[Cite as *State v. Lamp*, 2021-Ohio-2763.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

RICHARD ALLEN LAMP,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0093

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20 CR 14

BEFORE:
Carol Ann Robb, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed in part, Vacate in part sentences and Remanded.

Atty. Paul J. Gains, Mahoning County Prosecutor*, Atty. Ralph M. Rivera,* Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Edward Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio 44503 for Defendanrt-Appellant.

Dated: July 27, 2021

Robb, J.

{¶1} Defendant-Appellant Richard Lamp appeals the decision of the Mahoning County Common Pleas Court finding him guilty of aggravated robbery, receiving stolen property and obstructing official business. Appellant raises three arguments in this appeal. He contends there is insufficient evidence for the aggravated robbery and receiving stolen property convictions. He also asserts those convictions are against the manifest weight of the evidence. Lastly, Appellant alternatively argues that the aggravated robbery and obstructing official business convictions should have merged because they were allied offenses of similar import. For the reasons expressed below, the evidence was legally sufficient to support the convictions for aggravated robbery and receiving stolen property. Likewise, the convictions were not against the manifest weight of the evidence. As to the merger issue, the convictions for aggravated robbery and obstructing official business should have merged. The failure to merge results in plain error. Accordingly, for the reasons expressed below, the determinations of guilt for aggravated robbery and receiving stolen property are affirmed. However, the sentences for aggravated robbery and obstructing official business are vacated and the matter is remanded for resentencing with instructions for the state to elect on which offense it wishes to proceed to sentence.

Statement of Facts and Case

{¶2} In the early morning hours of December 27, 2019, Phillip Benjamin came across Appellant walking on Beloit Snodes Road in Mahoning County, Ohio. Benjamin stopped and Appellant asked Benjamin if he had gas and knew the way to Massillon. Benjamin, using Google Maps, showed Appellant the way to Massillon, and then he took Appellant to a gas station.

{¶3} After getting gas, they traveled back to the vehicle Appellant was driving, a Dodge Journey; this vehicle was near the area where Benjamin had encountered Appellant. Appellant began the process of getting the gas can out of the back of Benjamin's vehicle. However, upon seeing Goshen Township Officer Isaiah Thomas

arrive at the scene, Appellant put the gas can back in Benjamin's vehicle and returned to the passenger seat of Benjamin's vehicle.

{¶4} As the above was occurring, Officer Thomas was dispatched to 14700 Beloit Snodes Road; there was a report of an individual walking into Beloit who appeared to be intoxicated. Sergeant Donald Davis from the Smith Township Police Department also responded to the call.

{¶5} When the license plate of the Dodge Journey was run it was discovered the vehicle was stolen. Angela Otto owned the vehicle and reported it stolen on December 26, 2019. Her wallet, containing rewards cards, a social security card, approximately $800, and prescription medicine were in the vehicle when it was stolen. Benjamin agreed to have his vehicle searched. On the passenger side, where Appellant was sitting, reward cards, receipts, Otto's social security card, and a blue cellphone was found, and narcotics were found. A bottle of Gabapentin pills prescribed to Otto was on the floor of the passenger side. Appellant's person was also searched. Fifty tablets of Clonazepam, a prescription bottle listing Otto as the patient, $781.00, and an Ohio Direction Card issued to Otto were found on his person.

{¶6} Appellant was then transported to the Smith Township Police Department for booking and processing by Sergeant Davis. During booking, while Sergeant Davis was attempting to put belly chains on Appellant, Appellant lunged at Sergeant Davis. Appellant was immediately taken to the ground and subdued. The incident was recorded. Sergeant Davis testified at trial that he keeps his service weapon in a Level 3 Safariland Holster, which has a hood for extra retention purposes. This holster requires a process to release the service weapon. Specifically it requires pressure; the hood has to be pushed down to release the gun from the holster. Sergeant Davis indicated that the hood was released during Appellant's attempt to remove the firearm from his person.

{¶7} Following these events, Appellant was indicted for aggravated robbery in violation of R.C. 2911.01(B)(1)(C)(1), a first-degree felony; two counts of receiving stolen property in violation of R.C. 2913.51(A)(C), both fourth-degree felonies; and obstructing official business in violation of R.C. 2921.31(A)(B), a fifth-degree felony. 1/30/20 Indictment. Count one, aggravated robbery, was for attempting to take Sergeant Davis' service weapon. Count two, receiving stolen property was for the vehicle, a black Dodge

Journey. The third count, receiving stolen property, was for the narcotics found on Appellant's person and on the passenger side of Benjamin's vehicle where Appellant was sitting.

{¶8} Appellant pled not guilty and waived his right to a jury trial. 8/3/20 J.E. Waiver of Jury Trial. The case proceeded to a bench trial. The trial court, as trier of fact, found Appellant guilty of aggravated robbery, receiving stolen property (Dodge Journey), and obstructing official business. 8/5/20 J.E. The trial court found him not guilty of count three receiving stolen property (narcotics). 8/5/20 J.E.

{¶9} Appellant received an indefinite term of 5 to 7 1/2 years for aggravated robbery. 8/7/20 J.E. He received 18 months for receiving stolen property and 1 year for obstructing official business. 8/7/20 J.E. The trial court ordered the definite terms to be served concurrently with the indefinite term. 8/7/20 J.E. Appellant was also advised he would be subject to 5 years of post release control. 8/7/20 J.E.

{¶10} Appellant appealed his conviction. 8/20/20 Notice of Appeal.

Aggravated Robbery

First Assignment of Error

"The conviction for aggravated robbery was based on insufficient evidence as the state failed to prove that Appellant was attempting to remove the firearm from the arrested [sic] officer."

{¶11} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the state met its burden of production. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). It is a question of law. *Id.* at 386.

{¶12} The relevant inquiry in reviewing the sufficiency of the evidence "'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. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 12, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction beyond a reasonable doubt. *State v. Starks*, 8th Dist. Cuyahoga

No. 91682, 2009-Ohio-3375, ¶ 25; *Jenks* at paragraph two of the syllabus. In other words, "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime." *State v. Flood*, 10th Dist. Franklin No. 18AP-206, 2019-Ohio-2524, ¶ 16, quoting *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4.

{¶13} Appellant was found guilty of aggravated robbery in violation of R.C. 2911.01(B)(C), which states:

> (B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:
>
> (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
>
> (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.
>
> (C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

R.C. 2911.01.

{¶14} Appellant does not dispute Sergeant Davis is a law enforcement officer or that the firearm at issue is a deadly weapon. Rather, he contends the evidence is not sufficient to show he attempted to remove Sergeant Davis' service weapon. He contends the evidence indicates he was attempting to take the keys from Sergeant Davis.

{¶15} To prove the essential element of attempting to remove Sergeant Davis' service weapon, the state provided Sergeant Davis' testimony and the video of the incident. At trial, Sergeant Davis testified about the incident. Sergeant Davis stated that when he attempted to put the belly chains on Appellant, Appellant lunged at him and aggressively reached for his service weapon. Tr. 24-25. Sergeant Davis testified when

he asked Appellant why he reached for the weapon, Appellant responded he was trying to take the weapon in an attempt to escape and he did not know why he did it. Tr. 25. Sergeant Davis explained the service weapon was in a holster. Tr. 26. The holster was a Level 3 Safariland Holster that has a hood for extra protection. Tr. 26. In order for the weapon to be released from the holster, the hood of the holster has to be pushed down. Tr. 26-27. Sergeant Davis testified Appellant clearly reached for his weapon and this is evinced by the fact that he had to snap the hood of the retention back into place because Appellant had pressed it forward. Tr. 43-44, 47.

{¶16} The video of the incident was played at trial. A review of the video indicates Appellant's actions could be seen as an attempt to take Sergeant Davis' service weapon. Appellant is seen reaching to the side of Sergeant Davis' body where his service weapon is located. His line of sight also appears to be focused on the weapon. Tr. 47. Appellant's body obscures the view of whether he actually grabbed or touched Sergeant Davis' weapon.

{¶17} During cross, Sergeant Davis admitted the statement Appellant made about attempting to take the service weapon was not in his report. Tr. 32. He also acknowledged that in the video Appellant said he reached for Sergeant Davis' keys. Tr. 42. The keys were located on Sergeant Davis' belt toward the side where the holstered service weapon was located.

{¶18} That being said, we must consider the evidence in the light most favorable to the prosecution. When considered in that light, the state did produce sufficient evidence Appellant was attempting to remove Sergeant Davis' service weapon. Sergeant Davis testified Appellant was attempting to remove the weapon and the video could reasonably indicate Appellant was attempting to remove the weapon. For those reasons, this assignment of error is meritless.

Second Assignment of Error

"The conviction for aggravated robbery was against the manifest weight of the evidence."

{¶19} While the test for sufficiency requires a determination of whether the prosecution has met its burden of production at trial, a manifest weight challenge questions whether the prosecution has met its burden of persuasion. *Thompkins*, 78 Ohio

St.3d at 390. A challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Id*. at 386. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id*. at 387, citing *State v. Robinson*, 162 Ohio St. 486, 487, 124 N.E.2d 148 (1955).

{¶20} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. * * * Weight is not a question of mathematics, but depends on its effect in inducing belief." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, quoting *Thompkins* at 387. When considering a challenge to the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Thompkins*.

{¶21} A conviction is not against the manifest weight of the evidence simply because the jury believed the state's version of events over the appellant's version. *State v. Gullick*, 10th Dist. Franklin No. 13AP-317, 2014-Ohio-1642, ¶ 11, citing *State v. Houston*, 10th Dist. Franklin No. 04AP-875, 2005-Ohio-449, ¶ 38 (reversed and remanded in part on other grounds). The jury, or the court in a bench trial, may take note of inconsistencies at trial and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶ 21, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). Reversing a conviction as being against the manifest weight of the evidence should only occur in the most "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶22} Appellant's argument under this assignment of error is similar to the argument under the first assignment of error. He asserts the evidence does not show he was attempting to take the sergeant's service weapon.

{¶23} As discussed in the first assignment of error, there is evidence that if believed supports the conviction for aggravated robbery. The evidence could reasonably

demonstrate Appellant was attempting to take Sergeant Davis' service weapon. On the other hand, the evidence might also indicate Appellant was not attempting to take the weapon, but rather was attempting to take the keys from Sergeant Davis' belt. Appellant can be heard in the video stating the word "keys."

{¶24} This case was tried to the bench. The trial court explained its reasoning for its finding of guilt on the record:

> As to the final count, which is Count One in the indictment, a charge of aggravated robbery, Attorney Carfolo did a very good job in cross examining Sergeant Davis as it relates to statements allegedly made by the defendant that were not contained in the police report. At the same time, two things were very clear to the court. Actually, three things. The video itself, State's Exhibit 1, although blocked out by Mr. Lamp as he went to reach for Sergeant Davis' gun belt, it did appear that his motion was such that he was both looking at and reaching for the service revolver. Although Mr. Lamp did clearly talk about keys while on the floor, I believe a legitimate question, irrespective of the mental state of the defendant, is what in the world are keys going to do when a police officer still has a firearm. And third, as I think important as the video itself, is Sergeant Davis' testimony that when he looked down, Mr. Lamp's hands were on his firearm and that the cover on the holster had come undone.

Tr. 103-104.

{¶25} Clearly, the trial court believed the state's version/theory. The trial court's reasoning is supported by the record. As stated above, a conviction is not against the manifest weight of the evidence merely because the trier of fact believed the state's version over the appellant's version. *Gullick*, 10th Dist. No. 13AP-317, 2014-Ohio-1642 at ¶ 11. This assignment of error is meritless.

Receiving Stolen Property

Third Assignment of Error

"The conviction for receiving stolen property was based on insufficient evidence as the state failed to prove that Appellant knew, or should have known that the motor vehicle was stolen."

{¶26} Appellant was convicted of receiving stolen property, the Dodge Journey, in violation of R.C. 2913.51(A)(C). Subsection (A) indicates, "No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." Subsection (C) indicates that if the property is a motor vehicle, as defined by R.C. 4501.01, the violation is a fourth-degree felony.

{¶27} As stated above, a sufficiency of the evidence challenge requires a reviewing court to view the evidence in a light most favorable to the prosecution and to assess whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, at ¶ 12.

{¶28} Appellant argues there is no evidence presented to show that he knew or should have known the vehicle was stolen; the argument focuses on the essential element of knowing or having reasonable cause to believe the property was stolen. Thus, according to Appellant, the state did not meet its burden of production and the conviction is support by insufficient evidence.

{¶29} Testimony from the owner of the Dodge Journey indicated the vehicle was reported stolen on December 26, 2019 and that the owner does not know Appellant and did not give him permission to use the vehicle. Tr. 69, 72.

{¶30} Officer Isaiah Thomas, who was dispatched to 14700 Beloit Snodes Road due to a report of an individual walking into Beloit who appeared to be intoxicated, testified that upon arriving at the scene he saw a vehicle in the ditch and another one pulled up behind it. Tr. 61-62. The officer observed Appellant get out of the passenger side of the parked vehicle, grab a gas can out of the back of the vehicle, and head to the vehicle in the ditch. Tr. 62. As soon as the officer activated his overhead lights, Appellant put the

gas can back in the vehicle, closed the hatch, and got back into the passenger side of the vehicle. Tr. 62.

{¶31} Phillip Benjamin, the individual who encountered Appellant walking on the road and got him gas, testified similarly to Officer Thomas' account of events. Tr. 53. He explained that Appellant was in the middle of getting the gas can out, but then put it back in the vehicle and got back into the passenger side of his vehicle. Tr. 55.

{¶32} This evidence could be seen as an indication that Appellant knew the vehicle was stolen or had a reasonable belief the vehicle was stolen. The act of ceasing to get the gas can out of Benjamin's vehicle and returning to the passenger seat of Benjamin's vehicle, rather than fueling the Dodge Journey, could lead a reasonable person to find that Appellant knew the vehicle was stolen or reasonably believed the vehicle was stolen. If Appellant had been given permission to use that vehicle or had believed the car was not stolen he would have continued with the act of fueling the vehicle.

{¶33} When the evidence is viewed in the light most favorable to the state, it did meet its burden of production. This assignment of error is meritless.

Fourth Assignment of Error

"The conviction for receiving stolen property was against the manifest weight of the evidence."

{¶34} As stated above, a manifest weight of the evidence argument attacks the credibility of the evidence presented. *Thompkins*, 78 Ohio St.3d at 390. In considering a challenge to the weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.* at 387.

{¶35} Appellant's argument under this assignment of error is similar to the argument presented under the third assignment of error. He contends there is no evidence supporting the conclusion that he knew or should have known the vehicle was stolen.

{¶36} As discussed in the third assignment of error, there is evidence that if believed supports the conviction for receiving stolen property (that Appellant knew or reasonably had cause to believe the Dodge Journey was stolen). Appellant's reaction to

seeing the police arrive and stopping the action of fueling the Dodge Journey could arguably not support the conviction of receiving stolen property. However, as with the finding of guilty for the aggravated robbery charge, the trial court, as the trier of fact, also provided its reasoning for its finding of guilty for the receiving stolen property (Dodge Journey) charge:

> As it relates to the second count in the indictment, also charging Mr. Lamp with receiving stolen property, specifically as it relates to the 2015 Dodge Journey, this is actually where the jury instructions, ones that the court and counsel read in preparation for any criminal trial, came into play. And that was the court's rereading the definition of circumstantial evidence, inference and equal weight. And although there was no direct evidence that Mr. Lamp received, retained or disposed of that motor vehicle, there was circumstantial evidence, through the testimony of both Mr. Benjamin and Officer Thomas from the Goshen Police District that would enable the court to find by direct evidence facts which the court, of course, may reasonably infer from other related or connected facts which naturally and logically follow. We know the definition.
>
> Mr. Benjamin finds Mr. Lamp on the side of the road, takes him to get some gas. Clearly a good Samaritan. Goes back to the street. And the uncontroverted testimony is that Mr. Lamp was going back to Ms. Otto's car with a gas can. Law enforcement rolls up, Mr. Lamp gets back in the car. And I think clearly an inference can be made based upon the facts in evidence that Mr. Lamp did receive, retain or dispose of the 2015 Dodge Journey, the property of Angela Otto, knowing or having reasonable cause to believe that that property had been obtained through the commission of a theft offense and that the property involved was a motor vehicle, again, back on December 27, 2019, in Mahoning County. And the court will make a finding of guilty beyond a reasonable doubt as to that count.

Tr. 101-102.

{¶37} As stated above, the test for manifest weight is to review the record weighing the evidence and all **reasonable inferences**. *Thompkins* at 387. The trial court made a reasonable inference given the evidence. The trier of fact did not clearly lose its way and create a manifest miscarriage of justice. The conviction for receiving stolen property (Dodge Journey) is not against the manifest weight of the evidence. This assignment of error is meritless.

Merger

Fifth Assignment of Error

"Assuming that the conviction for aggravated robbery is not based on insufficient evidence and/or against the manifest weight of the evidence, the same should have merged with the conviction for obstructing official business, and the failure of the trial court to do so is plain error."

{¶38} Appellant asserts the convictions for aggravated robbery and obstructing official business should have merged. He acknowledges he did not raise the merger issue to the trial court and therefore the standard of review is plain error. He contends the facts of the case indicate there was no difference in the harm committed between the two offenses. He argues the conduct is the exact same for each offense, they occurred at the same time, and were done with a singular animus. That singular animus was Appellant attempting to gain control of the officer's keys and/or gun.

{¶39} The state counters stating Appellant's conduct shows the harm that resulted from each offense was separate and identifiable. State's Brief 23. Therefore, there is no plain error.

{¶40} The record confirms that the merger issue was not raised to the trial court. Accordingly, Appellant forfeited all but plain error. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 3. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). Under the plain error standard, an error is not reversible unless it affected the outcome of the proceeding and reversal is necessary to correct a manifest miscarriage of justice. *Rogers*. To prevail on a claim of plain error in the merger context, Appellant must "demonstrate a reasonable probability that the convictions are for allied offenses of similar import committed with the same conduct and without a separate animus." *Id.*

{¶41} With that standard in mind, we now turn to whether the offenses of aggravated robbery and obstructing official business should have merged. The Ohio Supreme Court in *Ruff* explained and clarified the test for merger:

> When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).
>
> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation.
>
> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes

> offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 24-26.

{¶42} The aggravated robbery conviction is discussed above at length. Appellant was convicted of aggravated robbery because he attempted to remove Sergeant Davis' service weapon. That conviction required the officer to be acting in the course and scope of the officer's duties. R.C. 2911.01(B)(1).

{¶43} Appellant was also convicted of obstructing official business in violation of R.C. 2921.31(A), which provides that "[n]o person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." In finding him guilty of this offense, the trial court stated, "And clearly, whether Mr. Lamp was reaching or grabbing for the keys or the service revolver, I am going to find that those essential elements have been proven beyond a reasonable doubt and find Mr. Lamp guilty of Count Four." Tr. 101.

{¶44} There has not been a case addressing the merger of aggravated robbery and obstructing official business. Considering the facts of this case, the offenses were of similar import; the harm for each offense was the same. The act of reaching for the service weapon constituted both offenses and the harm was the attempt to prevent the officer from performing his duties. Furthermore, the harm that resulted from each offense is not separate. Attempting to remove the firearm was an attempt to disarm the officer and stop the officer from performing his duties. Merger was required given the facts.

{¶45} It is acknowledged that the sentence for obstructing official business was ordered to be served concurrently to the sentence for aggravated robbery. However, the Ohio Supreme Court has indicated when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31 (State argued where a defendant is sentenced to a jointly recommended sentence pursuant to a plea agreement, the failure to merge convictions on allied offenses cannot be said to constitute plain error. Supreme Court disagreed stating, "We have previously held that imposition

of multiple sentences for allied offenses of similar import is plain error. *State v. Yarbrough,* 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96–102. Justice O'Donnell's dissent focuses on the fact that Underwood received the benefit for which he bargained. It is argued that the court's sentencing on each count had no practical or prejudicial effect on Underwood. After all, two years is two years. However, even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law. *State v. Gibson,* Cuyahoga App. No. 92275, 2009-Ohio-4984, 2009 WL 3043980, ¶ 29; *State v. Coffey,* Miami App. No. 2006 CA 6, 2007-Ohio-21, 2007 WL 29424, ¶ 14; *State v. Thompson* (July 23, 1999), Washington App. No. 98 CA 10, 1999 WL 552646, *7; *State v. Gilmore,* Hamilton App. Nos. C–070521 and C–070522, 2008-Ohio-3475, 2008 WL 2696873, ¶ 17.”). Thus, concurrent sentences do not result in the error being deemed harmless. The failure to merge results is plain error. *State v. Hamilton*, 1st Dist. Hamilton App. Nos. C-160247 and C-160248, 2017-Ohio-8140, ¶ 55 (Sentencing a defendant to separate, concurrent terms for allied offenses of similar import that merge results is plain error.).

{¶46} Consequently, for the above stated reasons this assignment of error has merit. The sentences for aggravated robbery and obstructing official business are vacated and the matter is remanded for resentencing.

Conclusion

{¶47} Assignments of error one through four lack merit and are overruled; the findings of guilty for aggravated robbery and receiving stolen property are affirmed. The fifth assignment of error has merit. The sentences for aggravated robbery and obstructing official business are vacated and the matter is remanded to the trial court for a new sentencing hearing at which the state must elect which offense (aggravated robbery or obstructing official business) it will pursue against Appellant. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph two of the syllabus and ¶ 24-25.

Donofrio, P J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed in part. The sentences for aggravated robbery and obstructing official business are vacated. We hereby remand this matter to the trial court for a new sentencing hearing at which the state must elect which offense (aggravated robbery or obstructing official business) it will pursue against Appellant according to law and consistent with this Court's Opinion. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.