[Cite as *State v. Ruby*, 2011-Ohio-4864.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-10-028

Appellee — Trial Court No. 09-CR-865

v.

Ronald D. Ruby — **DECISION AND JUDGMENT**

Appellant — Decided: September 23, 2011

* * * * *

Thomas L. Stierwalt, Sandusky County Prosecuting Attorney,
and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

Andrew R. Schuman, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Defendant-appellant, Ronald Ruby, appeals his conviction and sentence on multiple offenses arising from a home invasion at the residence of an elderly couple, James and Mary Kohler. Appellant raises numerous assignments of error in which he challenges the propriety of his sentences and the effectiveness of his trial counsel. For

the reasons that follow, we affirm the judgment of the Sandusky County Court of Common Pleas in part, and reverse in part, and remand the cause for the limited purposes set forth below.

I. FACTS

{¶ 2} During the night of July 2, 2009, appellant and co-defendants, Jimmy Houston and Paul Biddwell, broke into the Gibsonburg home of 74-year-old James Kohler and 76-year-old Mary Kohler, beat them severely, and stole 35 firearms and money from the residence. The burglary was planned in advance by Houston, who had visited the Kohler residence on several occasions to sell Mr. Kohler "a couple of junk rifles." According to appellant, the burglary was planned to take place while the Kohlers were out of town. On the evening of the burglary, Houston dropped off Bidwell and appellant at the end of the Kohlers' driveway. When the two walked to the house, they observed Mr. Kohler asleep on the couch in the living room. They kicked in the front door, beat Mr. Kohler in the head, grabbed him by his disabled right arm, threw him headfirst into a brick fireplace hearth, continued to beat him on the face as he lay on the floor, resulting in a broken eye socket and loss of consciousness, and then tied him up. They then proceeded upstairs to Mrs. Kohler's bedroom, where she was sleeping, beat her in the face, threatened her with rape, bound her hands and feet, and pushed her down a flight of stairs.

{¶ 3} On July 30, 2009, the Sandusky County Grand Jury returned a 43-count indictment against appellant, charging him with two counts of attempted murder in

violation of R.C. 2903.02(A) and 2923.02, felonies of the first degree (Counts 1 and 2), two counts of felonious assault in violation of R.C. 2903.11(A)(1), felonies of the second degree (Counts 3 and 4), two counts of kidnapping in violation of R.C. 2905.01(A)(2), felonies of the first degree (Counts 5 and 6), two counts of aggravated robbery in violation of R.C. 2911.01(A)(3), felonies of the first degree (Counts 7and 8), one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree, with a firearm specification (Count 9), 33 counts of grand theft in violation of R.C. 2913.02(A)(1) and (B)(4), felonies of the third degree (Counts 10-42), and one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree (Count 43).

{¶ 4} On September 23, 2009, appellant withdrew his initial pleas of not guilty to all counts and entered guilty pleas to Counts 1 and 2 (attempted murder of James Kohler and Mary Kohler, respectively), Count 5 (kidnapping of James Kohler), Count 9 (aggravated burglary with a firearm specification), and Count 10 (grand theft of a firearm). In exchange, the state agreed to dismiss the remaining charges at sentencing.

{¶ 5} A sentencing hearing was held on May 11, 2010. During the hearing, appellant's counsel stated, "It would be our position that the Kidnapping, the Aggravated Burglary charges would merge, that those have a single animus, that they did not occur separately." The trial court did not explicitly rule on the issue of allied offenses, but did impose a separate sentence for each offense. Specifically, the court sentenced appellant to a ten-year term of incarceration for each attempted murder, to be served consecutively,

ten years for kidnapping and aggravated burglary, to be served concurrently to each other and to the sentences for attempted murder, and a mandatory one-year term for the firearm specification to be served consecutively to the sentences for attempted murder. The court also imposed a one-year sentence for the grand theft. The court did not specifically state that the one-year sentence imposed for grand theft would run consecutive to the murder counts, but did state that the aggregate sentence was 22 years.

{¶ 6} On May 12, 2010, the trial court filed its judgment entry, which also failed to specify that the one-year prison term for grand theft would be served consecutively, but provided that "Defendant is further sentenced to a one year term in prison on count Ten, for an aggregate sentence of TWENTY-TWO (22) years prison." Appellant now appeals that judgment, asserting the following assignments of error:

{¶ 7} "1. The sentence was contrary to law and constitutes an abuse of discretion.

{¶ 8} "2. The trial court erred in imposing consecutive sentences without making statutory findings required by R.C. 2929.14(E)(4) and 2929.41(A).

{¶ 9} "3. The trial court erred by not advising the defendant of the consequences of failing to pay costs of prosecution, pursuant to R.C. 2947.23.

{¶ 10} "4. The trial court failed to include in the sentencing entry the name and section reference for the firearm specification, as required by R.C. 2929.19(B)(3).

{¶ 11} "5. Trial counsel was ineffective in violation of the United States and Ohio Constitutions for failing to make the arguments and objections set forth in the preceding

assignments of error, and for permitting the defendant to enter a plea that was not knowing, intelligent and voluntary.

{¶ 12} "6. The trial court failed to determine whether the offenses were allied offenses of similar import and the result of a single act."

II. PROPORTIONALITY, CONSISTENCY, AND LEGALITY OF SENTENCE

{¶ 13} In his first assignment of error, appellant asserts that his 22-year sentence is contrary to law and constitutes an abuse of the trial court's discretion. Appellant delineates four separate arguments in support of his position.

A. Conservation of Resources

{¶ 14} Appellant first argues that the trial court violated the conservation-of-resources principle embodied in R.C. 2929.13(A), which provides that a "sentence shall not impose an unnecessary burden on state or local government resources." Appellant points out that "a 22-year sentence * * * places him at nearly 60 years old at [the] time of his anticipated release" and posits that most individuals cease committing serious crimes as they approach the age of 60. Thus, appellant reasons, "Because any danger [he] might pose [to society] would be abated when he reaches his fifties, the trial court violated the principle set forth in R.C. 2929.13(A) by imposing a 22-year prison term."

{¶ 15} R.C. 2929.13(A) does not establish a rule of felony sentencing under which no offender may be imprisoned past a certain age. The statute precludes a sentence from imposing an "unnecessary burden" on government resources, but contains no presumption that imprisoning an offender beyond the age of 50 or 60 imposes such a

burden. By its plain language, R.C. 2929.13(A) "'suggests that the costs, both economic and societal, should not outweigh the benefit that the people of the state derive from an offender's incarceration.'" *State v. Ward*, 6th Dist. No. OT-10-005, 2010-Ohio-5164, ¶ 9, quoting *State v. Vlahopoulos*, 154 Ohio App.3d 450, 2003-Ohio-5070, ¶ 5, abrogated on other grounds by *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. See, also, *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407, ¶ 33.

{¶ 16} Moreover, although resource burdens may be a relevant sentencing criterion, a sentencing court is not required to elevate resource conservation above the principles and purposes of felony sentencing under R.C. 2929.11 or the seriousness and recidivism factors in R.C. 2929.12. *Carlisle* at ¶ 33. See, also, *State v. Bianca*, 5th Dist. No. 10-COA-041, 2011-Ohio-3321, ¶ 16; *State v. Weber*, 5th Dist. No. 10-COA-003, 2010-Ohio-4058, ¶ 24-25; *State v. Kase*, 187 Ohio App.3d 590, 2010-Ohio-2688, ¶ 20; *State v. Hyland*, 12th Dist. No. CA2005-05-103, 2006-Ohio-339, ¶ 34-35; *State v. Foster*, 11th Dist. No. 2004-P-0104, 2005-Ohio-5281, ¶ 66.

{¶ 17} In *State v. Ferenbaugh*, 5th Dist. No. 03COA038, 2004-Ohio-977, ¶ 8, the Fifth Appellate District held:

{¶ 18} "The record sub judice is devoid of any evidence to support the claim of an 'unnecessary burden on state or local government resources.' In fact, the record indicates [that] appellant's past probation violations have placed a burden on local government resources. * * * Having failed twice on local supervision resulting in probation violation

hearings, resentencing and jail time, we find that the least impact on local and state government resources in this case would be imprisonment."

{¶ 19} In *State v. Konstantinov*, 5th Dist. No. CAA 09 0075, 2010-Ohio-3098, ¶ 24, the court concluded, "Despite appellant's age [of 65], based on his long pattern of criminal activity the court did not err in rejecting his argument * * * that [an aggregate six year term of] incarceration placed an unnecessary burden on state resources." Similarly, in *State v. Burrows*, 5th Dist. No. 07CAA080039, 2008-Ohio-2861, ¶ 26, the court held that an eight-year sentence imposed on a 48-year-old offender did not create an unnecessary burden on state resources, where the record revealed that appellant had "committed numerous theft offenses" and "had numerous previous criminal convictions."

{¶ 20} Even if we accepted the general proposition that most offenders will stop committing serious crimes by the time they reach their fifties or sixties, the record in this case does not disclose that appellant is one of them. To the contrary, appellant has a long pattern of criminal activity that spans from the time he was a juvenile, including previous convictions for assault, attempted aggravated burglary, theft, forgery, carrying concealed weapons, multiple counts of receiving stolen property, and various drug-related offenses, as well as several probation violations. In fact, appellant was on probation when he committed the present offenses. In addition, the crimes in this case were carried out with grievous violence against two elderly victims, which prompted the trial court's finding that "[t]his crime is about as heinous as they come." Based on the present record, we cannot conclude that appellant's sentence is contrary to R.C. 2929.13(A).

B. Proportionality and Consistency

{¶ 21} Appellant's second contention is that his sentence is neither proportional nor consistent under R.C. 2929.11(B) and constitutes an abuse of discretion. Appellant argues that the trial court "failed to engage in a proportionality or consistency analysis, making no reference to such an analysis in its sentencing entry and merely imposing the same approximate sentences on all three defendants, even though Ruby asserted that he played no role in the beatings." Appellant reasons that he should have received a shorter sentence than his co-defendants because he denied any participation in the beatings and Houston planned the invasion.

{¶ 22} When reviewing a felony sentence, this court has repeatedly followed the two-step analysis adopted by a plurality of the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See, e.g., *State v. Loyd*, 6th Dist. Nos. E-10-055, E-10-056, 2011-Ohio-2964, ¶ 35; *State v. Mendoza*, 6th Dist. No. WD-008, 2011-Ohio-1971, ¶ 22; *State v. Donald*, 6th Dist. No. S-09-027, 2010-Ohio-2790, ¶ 6; and *State v. Turner*, 6th Dist. No. L-09-1195, 2010-Ohio-2630, ¶ 50. Under that approach, an appellate court must first "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." *Kalish* at ¶ 26.

{¶ 23} We have also recognized that sentencing consistency is not derived from a numerical comparison of prison terms between co-defendants or by reference to prison terms imposed in other cases where defendants were sentenced for the same offense. "Consistent sentencing occurs when a trial court properly considers the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 in every case." *State v. Elkins*, 6th Dist. No. S-08-014, 2009-Ohio-2602, ¶ 17. See, also, *State v. O'Neil*, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, ¶ 31.

{¶ 24} With regard to the first prong of the *Kalish* test, appellant's only argument at this point is that the trial court failed to consider the sentencing guidelines and factors in R.C. 2929.11 and 2929.12. This argument, however, is belied by the record. At sentencing, the court explicitly recognized its obligations "to protect the public from future crimes," "to impose an appropriate punishment," to "consider factors which indicate that you would likely commit future crimes," and "to be consistent with my sentences and * * * to take into consideration the relevant seriousness and recidivism factors under [R.C.] 2929.12(B) through (E)." This is more than sufficient to indicate the trial court's compliance with those statutes. *State v. O'Neil*, supra, 2011-Ohio-2202, ¶ 26. Moreover, even "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Kalish* at ¶ 18, fn. 4. The presumption remains in the absence of an affirmative showing to the contrary. *State v. James*, 7th Dist. No. 07 CO 47, 2009-Ohio-4392, ¶ 50.

{¶ 25} Addressing the second step of the *Kalish* test, we find nothing unreasonable, arbitrary, or unconscionable in the trial court's application of the relevant considerations in R.C. 2929.11 and 2929.12. Before imposing sentence, the trial court "considered the statements of the victims, the Presentence Investigation, the official version of the facts and defendant's version." In regard to the beatings, the trial court explained, "Each of the three [defendants] have a slightly different take on what happened, so we * * * can't really identify the person who did the beating, but certainly can place all three defendants at the scene." The court then noted that appellant's "criminal history [is] quite lengthy, * * * about 16 years * * * of criminal history," and that appellant has "not been successfully rehabilitated." The court found that "[t]his crime is about as heinous as they come," considered that the Kohlers suffered "serious physical and psychological harm," which was "exacerbated due to their ages," and explained that it could not identify "any factors which would appear to make the offense less serious for sentencing purposes."

{¶ 26} Moreover, even if we were inclined to test consistency and proportionality by comparing the sentences in this case, we could not conclude that the trial court abused its discretion in failing to impose a shorter aggregate sentence on appellant than it imposed on his co-defendants. With respect to the beatings, appellant stood in no better sentencing position than his co-defendants. It appears from the record at sentencing that each defendant denied a role in the beatings and blamed one or more of the others. According to the presentence investigation, appellant claimed that Biddwell beat the

Kohlers, Biddwell claimed that appellant and Houston beat the Kohlers, and Houston did not give a statement to police. Thus, there was good reason for the trial court's refusal to distinguish culpability on this basis. With regard to planning the invasion, while Houston may have been the architect of the project, the record does not reveal the actual length of Houston's sentence, the extent of his prior criminal history, or whether he too was on probation at the time of this offense. See *State v. Smith*, 8th Dist. No. 95243, 2011-Ohio-3051, ¶ 68-70.

C. Consecutive Sentence for Grand Theft

{¶ 27} Appellant further contends that his sentence should be reduced by one year because the trial court failed to specify in its sentencing entry whether the one-year term for grand theft would be served consecutively or concurrently to the prison terms for attempted murder. Appellant argues that any ambiguity as to whether a sentence is to be served concurrently or consecutively must be resolved in the defendant's favor. Appellant also suggests that the sentencing entry is inconsistent with the statements made by the trial court at the sentencing hearing in regard to the sentence for grand theft.

{¶ 28} The problem with appellant's argument, however, is that there is no ambiguity or inconsistency in this case. Although the trial court did not specifically state at sentencing or in its entry that the term for grand theft was to run "consecutive" to the terms for attempted murder, it made eminently clear at both times that the one-year term for grand theft brought the aggregate prison term up from 21 to 22 years.

D. The Firearm Specification

{¶ 29} Finally, appellant argues that the total prison term should be reduced by one year because the trial court improperly ran the mandatory one-year prison sentence for the firearm specification consecutive to the aggregate 20-year term imposed on the murder counts. According to appellant, the firearm specification can only be run consecutive to the sentence on the base offense of aggravated burglary, which was run concurrent with the sentences for attempted murder.

{¶ 30} This precise issue was addressed by the court in *State v. Spears*, 8th Dist. No. 94089, 2010-Ohio-2229. In that case, the defendant Myron Spears pled guilty to one count of felonious assault with a three-year firearm specification, one count of kidnapping, and one count of aggravated burglary. The trial court sentenced Spears to seven years for felonious assault and eight years on the kidnapping and aggravated burglary charges, and ordered those sentences to run concurrently. Rejecting Spears' argument that his total sentence should be ten years, rather than eleven years, the Eighth District Court of Appeals held:

{¶ 31} "However, R.C. 2929.14(E)(1)(a) requires that the mandatory three-year prison sentence for the firearm specification be served 'consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.' Thus, the three-year firearm specification must be served before both the seven-year sentence on the felonious assault count and the concurrent eight-year sentences on the kidnapping and aggravated burglary counts begin. When the three years is added to the

eight years, the sentence adds up to a total of eleven years, not ten, even though the eight-year sentences were ordered to run concurrently with the felonious assault conviction." Id. at ¶ 9.

{¶ 32} Accordingly, appellant's first assignment of error is not well-taken.

III. STATUTORY FINDINGS FOR CONSECUTIVE SENTENCES

{¶ 33} In his second assignment of error, appellant asserts that the trial court erred by imposing consecutive sentences without making the statutory findings required by R.C. 2929.14(E)(4) and 2929.41(A), which were severed from the sentencing code by the Supreme Court of Ohio in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Appellant argues that *Foster* has been "undone" by the United States Supreme Court's decision in *Oregon v. Ice* (2009), 555 U.S. 160, and that "[a]ny decision in this case should be stayed until the Supreme Court of Ohio issues a decision in *Hodge* regarding the effect of *Ice* on the *Foster* case." At the time appellant's brief in this case was filed, however, the Supreme Court of Ohio had already issued its decision in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, certiorari denied, *Hodge v. Ohio* (2011), 131 S.Ct. 3063. The court held in *Hodge* that *Ice* did not revive the former consecutive-sentencing provisions of R.C. 2929.14(E)(4) and 2929.41(A) that were excised in *Foster*, and that trial courts are not required to engage in fact-finding before imposing consecutive sentences unless the General Assembly enacts new legislation to that effect. Id. at paragraphs two and three of the syllabus.

{¶ 34} Relying on several pre-*Hodge* appellate decisions, appellant also suggests that "the Ohio General Assembly, through 2008 House Bill 130, had amended and re-enacted R.C. 2929.14(E)(4) with an effective date of April 7, 2009 and that any sentences subsequent to that date, like Ruby's, must be in compliance with these once excised statutes based on their re-enactment." In *Hodge*, however, the Ohio Supreme Court noted that the post-*Foster* amendments to R.C. 2929.14 did not constitute an affirmative reenactment of R.C. 2929.14(E)(4). Id. at ¶ 27, fn. 7. In fact, the decisions upon which appellant relies is typified by *State v. Jordan*, 11th Dist. No. 2009-T-0110, 2010-Ohio-5183, which held that "a sentencing judge, pronouncing a sentence after April 7, 2009, must again, as before *Foster's* release, make certain findings of fact before imposing consecutive sentences on a defendant." Id. at ¶ 14. That holding was reversed by the Ohio Supreme Court in *State v. Jordan*, 128 Ohio St.3d 268, 2011-Ohio-737, upon the authority of *Hodge*. Moreover, this court recently affirmed the principle that only an affirmative reenactment of the excised sentencing provisions will cause their revival, explaining that the mere act of reprinting those sections as part of amendments to other provisions does not constitute such a reenactment. *State v. Millhoan*, 6th Dist. Nos. L-10-1328, L-10-1329, 2011-Ohio-4741, quoting *State v. Hohvart*, 7th Dist. No. 10 MA 31, 2011-Ohio-3372, ¶ 11.

{¶ 35} Accordingly, appellant's second assignment of error is not well-taken.

IV. NOTIFICATION IN REGARD TO COSTS OF PROSECUTION

{¶ 36} In his third assignment of error, appellant contends that the trial court erred by not adhering to the mandates of R.C. 2947.23(A)(1)(a) and (b). We agree.

{¶ 37} R.C. 2947.23(A)(1) provides:

{¶ 38} "In all criminal cases, * * * the judge or magistrate shall include in the sentence the costs of prosecution * * * and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

{¶ 39} "(a) If the defendant fails to pay that judgment or fails to make timely payments toward that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

{¶ 40} "(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount."

{¶ 41} In *State v. King*, 6th Dist. No. WD-09-069, 2010-Ohio-3074, ¶ 12, this court held that the failure to provide the defendant with the required R.C. 2947.23(A)(1) notification in regard to the possible imposition of community service constitutes

reversible error. See, also, *State v. Cardamone*, 8th Dist. No. 94405, 2011-Ohio-818, ¶ 13-15.

{¶ 42} In this case, the trial court ordered that appellant pay the costs of prosecution, but did not give the required notification under R.C. 2947.23(A)(1)(a) and (b). The state argues that appellant is barred from raising the issue on appeal, because he did not file a motion to waive the payment of court costs at the time of sentencing. But the defendant's counsel in *King* also failed to file a motion to waive the payment of costs at sentencing, and we still sustained the assigned error in regard to lack of proper notification of potential community service under R.C. 2947.23(A)(1).

{¶ 43} Accordingly, appellant's third assignment of error is well-taken.

V. SECTION REFERENCE OF FIREARM SPECIFICATION

{¶ 44} In his fourth assignment of error, appellant asserts that the trial court failed to include in its sentencing entry the name and section reference of the firearm specification as required under R.C. 2929.19(B)(3)(b). We agree, in part.

{¶ 45} R.C. 2929.19(B)(3)(b) provides:

{¶ 46} "In addition to any other information, [the sentencing court shall] include in the sentencing entry the name and section reference to the offense or offenses, the sentence or sentences imposed and whether the sentence or sentences contain mandatory prison terms, if sentences are imposed for multiple counts whether the sentences are to be served concurrently or consecutively, and the name and section reference of any

specification or specifications for which sentence is imposed and the sentence or sentences imposed for the specification or specifications."

{¶ 47} The sentencing entry in this case clearly includes the name of the firearm specification. It imposes a "ONE (1) year mandatory sentence for the firearm specification" and provides that "[t]he mandatory one-year firearm specification term shall run consecutive to counts One and Two." It does not, however, include any section reference for that specification.

{¶ 48} Relying on *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, the state argues that "the firearm specification is not a separate offense that must be named in the sentencing entry." In *Ford*, the Ohio Supreme Court held that a firearm specification and its predicate offense are not allied offenses of similar import, "because a firearm specification is a penalty enhancement, not a criminal offense." Id. at paragraph one of the syllabus. But the nature of a firearm specification as a penalty enhancement, rather than a criminal offense, is irrelevant for purposes of R.C. 2929.19(B)(3)(b), which expressly provides that the sentencing entry shall include section references for both the specification and its predicate offense. Thus, the failure of the trial court to include a section reference for the firearm specification in its judgment entry constitutes error.

{¶ 49} Accordingly, appellant's fourth assignment of error is well-taken in part.

VI. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

{¶ 50} Appellant asserts in his fifth assignment of error that his trial counsel was ineffective "for failing to make the arguments and objections set forth in the preceding

assignments of error, and for permitting [him] to enter a plea that was not knowing, intelligent and voluntary." As to the latter contention, appellant alleges that his trial counsel failed to advise him of the aggregate possible penalty for the charged offenses and claims that if he had been so informed, he "would likely have not entered pleas to the charges and the outcome of the proceedings would have been different."

{¶ 51} The parties agree on the applicable test for determining claims of ineffective assistance of counsel. "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Prejudice exists where "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Pryor*, 5th Dist. No. 2007-CA-00166, 2008-Ohio-1249, ¶ 75.

{¶ 52} As to appellant's contention that his trial counsel failed to rectify the preceding errors, none of those assigned errors has been sustained on grounds that would affect the validity of appellant's pleas or the length of his sentence. In regard to appellant's allegation that he would have pled differently had his trial counsel informed him of the aggregate possible penalty, that allegation is not supported by the record. Appellant was well-aware of the maximum penalty he could receive for all offenses. At his plea hearing, the trial court informed appellant that he could receive a sentence of up to five years on the grant theft and up to ten years on each of the other four counts. The

trial court then advised appellant that "your plea will result in a conviction to all crimes charged" and that "the sentence on each count could be imposed either consecutive or concurrent."

{¶ 53} Accordingly, appellant's fifth assignment of error is not well-taken.

VII. ALLIED OFFENSES

{¶ 54} In his final assignment of error, appellant maintains that "the trial court should have conducted an allied offense analysis, found that the offenses were a single course of conduct, and merged all counts for sentencing." According to appellant, "[t]he break-in, beatings and theft offenses were, effectively, one transaction" and "the attempted murder involved the defendants being physically in control of the victims, indicating that the kidnapping was part and parcel of the attempted murder charges."

{¶ 55} R.C. 2941.25 provides:

{¶ 56} "(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.

{¶ 57} "(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."

{¶ 58} The Supreme Court of Ohio recently redefined the test for determining whether multiple offenses should be merged as allied offenses of similar import under R.C. 2941.25. In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44, the court overruled its prior decision in *State v. Rance* (1999), 85 Ohio St.3d 632, "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." Pursuant to *Johnson*, the conduct of the accused must be considered in determining whether two offenses should be merged as allied offenses of similar import under R.C. 2941.25. Id., at the syllabus. The determinative inquiry is two-fold: (1) "whether it is possible to commit one offense *and* commit the other with the same conduct," and (2) "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" (Emphasis sic.) Id. at ¶ 48-49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶ 50 (Lanzinger, J., dissenting). "If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged." Id. 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." (Emphasis sic.) Id. at 51.

{¶ 59} We can summarily conclude at the outset that the counts of aggravated burglary and grand theft should have been merged. At oral argument in this case, the state conceded, and we agree, that those offenses should be merged as allied offenses of

similar import under the present facts. The theft of firearms and money was the purpose and grand incidence of the burglary, and only those items were taken from the residence. See *State v. Bridgeman*, 2d Dist. No. 2010 CA 16, 2011-Ohio-2680, ¶ 54 (holding that the offenses of aggravated burglary and grand theft were committed with a single state of mind where the defendant forcibly entered a bank to commit grand theft, threatened the employees with a firearm, and left with money from the bank).

{¶ 60} Aside from aggravated burglary and grand theft, we find that all of the offenses in this case were committed with a separate animus. The two counts of attempted murder involve two different victims, and each attempted murder was "necessarily committed with a separate animus." 1973 Legislative Service Commission comments to R.C. 2941.25, 1972 Am.Sub.H.B. No. 511. See, also, *State v. Harvey*, 3d Dist. No. 5-10-05, 2010-Ohio-5408, ¶ 24 ("Clearly, a defendant can be convicted for more than one offense if each offense involves a different victim, even though the offenses charged are identical * * *"); *State v. Young*, 2d Dist. No. 23642, 2011-Ohio-747, ¶ 39 ("separate convictions and sentences are permitted when a defendant's conduct results in multiple victims"); *State v Poole*, 8th Dist. No. 94759, 2011-Ohio-716, ¶ 14, quoting *State v. Poole*, 8th Dist. No. 80150, 2002-Ohio- 5065, ¶ 33 ("'felonious assault [like attempted murder] is a crime defined in terms of conduct toward another and * * * where there are two victims, there is a dissimilar import for each person and the two charges of felonious assault are not allied offenses of similar import'").

{¶ 61} The attempted murders and the two allied theft offenses were not committed with the same animus. The facts of this case indicate that the animus for the beatings was to cause the death of the Kohlers. This animus was separate from the animus to commit the burglary and theft. See *State v. Rios*, 8th Dist. No. 95364, 2011-Ohio-3053, ¶ 65. The beatings, moreover, were entirely unnecessary for the successful commission of the theft offenses. See *State v. Howard*, 1st Dist. No. C-100240, 2011-Ohio-2862, ¶ 55. Contrary to appellant's assertion, there is no indication in the record that the purpose of the beatings was to establish physical control over the Kohlers while the burglary and theft were in progress and, in any event, it was hardly necessary under the circumstances for appellant and his co-defendants to beat two frail and elderly victims to the brink of death in order to control them while those offenses were being committed. Indeed, Mrs. Kohler aptly stated at sentencing, "The person who planned this robbery knew that my husband was physically handicapped and I was a small person. Who would beat another human being under these circumstances?"

{¶ 62} The record also reveals that the kidnapping of Mr. Kohler was committed with a separate animus, distinct from the animus that drove the attempted murders and from the animus that directed the theft offenses. Mr. Kohler was 74 years of age, suffering from a stroke-related disability, and already beaten far beyond what was necessary to control his person or insure his compliance when he was tied up. Indeed, it appears from the record that Mr. Kohler was laying on the floor unconscious with a broken eye socket at the time he was restrained. Under these circumstances, we find that

the kidnapping took on a significance of its own, demonstrating a separate animus sufficient to sustain separate convictions and sentences for these offenses. Cf. *State v. Edwards*, 6th Dist. No. L-08-1408, 2010-Ohio-2582, ¶ 17.

{¶ 63} Accordingly, appellant's sixth assignment of error is well-taken to the extent that the trial court failed to merge the counts of aggravated burglary and grand theft.

{¶ 64} The judgment of the Sandusky County Court of Common Pleas is affirmed in part, and reversed in part. The sentences imposed for aggravated burglary and grand theft are vacated. The portion of the sentence relative to costs of prosecution is vacated. The cause is remanded for a new sentencing hearing on those matters, and for further proceedings consistent with this decision. Costs of this appeal are assessed equally to the parties pursuant to App.R. 24(A)(4).

JUDGMENT AFFIRMED IN PART,
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____

JUDGE

Arlene Singer, J. _____

_____

Thomas J. Osowik, P.J. _____ JUDGE

CONCUR.

_____

JUDGE