53} For his Christmas Eve conduct, Mr. May was charged with: one count of burglary; three counts of aggravated robbery - one for each victim although the indictment did not specify the identity of the three victims; six counts of robbery; and one count of kidnapping. Mr. May asserts the trial court should have merged (1) the three aggravated robberies counts; (2) kidnapping and the aggravated robbery counts; and (3) burglary and the aggravated robbery counts.

{¶54} We recognize that Mr. May pled guilty to all eleven felony counts in the indictment. However, when a defendant pleads guilty to multiple offenses of similar import and the trial court accepts the pleas, the trial court is still duty-bound to conduct a hearing to determine whether the crimes were committed separately or with a separate animus for each offense prior to sentencing the defendant. *State v. Mangrum* (1993), 86 Ohio App.3d 156, 158; *State v. Ewing*, 2nd Dist. No. 23949, 2011-Ohio-1981, ¶16.

{¶55} This principle was very recently affirmed by the Supreme Court of Ohio in *Underwood*, supra. In that case, the defendant pleaded guilty to multiple counts of aggravated theft and theft pursuant to a plea agreement, and the court convicted him of the multiple counts and sentenced him to concurrent terms; the court did so without first engaging in a merger/allied offenses analysis at the sentencing hearing. The Second

District vacated the convictions, and the Supreme Court of Ohio affirmed the appellate court, stating that "[w]hen the plea agreement is silent on the issue of allied offenses of similar import *** the trial court is obligated under R.C. 2941.25 to determine whether the offenses are allied, and if they are, to convict the defendant of only one offense." Id. at ¶29.

{¶56} In *Underwood*, the state argued the trial court's sentence on each count of the allied offenses had no practical or prejudicial effect on the defendant, because he received concurrent terms for his offenses. The Supreme Court of Ohio disagreed, explaining that "even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law." *Underwood* at ¶31 (citations omitted). As the court explained:

{¶57} "R.C. 2941.25(A) clearly provides that there may be only one conviction for allied offenses of similar import. Because a defendant may be convicted of only one offense for such conduct, the defendant may be sentenced for only one offense. This court has previously said that allied offenses of similar import are to be merged at sentencing. See *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E. 2d 149, ¶43; *State v. McGuire* (1997), 80 Ohio St. 3d 390, 399, 1997-Ohio-335, 686 N.E.2d 1112. Thus, a trial court is prohibited from imposing individual sentences for counts that constitute allied offenses of similar import. A defendant's plea to multiple counts does not affect the court's duty to merge those allied counts at sentencing. This duty is mandatory, not discretionary." Id. at ¶26.

{¶58} **Case to be Remanded for Merger Determination Pursuant to *Johnson***

{¶59} In this sentencing matter, which took place before *Johnson* was released, the trial court merged the six robbery counts with the three aggravated robbery counts,

but not (1) burglary and aggravated robbery, (2) aggravated robbery and kidnapping, or (3) the three aggravated robbery counts. Because the trial court determined the merger issue without applying the new *Johnson* analysis, we remand to the trial court for a new sentencing hearing.

{¶60} In *State v. Ross*, 9th Dist. No. 25178, 2011-Ohio-3197, after a trial, the defendant was convicted and sentenced separately for murder, felonious assault, and endangering children. As the parties were not in agreement as to whether the offenses were allied, the Ninth District remanded, stating: "This court expresses no position on that issue at this time. Rather than decide this issue in the first instance, we must remand this matter to the trial court for a determination as to whether [appellant's] offenses are, in fact, allied offenses of similar import. *** Therefore, we reverse on this basis and remand to the trial court for the application of *Johnson* in the first instance." Id. at ¶12. See, also, *State v. Wenker*, 9th Dist. No. 25185, 2011-Ohio-786, ¶21-22 (remanding matter to the trial court for consideration of defendant's conduct and offenses pursuant to *Johnson*).

{¶61} Similarly, this case requires a remand for the trial court to determine whether the various offenses should be merged pursuant to *Johnson*. The question remains, however, as to whether upon remand the state can present further evidence surrounding Mr. May's offenses at the resentencing hearing.

{¶62} In *Miller*, supra, the defendant pleaded guilty to and was separately convicted of and sentenced for illegal manufacturing of methamphetamine and possession or assembly of chemicals to produce methamphetamine. This court reversed the convictions and remanded to the trial court for a new sentencing hearing. Specifically, we explained that, with respect to the first prong of the *Johnson* test, it is

possible for both offenses to be committed with the same conduct. Regarding the second prong, while it is clear that each charge arose from appellant's conduct on the day of the incident, "the record contains insufficient facts regarding the circumstances of appellant's arrest for this court to draw a firm conclusion on whether the two offenses were, in fact, committed by the same conduct." Id. at ¶56.

{¶63} We explained that "[b]ecause the *Johnson* test requires a court to consider the specific details of the conduct which precipitated the charges, we are unable, at this time, to determine whether appellant's convictions for illegal manufacturing of methamphetamine and possession of chemicals to produce methamphetamine should have merged. Given the new test set forth in *Johnson*, we hold this matter must be remanded to the trial court for the limited purpose of establishing the facts underlying the charges. Once the facts are established, the trial court shall analyze appellant's conduct under *Johnson* and rule whether the crimes at issue should be merged for sentencing." Id.

{¶64} Here, unlike *Miller*, the record contains the prosecutor's recitation of facts surrounding the incident at the check cashing store, which appears to form a sufficient factual basis regarding the defendant's conduct for a proper merger analysis. Thus, upon remand, the trial court is to hold a new sentencing hearing in which the parties shall advance arguments and apply the *Johnson* analysis, based on the facts contained in the record. The trial court is to determine whether the following offenses should be merged into a single conviction for sentencing: (1) burglary and aggravated robbery; (2) kidnapping and aggravated robbery; and (3) the three aggravated robbery counts.

{¶65} If the court decides some or all of the offenses should be merged, the court must then accept the state's choice among allied offenses, merge the allied

offenses into a single conviction for sentencing, and impose a sentence appropriate for the merged offense. See *Whitfield* at ¶24.

{¶66} The fourth assignment of error is sustained.

{¶67} **Mr. May's Guilty Plea and Substantial Compliance With Crim R. 11**

{¶68} Under the first assignment of error, Mr. May claims his guilty plea was not knowing and intelligent because the trial court "misinformed" him during the plea colloquy regarding his maximum sentence. He maintains the court advised him he faced the maximum sentence of 106 years when his maximum sentence was actually only 58 years, when one takes into account the trial court's subsequent merging of the six robbery counts into the aggravated robbery counts. He claims because he was misinformed of his maximum sentence, his plea was not knowing and should be vacated.

{¶69} **Crim. R. 11 Requirements**

{¶70} Under Crim.R. 11(C)(2), "the trial judge may not accept a plea of guilty or no contest without addressing the defendant personally and (1) '[d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing,' (2) informing the defendant of the effect of the specific plea and that the court may proceed with judgment and sentencing after accepting it, and ensuring that the defendant understands these facts, and (3) informing the defendant that entering a plea of guilty or no contest waives the constitutional rights to a jury trial, to confrontation, to compulsory process, and to require proof of guilt beyond a

reasonable doubt and determining that the defendant understands that fact." *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶27, citing Crim.R. 11(C)(2)(a) through (c).

{¶71} "Generally, a guilty plea is deemed voluntary if the record demonstrates the trial court advised the defendant of (1) the nature of the charge and the maximum penalty involved, (2) the effect of entering a guilty plea, and (3) that the defendant will be waiving his constitutional rights by entering the plea." *State v. Dudas*, 11th Dist. Nos. 2008-L-081 and 2008-L-082, 2008-Ohio-7043, ¶30.

{¶72} **Substantial Compliance**

{¶73} When the trial court fails to explain the *constitutional* rights set forth in Crim.R. 11(C)(2)(c), it is presumed the plea was entered involuntarily and unknowingly and therefore invalid. *Clark* at ¶31. However, if the trial court imperfectly explained *nonconstitutional* matters such as the maximum possible penalty and the effect of the plea, a substantial-compliance rule applies. Id. "Under this standard, a slight deviation from the text of the rule is permissible; so long as the totality of the circumstances indicates that 'the defendant subjectively understands the implications of his plea and the rights he is waiving,' the plea may be upheld." Id., quoting *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶74} When the trial court does not substantially comply with Crim.R. 11 in regard to a nonconstitutional right, reviewing courts must determine whether the trial court partially complied or failed to comply with the rule. If the trial court partially complied, the plea may be vacated only if the defendant demonstrates a prejudicial effect. Id. at ¶32. "The test for prejudice is 'whether the plea would have otherwise been made.'" Id., quoting *Nero* at 108.

{¶75} Here, the transcript of the change of plea proceeding reflects that the trial court explained to Mr. May the potential maximum sentence he could receive if he was convicted of all eleven counts and if the sentences were imposed consecutively. As he faced an indictment containing seven second-degree felony offenses and four first-degree felonies offense, each with an accompanying repeat violent offender specification, the court correctly explained that the maximum sentences for these offenses would add up to 106 years if imposed consecutively.

{¶76} **When Must the Trial Court Engage in the Merger Analysis**

{¶77} Mr. May claims the trial court should have taken merger into account when advising him of his maximum penalty at the plea hearing. However, the case law authority clearly indicates the trial court is only required to engage in the merger analysis at sentencing, *not prior to the finding of guilt*. See *Underwood* at ¶27 ("a trial court is required to merge allied offenses of similar import at sentencing"). After all, R.C. 2941.25 is a *sentencing* statute. See *State v. Kent* (1980), 68 Ohio App.2d 151, paragraph one of the syllabus.

{¶78} Crim.R. 11 makes no reference to allied offenses, and the case law does not require the trial court to have a factual basis of the offenses before accepting a guilty plea. *Kent* at 156, citing *State v. Ricks* (1976), 48 Ohio App.2d 128; *State v. Wood* (1976), 48 Ohio App.2d 339. It would be virtually impossible, and potentially prejudicial to the defendant, to require the trial court to engage in the allied offenses/merger analysis before the state's recitation of the facts leading to the indictment. In fact, we would be placing the proverbial cart before the horse if we were to require the trial court to determine which allied offenses should be merged for sentencing prior to a finding of guilt in each offense. Therefore, we consider the trial

court's advisement of maximum penalty without taking into account of potential merger in substantial compliance of Crim.R. 11.[3] Accord *Kent*, supra (defendant's guilty plea was not invalidated by the trial court's failure to engage in allied offenses analysis before accepting the plea).

{¶79} Even if we were to consider the court's advisement of maximum penalty to be only in partial compliance with Crim.R. 11, Mr. May has not demonstrated that he suffered prejudice, i.e., that he would not have made the plea otherwise. Without an affidavit, he claims in his brief that "[h]ad [he] known that the maximum sentence he could receive after trial was almost half what the trial court said it was, [he] would have elected to go to trial." The record, however, is devoid of any evidence to indicate that, had Mr. May known his maximum exposure for imprisonment was *only* 58 instead of 106 years, he would have chosen to go to trial. Therefore, the first assignment of error is without merit.

{¶80} **Ineffective Assistance of Counsel**

{¶81} In his third assignment of error, Mr. May contends his trial counsel provided ineffective assistance resulting in an unknowing, unintelligent, and involuntary guilty plea, and improper sentences. He argues his counsel should have challenged the burglary count in the indictment, advocated the merger of the various allied offenses, and questioned the trial court's erroneous advisement regarding the his maximum penalty.

{¶82} To establish his claim that counsel provided ineffective assistance, Mr. May must demonstrate (1) his counsel was deficient in some aspect of his

3. We note, however, a few appellate courts have held that the trial court erred in accepting the guilty plea if the allied offenses issue had not been resolved during the plea hearing. See *State v. Manus*, 8th Dist. No. 94631, 2011-Ohio-603; *State v. Taylor*, 4th Dist. No. 07CA29, 2008-Ohio-484.

representation, and (2) there is a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668.

{¶83} A threshold issue in a claim of ineffective assistance of counsel is whether there was actual error on the part of appellant's trial counsel. *State v. McCaleb*, 11th Dist. No. 2002-L-157, 2004-Ohio-5940, ¶92. In Ohio, every properly licensed attorney is presumed to be competent and therefore a defendant bears the burden of proof. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. To overcome this presumption, a defendant must demonstrate that "the actions of his attorney did not fall within a range of reasonable assistance." *State v. Henderson*, 11th Dist. No. 2001-T-0047, 2002-Ohio-6715, ¶14. Counsel's performance will not be deemed ineffective unless and until the performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *State v. Iacona* (2001), 93 Ohio St.3d 83, 105.

{¶84} Furthermore, wide latitude of professional judgment is afforded to decisions on strategy and trial tactics, and it is not the duty of a reviewing court to analyze the trial counsel's legal tactics and maneuvers. *State v. Gau*, 11th Dist. No. 2005-A-0082, 2006-Ohio-6531, ¶35, citing *Strickland* at 689.

{¶85} **Standard of Review When There Is a Guilty Plea**

{¶86} In the context of a guilty plea, the standard of review for ineffective assistance of counsel is whether: (1) counsel's performance was deficient, and (2) the defendant was prejudiced by the deficient performance in that there is a reasonable probability that, but for counsel's error, the defendant would not have pled guilty. *State v. Madeline* (Mar. 22, 2002), 11th Dist. No. 2000-T-0156, 2002 Ohio App. LEXIS 1348,

*9. However, "[t]he mere fact that, if not for the alleged ineffective assistance of counsel, the defendant would not have entered a guilty plea is not sufficient to establish the requisite connection between the guilty plea and the ineffective assistance." Id. at *10, citing *State v. Sopjack* (Dec. 15, 1995), 11th Dist. No. 93-G-1826, 1995 Ohio App. LEXIS 5572, citing *State v. Haynes* (Mar. 3, 1995), 11th Dist. No. 93-T-4911, 1995 Ohio App. LEXIS 780. "Rather, ineffective assistance of trial counsel is found to have affected the validity of a guilty plea when it precluded a defendant from entering his plea knowingly and voluntarily." *Madeline* at *10, citing *Sopjack*. See, also, *State v. Dansby*, 5th Dist. Nos. 2009AP120065 and 2009AP120066, 2010-Ohio-4538, ¶19.

{¶87} Mr. May claims his trial counsel's failure to challenge the trial court's notification of his maximum penalty precluded him from entering a knowing and voluntary plea. As we have determined above, the trial court's advisement of the maximum penalty without factoring in potential merger was in substantial compliance of the requirement of Crim.R. 11. Therefore, his plea was knowing and voluntary, and counsel's performance cannot be deemed deficient.

{¶88} Regarding the claim that his trial counsel provided ineffective assistance in failing to challenge the burglary count in the indictment, we have determined that the facts surrounding this case as recited by the prosecutor are sufficient to establish the trespass element and therefore counsel could not be faulted for failing to challenge the burglary charge.

{¶89} Regarding counsel's failure at sentencing to advocate for the merger of burglary, kidnapping, and three counts of aggravated robbery, this claim is moot due to our disposition of the fourth assignment of error.

{¶90} The third assignment of error is overruled.

{¶91} The judgment of the Lake County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.