[Cite as *State v. Rhodehamel*, 2011-Ohio-5618.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-96 (C.P.C. No. 09CR-11-6828)
v.	:	No. 11AP-97 (C.P.C. No. 10CR-06-3697)
David R. Rhodehamel,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 1, 2011

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

David J. Graeff, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, David R. Rhodehamel ("appellant"), appeals the judgments of the Franklin County Court of Common Pleas, which convicted him of six counts of money laundering, two counts of theft, and one count of forgery. For the following reasons, we affirm.

{¶2} Appellant was indicted on crimes he committed while working for the property management company of Wears, Kahn, and McMenamy, which later became Coldwell Banker. (We will refer to the company as Wears, Kahn, and McMenamy here.) Specifically, he was indicted on the following: (1) one count of theft of $225,000 from Mattlin Holdings LLC, which was a client of Wears, Kahn, and McMenamy; (2) theft of $50,000 from Mattlin Holdings LLC; (3) theft, forgery, and securing writings by deception concerning a First City Bank mortgage he obtained on Mattlin Holdings LLC's property; (4) four counts of tampering with records he submitted to First City Bank; and (5) three counts of money laundering in a scheme pertaining to the purchase of a condominium for himself and his family.

{¶3} Appellant pleaded not guilty to the charges, and a jury trial ensued. At trial, Steve Kahn testified that appellant started working for Wears, Kahn, and McMenamy in the 1990's and that one of his duties was to manage the commercial real estate owned by Mattlin Holdings LLC.

{¶4} Robert McMenamy, also of Wears, Kahn, and McMenamy, testified as follows. Around 2000, appellant was running all facets of the property management company, and, among his responsibilities, he supervised bookkeepers who generated monthly statements for clients. The statements documented expenses and profits for property the company managed. Appellant was also in charge of a large bank account holding funds for the company's clients. The account was set up in 2002 at appellant's suggestion. Prior to that time, each client had a separate bank account. Although

appellant was in charge of that account, he was not authorized to use client funds for his personal use.

{¶5} Donna Connolly, a bookkeeper at Wears, Kahn, and McMenamy, testified about the company's computerized bookkeeping system. She said that although appellant was not "technologically savvy," he "probably could have figured" out how the system worked if he "looked through" it. (Tr. Vol. IV, 145.) She also testified that, around 2002, Jerry Durham became the property manager for all of the company's clients and that appellant became "the overseer of the property management area." (Tr. Vol. IV, 79.) As an "overseer," appellant would be consulted on any issues that came up regarding property management.

{¶6} First City Bank Vice President David Dygert testified as follows about the mortgage appellant obtained on Mattlin Holdings LLC's property. On July 20, 2004, appellant sent Dygert an e-mail indicating that he " 'acquired the entire interest in an LLC which owns several pieces of real estate' " and that he wanted to obtain a mortgage on that property. (Tr. Vol. IV, 175.) Appellant specified in another e-mail that he was referring to Mattlin Holdings LLC, and he indicated that he acquired that company in 2002. On July 30, 2004, Dygert sent appellant an e-mail requesting information on Mattlin Holdings LLC, and, on August 12, 2004, Dygert sent an e-mail asking appellant to send " 'a hundred percent proof of your hundred percent ownership.' " (Tr. Vol. IV, 188.)

{¶7} Next, Dygert identified documents in appellant's mortgage application file. The file contained a financial statement indicating that appellant acquired Mattlin

Holdings LLC in 2002. And the file contained a copy of a purchase agreement for Mattlin Holdings LLC. The agreement was dated May 23, 2002, and listed the seller as Betty Mattlin and the buyer as appellant through one of his business ventures, CSR Tremont LLC.

{¶8} Dygert testified that he and Charles Cecil, another First City Bank Vice President, approved appellant's mortgage on September 23, 2004. Dygert said that appellant's mortgage would not have been approved if it were known that fraudulent documents were submitted during the application process.

{¶9} On cross-examination, Dygert testified that Exhibit P appeared to be a letter he faxed to appellant, but it was not dated or signed. In the letter, Dygert said, "[n]eed to know which form deal is taking – if going in direction of deal from a few years ago, you will need to sign the pile of agreements and complete deal (pay purchase price, etc. – whatever deal you cut with lady)." (Exhibit P.) Dygert also said, "[i]f going in direction of 'option' at death per your new discussions, you will need Mattlin lady * * * to sign a resolution authorizing our loan or make sure the agreement has stuff in it that says you can take out loan and mortgage (I did not see anything like that in your e mail version)." (Exhibit P.)

{¶10} Next, Cecil testified about the mortgage appellant obtained on Mattlin Holdings LLC's property. Cecil stated that, although he does not specifically recall what documents he reviewed while deciding whether to approve appellant's mortgage, he believed that he considered the 2002 purchase agreement for Mattlin Holdings LLC

because it was important to confirm that appellant owned the property being mortgaged. He also testified as follows.

{¶11} Around the end of 2008 or the beginning of 2009, appellant started making late payments on the First City Bank mortgage. At that same time, Cecil learned from Betty Mattlin that she did not sell her property to appellant. In March or April 2009, Cecil and First City Bank President Doug Simson met with appellant about Betty Mattlin's claim. They showed appellant the 2002 purchase agreement they had in the mortgage application file, and appellant said that the "document was not representative of the deal that he had with Mrs. Mattlin." (Tr. Vol. V, 81.) Cecil and Simson asked appellant about his financial statement, which indicated that he acquired Mattlin Holdings LLC in 2002, and appellant admitted that the statement contained his signature. The meeting ended, and appellant subsequently showed Cecil and Simson a purchase agreement dated October 5, 2004. The agreement listed the seller as Betty Mattlin and the buyer as appellant through CSR Tremont LLC. It noted that appellant would acquire property owned by Mattlin Holdings LLC upon Betty Mattlin's death and that, in the meantime, he had the right to mortgage the property.

{¶12} Cecil confirmed that appellant's mortgage would not have been approved if it were known that fraudulent documents were submitted during the application process. In fact, Cecil noted that First City Bank has filed a civil claim for fraud against appellant based on the documentation he submitted as part of his application for the mortgage on Mattlin Holdings LLC's property.

{¶13} Betty Mattlin, who was 92 years old at the time of trial, verified that appellant managed her commercial real estate while he was employed at Wears, Kahn, and McMenamy. She also testified that she did not agree to sell Mattlin Holdings LLC to appellant in 2002 and that her signature as a seller on the 2002 purchase agreement was forged.

{¶14} Richard Mattlin testified that the 2004 purchase agreement of Mattlin Holdings LLC appears to contain the signature of his mother, Betty Mattlin. He also testified that he became aware of a discrepancy in a distribution Wears, Kahn, and McMenamy made to Betty Mattlin in 2005. He said that a statement from the property management company indicated that Betty Mattlin was supposed to get a distribution of $250,000 in September 2005, but Betty Mattlin's personal banking statements only showed a distribution to her in the amount of $200,000. The prosecutor asked Richard Mattlin where he obtained the property management company's statement, which was identified as Exhibit 39, and he said that he could not remember.

{¶15} The prosecution recalled Richard Mattlin a few days later, over appellant's objection. This time, Richard Mattlin testified that since his last testimony, he compared Exhibit 39 with records Mattlin Holdings LLC received in the ordinary course of business, and he said that the exhibit was a true and accurate business record.

{¶16} Bank records admitted into evidence indicate that, on October 4, 2004, money that Wears, Kahn, and McMenamy held in the bank for two clients—Dublin Imaging and Sports Medicine Ltd and Broad Street ProScan Imaging Ltd—was transferred to a North American Title Company escrow account, which was set up for

the purchase of a condominium in Florida for appellant, his wife, and his in-laws. During that transaction, $80,000 was taken from each of the two clients. Also, on October 4, 2004, $58,618.21 was transferred from a miscellaneous account belonging to Wears, Kahn, and McMenamy to the North American Title Company escrow account. On October 18, 2004, money was deposited into the accounts holding Wears, Kahn, and McMenamy's miscellaneous funds and the client funds of Dublin Imaging and Sports Medicine Ltd and Broad Street ProScan Imaging Ltd. The deposits were in an amount equal to that taken out from each account on October 4, 2004. The money came from an account belonging to Columbus Properties LLC, which appellant partially owned, and a bank slip indicated that the transaction occurred " 'per David Rhodehamel.' " (Tr. Vol. III, 101.) Prior to that transaction, the $795,486 check from appellant's First City Bank mortgage was deposited into Columbus Properties LLC's account.

{¶17} Bank records also showed the following. A $250,000 check was written to Betty Mattlin in September 2005 from the Wears, Kahn, and McMenamy commingled account. The check was deposited back into the account, however, and another check from that account in the amount of $200,000 was written to Betty Mattlin. That latter check was deposited into Betty Mattlin's personal account in October 2005.

{¶18} Next, Columbus Police Detective Cynthia Shaw testified that her investigation of appellant revealed that he stopped making payments on the First City Bank mortgage in 2009. And, she testified that the payments appellant did make "roughly" totaled $300,000. (Tr. Vol. VII, 191.) She also testified that she found no bank records directly linking appellant to the withdrawal of money belonging to Dublin

Imaging and Sports Medicine Ltd, Broad Street ProScan Imaging Ltd, and the miscellaneous account of Wears, Kahn, and McMenamy. Columbus Police Officer Anthony Simon testified that a computer containing files named "DRhodehamel" and "DRR archive" was seized during an investigation of appellant. (Tr. Vol. VI, 145.) Simon searched those files and found a copy of the 2002 purchase agreement of Mattlin Holdings LLC. Lastly, the parties stipulated that James Booker would testify that he started working for Wears, Kahn, and McMenamy in early 2003 and that it "was [his] understanding that [appellant] was not the property manager for Mattlin Holdings, although occasionally property managers and personnel would discuss Mattlin Holdings issues with him." (Tr. Vol. VIII, 72.)

{¶19} Before jury deliberations, the prosecution dismissed the charge of securing writings by deception, and the trial court granted appellant's motion to dismiss the tampering with records charges. In addition, the trial court severed the three money laundering counts into six separate counts. The jury found appellant guilty of the non-dismissed counts, except for the theft of $225,000 from Mattlin Holdings LLC. Afterward, the trial court sentenced appellant to six years imprisonment. The sentence included consecutive two-year prison terms for the offenses of forgery and theft of mortgage proceeds. Appellant did not object to the trial court not merging those two offenses.

{¶20} Appellant appeals, raising the following assignments of error:

> I. (a) THE CONVICTION ON COUNT II OF CASE NO. 09-CR-6828 -- THE ALLEGED THEFT OF BANK LOAN PROCEEDS -- WAS BASED ON INSUFFICIENT EVIDENCE, CONTRA THE DUE PROCESS CLAUSE OF

> THE CONSTITUTION. (b) THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. (a) THE CONVICTION ON COUNT III OF CASE NO. 09-CR-6828 -- THE FORGERY COUNT -- WAS BASED ON INSUFFICIENT EVIDENCE, CONTRA THE DUE PROCESS CLAUSE OF THE CONSTITUTION. (b) THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
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> III. WHEN THE TRIAL COURT SENTENCES CONSECUTIVELY ON THEFT AND FORGERY, THE SENTENCE MUST BE VACATED WHEN THE TWO CONVICTIONS ARE ALLIED OFFENSES OF SIMILAR IMPORT UNDER STATE v. JOHNSON, 128 OHIO ST.3D 153, 2010-OHIO-6314, CONTRA THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.
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> IV. (a) THE CONVICTIONS ON COUNTS V THROUGH X OF CASE NO. 10-CR-3697 -- THE MONEY LAUNDERING COUNTS -- WERE BASED ON INSUFFICIENT EVIDENCE, CONTRA THE DUE PROCESS CLAUSE OF THE CONSTITUTION. (b) THE VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> V. (a) THE CONVICTION ON COUNT X OF CASE NO. 10-CR-3697 -- THE THEFT COUNT -- WAS BASED ON INSUFFICIENT EVIDENCE, CONTRA THE DUE PROCESS CLAUSE OF THE CONSTITUTION. (b) THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN THE COURT ERRED IN PERMITTING THE RECALL OF A KEY WITNESS.

{¶21} We begin by addressing appellant's first, second, fourth, and fifth assignments of error together because they concern similar issues. In those assignments of error, appellant first asserts that his convictions are based on insufficient evidence. We disagree.

{¶22} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*,

78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks,* paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶23} Appellant contends that there is insufficient evidence to support his forgery conviction. R.C. 2913.31(A)(2) defines forgery and states that "[n]o person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall * * * [f]orge any writing so that it purports to be genuine when it actually is spurious." A defendant's conviction for forgery can be based on circumstantial evidence. See *State v. Franklin* (1991), 62 Ohio St.3d 118, 124.

{¶24} Betty Mattlin testified that the 2002 purchase agreement purporting to sell Mattlin Holdings LLC to appellant was spurious and contained her forged signature. The evidence establishes that appellant, having a purpose to defraud, created that agreement and forged Betty Mattlin's signature on it given that, (1) when he applied for a mortgage on Mattlin Holdings LLC's property, he told First City Bank in an e-mail and

on a financial statement that he acquired the company in 2002, (2) the bank had a copy of the agreement in appellant's mortgage application file, and (3) the document was found on a computer linked to appellant. Accordingly, we conclude that appellant's forgery conviction is based on sufficient evidence.

{¶25} Appellant also argues that there is insufficient evidence to support his conviction for theft of the mortgage proceeds from First City Bank under R.C. 2913.02(A)(3), which states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [b]y deception." As above, however, the evidence shows that when appellant submitted an application to First City Bank for a mortgage on Mattlin Holdings LLC's property, he lied to the bank by claiming that he acquired the company in 2002, and, to reinforce that false claim, he gave the bank a copy of the spurious 2002 purchase agreement.

{¶26} Nevertheless, appellant contends that his conviction for theft of mortgage proceeds cannot stand because neither Cecil nor Dygert testified that they relied on the purchase agreement when they approved appellant's mortgage. Construing the evidence in a light most favorable to the state, we conclude that it was reasonable for the jury to find that Cecil relied on the agreement when he approved appellant's mortgage given that he testified to the importance of confirming that appellant owned the property being mortgaged. Likewise, it was reasonable for the jury to conclude that Dygert relied on the agreement because he had asked appellant to supply proof of his ownership of the property being mortgaged.

{¶27} Next, appellant argues that there is no evidence that First City Bank suffered any deprivation from appellant. But the bank was deprived of the mortgage proceeds it was deceived into giving appellant. And, the bank suffered deprivation when appellant defaulted on the mortgage. For all these reasons, we conclude that sufficient evidence supports appellant's conviction for theft of mortgage proceeds.

{¶28} Appellant additionally asserts that there is insufficient evidence to convict him of money laundering. Appellant was charged with money laundering under R.C. 1315.55(A)(4), which states that "[n]o person shall conduct or structure or attempt to conduct or structure a transaction that involves the proceeds of corrupt activity that is of a value greater than ten thousand dollars if the person knows or has reasonable cause to know that the transaction involves the proceeds of corrupt activity."

{¶29} Relying on *United States v. Miles* (C.A.11, 2002), 290 F.3d 1341, and a magistrate's decision in *United States v. Burroughs* (Aug. 25, 2010), S.D.Ga. No. CR410-154, appellant contends that the prosecution must also prove that he intended to conceal the proceeds of corrupt activity. But these federal cases are not binding precedent on this court. See *State v. Burnett*, 93 Ohio St.3d 419, 424, 2001-Ohio-1581. In any event, we need not apply the federal cases because, unlike here, they concern defendants charged with violating a money laundering statute containing an intent-to-conceal element. See *Burroughs*; *Miles* at 1355. Appellant also argues that there is insufficient evidence linking him to the transactions the prosecution labeled as money laundering. But appellant is tied to those transactions because they pertain to the purchase of a condominium for him, his wife, and his in-laws.

{¶30} Appellant further asserts that the transactions surrounding that condominium purchase do not constitute money laundering under R.C. 1315.55(A)(4). We conclude, however, that the transactions fall under the money laundering statute. Appellant initiated his scheme by stealing money, in excess of $10,000, from a miscellaneous account of Wears, Kahn, and McMenamy, as well as from two of the company's clients. These acts of theft constitute corrupt activity for purposes of money laundering under R.C. 1315.55(A)(4). See R.C. 1315.51(B) and 2923.31(I)(2)(c). Appellant used the proceeds of the corrupt activity in a series of transactions, in violation of the money laundering statute, when he placed them into the escrow account set up for the purchase of his condominium. Afterward, in another set of transactions, appellant used the First City Bank mortgage proceeds, which he obtained through theft by deception, to repay Dublin Imaging and Sports Ltd, Broad Street ProScan Imaging Ltd, and the miscellaneous account from Wears, Kahn, and McMenamy. Therefore, in the final analysis, we conclude that sufficient evidence supports appellant's convictions for money laundering.

{¶31} Lastly, appellant asserts that there is insufficient evidence to convict him for theft of $50,000 from Mattlin Holdings LLC. Wears, Kahn, and McMenamy sent Mattlin Holdings LLC a property activity statement indicating a disbursement of $250,000 in September 2005. But Betty Mattlin only received a check for $200,000. Given appellant's history and connection with Mattlin Holdings LLC, the jury could reasonably infer that appellant was engaging in another scheme to bilk that company by not disbursing the $50,000 that its property activity statement said it was entitled to and

by leaving that money in the bank at his disposal. To be sure, a check in the amount of $250,000 was written to Betty Mattlin in September 2005, but it was never given to her. Consequently, we conclude that sufficient evidence supports appellant's conviction for theft of $50,000 from Mattlin Holdings LLC.

{¶32} Next, appellant argues that his convictions are against the manifest weight of the evidence. We disagree.

{¶33} In determining whether a verdict is against the manifest weight of the evidence, we sit as a " 'thirteenth juror.' " *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine "whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶34} Appellant contends that his convictions for forgery and theft of mortgage proceeds from First City Bank are against the manifest weight of the evidence because

Exhibit P demonstrates that officials at the bank understood that he did not acquire Mattlin Holdings LLC in 2002. To be sure, Exhibit P, an undated letter to appellant, indicates that at one point in the mortgage application process, the bank was unclear about appellant's ownership of Mattlin Holdings LLC. By the time the mortgage was approved, however, appellant had falsely claimed to the bank that he acquired the company in 2002, and he provided a fraudulent purchase agreement to support that claim. Therefore, Exhibit P does not weigh against appellant's convictions for forgery and theft of mortgage proceeds.

{¶35} Appellant also argues that his conviction for theft of mortgage proceeds is against the manifest weight of the evidence because, despite the spurious 2002 purchase agreement, his 2004 purchase agreement entitled him to mortgage Mattlin Holdings LLC's property. But appellant's mortgage was approved on his false claim that he acquired Mattlin Holdings LLC in 2002, and, in fact, First City Bank filed a civil claim for fraud against appellant due to that misrepresentation. Accordingly, the 2004 purchase agreement does not weigh against appellant's conviction for theft of mortgage proceeds.

{¶36} Next, appellant argues that his conviction for theft of $50,000 from Mattlin Holdings LLC is against the manifest weight of the evidence. Appellant notes that the theft could only be conducted through a deliberate manipulation of the bookkeeping system at Wears, Kahn, and McMenamy, but that Connolly testified that he was not "technologically savvy." (Tr. Vol. IV, 145.) Connolly also testified, however, that it was

likely appellant would have been able to figure the system out if he "looked through" it. (Tr. Vol. IV, 145.)

{¶37} Appellant additionally contends that the weight of the evidence demonstrates that he had no opportunity to commit the theft from Mattlin Holdings LLC because he was not the property manager when the crime occurred in 2005. To be sure, in 2002, Jerry Durham was appointed property manager for clients of Wears, Kahn, and McMenamy. When that occurred, however, appellant became an "overseer of the property management area." (Tr. Vol. IV, 79.) As an "overseer," appellant was consulted on any issues that came up regarding property management. By 2005, appellant had responsibility over all facets of Wears, Kahn, and McMenamy, including the commingled account containing the funds of the company's clients. Consequently, appellant had the opportunity to take advantage of his autonomous and powerful position at Wears, Kahn, and McMenamy to defraud Mattlin Holdings LLC. Therefore, we conclude that appellant's conviction for the theft from Mattlin Holdings LLC is not against the manifest weight of the evidence.

{¶38} To challenge the weight of the evidence for his money laundering convictions, appellant notes Shaw's testimony that she found no bank records directly linking appellant to the withdrawal of money belonging to Dublin Imaging and Sports Medicine Ltd, Broad Street ProScan Imaging Ltd, and a miscellaneous account of Wears, Kahn, and McMenamy. But, as above, it was within the province of the jury to infer that appellant made those withdrawals because the money went toward the purchase of a condominium for him, his wife, and his in-laws.

{¶39} Lastly, while discussing his first and fifth assignments of error, appellant has asserted that error occurred in the jury instructions, during the prosecutor's closing argument, and with the admission of Richard Mattlin's testimony provided when he was recalled to the witness stand. But these issues do not correspond with the matters raised in the first and fifth assignments of error, which only concern sufficiency and manifest weight of the evidence. Appellant was required to address these unrelated issues in separate assignments of error; therefore, we need not address them. See *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. No. 10AP-419, 2011-Ohio-431, ¶54. Having concluded that appellant's convictions are neither based on insufficient evidence nor against the manifest weight of the evidence, we overrule his first, second, fourth, and fifth assignments of error.

{¶40} In his third assignment of error, appellant argues that the trial court should have merged his convictions for forgery and theft of mortgage proceeds. We disagree.

{¶41} Because appellant did not raise the merger issue at trial, the plain-error standard applies. See *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶127; Crim.R. 52(B). Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law. *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶55.

{¶42} R.C. 2941.25, Ohio's multiple count statute, provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for

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

{¶43} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶44, the Supreme Court of Ohio overruled *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, "to the extent" *Rance* called for a comparison of multiple offenses "solely in the abstract." Pursuant to *Johnson*, "[i]f 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.' " Id. at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50 (Lanzinger, J., concurring in judgment only). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." *Johnson* at ¶50. "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." Id. at ¶51. (Emphasis sic.)

{¶44} In support of his argument that merger applies to his convictions for forgery and theft of mortgage proceeds, appellant relies on *State v. Wolfe* (1983), 10 Ohio App.3d 324, 325-26, in which the Second District Court of Appeals concluded that two co-defendants' theft and forgery convictions merged. We need not reach that same

conclusion here, however, based on an examination of appellant's conduct, which, according to *Johnson*, involves an "inherently subjective" analysis. Id. at ¶52.

{¶45} Appellant's forgery conviction stems from his fraudulent creation of the 2002 purchase agreement. His theft conviction, however, stems from his obtaining a mortgage for which he was not entitled to in 2004. Because appellant committed the forgery separately and with a separate animus from the theft of the mortgage proceeds, the offenses do not merge under R.C. 2941.25. See *State v. Habash* (Jan. 31, 1996), 9th Dist. No. 17073 (concluding, under a subjective analysis, that there is no merger of two co-defendants' forgery and theft convictions because the "forgery convictions were based on their acts of endorsing * * * food stamps. Their theft convictions, on the other hand, were based on the acts of redeeming the food stamps for cash"). Therefore, the trial court did not commit error, let alone plain error, by not merging appellant's convictions for forgery and theft of mortgage proceeds. Accordingly, we overrule appellant's third assignment of error.

{¶46} In summary, we overrule appellant's five assignments of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgments affirmed.

BROWN and SADLER, JJ., concur.