[Cite as *State v. Raleigh*, 2010-Ohio-2966.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2009-08-046 CA2009-08-047
- vs -	:	O P I N I O N
	:	6/28/2010
MICHAEL C. RALEIGH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case Nos. 2009CR00035 and 2009CR00201

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

Michaela M. Stagnaro, 810 Sycamore Street, 2nd Floor, Cincinnati, Ohio 45202, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Michael C. Raleigh, appeals his conviction and sentence in the Clermont County Common Pleas Court for three burglaries, grand theft of six firearms, breaking and entering, receiving stolen property and two thefts. We affirm in part, reverse in part, and remand.

{¶2} Lisa Fridley returned to her home on the evening of October 2, 2008. Fridley entered her detached garage/barn the following morning, and found most of her tools

and equipment missing. Fridley reported the missing items to the sheriff's department; however, the sheriff was unable to find any fingerprints or evidence related to the theft.

{¶3} On November 3, 2008, Diane Re arrived home after work and found her jewelry box and six weapons missing. Re reported the theft to the sheriff's department, which was unable to find any damage or forced entry into the home. An investigator with the sheriff's office later questioned Re's neighbor, Elaine Harris, who reported she had seen a vehicle with a dark blue fender around 12:30 in the afternoon at Re's house. Harris also witnessed a white male enter the home and reemerge carrying something approximately two to three feet long wrapped in black. As Harris walked toward Re's home, she saw a blue van coming out of the driveway, but was unable to identify the driver. The sheriff's department issued a BOLO (be on the lookout for) notice for a blue van based on Harris' report.

{¶4} On November 14, 2008, Richard Miller was mowing and noticed a blue van on his property. Miller asked the driver what he was doing on the property. The driver, who Miller later identified as appellant, said he was looking for someone named Bishop and indicated he had taken a wrong turn. Miller noticed the front end of the blue van was damaged, and the van had a Kentucky license plate. Miller wrote down information about the van, including the license plate number, and reported the incident to the police.

{¶5} On November 15, 2008, at approximately 1:45 in the afternoon, Joseph Howard returned to his home from running errands with his children when he saw a blue van with a Kentucky license plate parked in his driveway. Howard pulled around the van to park and saw a man, who Howard later identified as appellant, in the doorway of Howard's home holding one of Howard's Labrador Retrievers by the collar. Appellant

explained that he had almost hit the Labrador and was returning the dog to the Howard home. Howard thanked appellant and asked him to leave. After appellant left, Howard checked his home and found nothing missing. Howard did not initially report anything to the police. Approximately six days later, after speaking with a relative in the sheriff's department, Howard reported the incident to the sheriff's office.

{¶6} On November 30, 2008, an investigative deputy from the Clermont County Sheriff's Office, Matthew Farmer, arrested appellant pursuant to a warrant for driving under suspension. An inventory search was conducted on appellant's van where officers found drugs, drug paraphernalia, and three rings. Mike Harris, another investigator with the sheriff's office, obtained a search warrant for appellant's van. Among other items, Harris collected the three rings and some pawn slips from the van.

{¶7} One of the pawn slips, which had appellant's name on it, was for a pawn shop in Kentucky where a chainsaw had been sold. The chainsaw was subsequently found to be one of the items taken from the Fridley's garage. One of the rings found in the van was a class ring from Earl College, engraved with the name "Mark Slagle." The sheriff's department contacted Slagle, who later identified the class ring and one of the other rings found in the van as his property. After being asked by the sheriff's department whether anything else had been taken, Slagle searched his home and found that a large glass jar with loose change was missing.

{¶8} Appellant was served with two separate indictments, which were not consolidated for trial but were tried simultaneously. In Case No. 2009-CR-000035, appellant was charged with one count of burglary (Count 1) and seven counts of grand theft of a firearm (Counts 2-8). These counts were based on the Re burglary and the

theft of six firearms.[1] In addition, appellant was indicted on one count of breaking and entering (Count 9) and one count of theft (Count 10). These counts stemmed from the Fridley breaking and entering and the theft of their tools and equipment. The second indictment in Case No. 2009-CR-000201 charged appellant with burglary of the Howard's home (Count 1), burglary of the Slagle's home (Count 2), the Slagle theft (Count 3), and receiving stolen property belonging to Slagle (Count 4).

{¶9} After a four-day trial, the jury convicted appellant on all charges. In Case No. 2009-CR-000035, appellant was sentenced to a total of seven years. In Case No. 2009-CR-000201, appellant was sentenced to 12 years. The trial court ran the sentences in each case concurrently. Appellant filed two appeals, which were subsequently consolidated by this court. In his appeal, appellant raises three assignments of error.

{¶10} Assignment of Error No. 1:

{¶11} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS THUS PREJUDICING HIS RIGHT TO A FAIR TRIAL."

{¶12} In his first assignment of error, appellant argues his trial counsel was ineffective for failing to request severance of the counts in each indictment, and severance of the two indictments, pursuant to Crim.R. 14. As a result, appellant believes he suffered prejudice and would not have been convicted but for the evidence of other criminal acts that the state was allowed to introduce as a result of the joinder. We do not agree.

{¶13} In an ineffective assistance of counsel claim, an appellant must (1)

1. During the trial the state moved to dismiss Count 7 or 8 of the indictment because one of the weapons

demonstrate that his counsel's performance fell below an objective standard of reasonable representation, and if so (2) show there was a reasonable probability that his counsel's errors affected the outcome of the proceedings. *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶14} "In order to prevail on a claim of ineffective assistance of counsel in a case involving a failure to make a motion on behalf of a defendant, the defendant must show '(1) that the motion * * * was meritorious, and (2) that there was a reasonable probability that the verdict would have been different had the motion been made[.]'" *State v. Kring*, Franklin App. No. 07AP-610, 2008-Ohio-3290, ¶55, citing *State v. Lawhorn,* Paulding App. No. 11-04-19, 2005-Ohio-2776, at ¶35. See, also, *State v. Coleman*, 85 Ohio St.3d 129, 1999-Ohio-258, at 11-12 (finding the "trial court could have properly denied any motion to sever"); *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, ¶117, citing *State v. Taylor* (1997), 78 Ohio St.3d 15, 1997-Ohio-243, at 43 (stating counsel's performance is not deficient for failure to raise a meritless issue).

{¶15} Upon a demonstration of prejudice, a defendant may move to sever the offenses within an indictment or trial involving multiple indictments pursuant to Crim.R. 14. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 76-77, citing *State v. Roberts* (1980), 62 Ohio St.2d 170, 175. In order to determine whether such a motion would have been meritorious, we must examine "(1) whether evidence of the other crimes would be admissible even if the counts [or indictments] were severed, and (2) if not, whether the evidence of each crime is simple and distinct." *State v. Schaim,* 65 Ohio St.3d 51, 59, 1992-Ohio-31, citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, 158-159; *Drew v.*

reported missing was subsequently found by the Res in their home. The trial court agreed to dismiss count

United States (C.A.D.C.1964), 331 F.2d 85, 91. "If the evidence of other crimes would be admissible at separate trials, any 'prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,' and a court need not inquire further." *Schaim* at 59, quoting *Drew* at 90.

{¶16} R.C. 2945.59 states "[i]n any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." See, also, Evid.R. 404(B) (evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). "Because R.C. 2945.59 and Evid.R. 404(B) codify an exception to the common law with respect to evidence of other acts of wrongdoing, they must be construed against admissibility, and the standard for determining admissibility of such evidence is strict." *State v. Broom* (1988), 40 Ohio St.3d 277, 281-82.

{¶17} During the trial, the state made the following comments to the trial court:

{¶18} "MR. FERRIS: Whether a motion to sever was filed before or argued, at this point the State was prepared to go forward under a 404(B) motion.

{¶19} "THE COURT: Yeah.

{¶20} "MR. FERRIS: It says other crimes, or wrongs , or acts – -

{¶21} "THE COURT: Sure.

8. On July 13, 2009, at the request of the state, the trial court also dismissed count 7.

{¶22} "MR. FERRIS: - - may, however be admissible for other purpose[s] such as: motive, opportunity, preparation, plan, knowledge. Okay?

{¶23} "THE COURT: Right.

{¶24} "MR. FERRIS: These other acts, I think it's probably pretty clear from the State's presentation that it shows his purpose, that it shows his plan. He's leaving work going a short distance during his lunch break - -

{¶25} "THE COURT: Yeah.

{¶26} "MR. FERRIS: - - to steal from houses.

{¶27} "THE COURT: Okay.

{¶28} "MR. FERRIS: And we've got him stealing from house, and stealing from house, and stealing from house; driving the same blue van house, after house, after house."

{¶29} It is clear from these statements that, had appellant made a motion to sever, the state would have argued that the other offenses would each have been admissible to show appellant's plan to steal from people's homes during lunch hours using his blue van.

{¶30} After a careful review of the record, we believe that evidence from the other crimes would be admissible in separate trials to show appellant's plan.[2] A blue van was seen at Re's home and Howard's home. Upon searching appellant's blue van, a pawn ticket for Fridley's chainsaw was found, as well as Slagle's two rings. Miller testified that he found appellant on his property, without permission, driving a blue van. Three of the victims testified that they lived on property that was isolated or wooded. All of the victims lived in close proximity to appellant's work. Re's home and Howard's

2. We also believe that the Howard burglary would have been admissible in the Re burglary, and vice

home were entered during the afternoon. Appellant's employer testified that appellant's lunch hours during mid to late October to early November 2008 were getting longer and more erratic.

{¶31} In view of this evidence, we find that, had appellant's trial counsel made a motion to sever, the court would have denied the motion. Because evidence from the other crimes would have been admissible in separate trials, a motion to sever would not have been meritorious. Therefore, appellant cannot succeed on his ineffective assistance of counsel claim. See *Kring*, 2008-Ohio-3290 at ¶55. Appellant's first assignment of error is overruled.

{¶32} Assignment of Error No. 2:

{¶33} "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN APPELLANT'S CONVICTIONS FOR BURGLARY, BREAKING AND ENTERING AND THEFT."

{¶34} Appellant's second assignment of error challenges his convictions for burglary, breaking and entering and two thefts based on the sufficiency of the evidence and the manifest weight of the evidence. In addition, appellant argues the state failed to prove the value of the thefts for felony enhancement purposes. We do not agree.

{¶35} Arguments regarding the sufficiency of evidence and the manifest weight of the evidence are reviewed under two different standards. *State v. Martin* (1993), 20 Ohio App.3d 172, 175. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), Summit App. No. CA19600, 2000 WL 277908, at *1, citing *State v. Thompkins,*

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versa, as evidence of identity, intent, and/or motive.

78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring).

{¶36} Because sufficiency of the evidence is required before a case may be taken to a jury, where a conviction is supported by the manifest weight of the evidence, there is necessarily a finding of sufficiency. *Thompkins,* 78 Ohio St.3d at 388; *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35. Therefore, when a conviction is supported by the manifest weight of the evidence, it is also dispositive as to a claim of insufficiency of the evidence. *State v. Lee*, 158 Ohio App.3d 129, 2004-Ohio-3946, ¶18; *Wilson* at ¶35; *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73.

{¶37} "An appellate court may only reverse a jury verdict as against the manifest weight of the evidence where there is a unanimous disagreement with the verdict of the jury." *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380, ¶45, citing *State v. Gibbs* (1999), 134 Ohio App.3d 247, 255-56. "Under the manifest weight of the evidence standard, a reviewing court must examine the entire record, weigh all of the evidence and reasonable inferences, consider the credibility of witnesses and determine 'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *Harry* at ¶45, citing *Martin*, 20 Ohio App.3d at 175; *Gibbs* at 256; *Thompkins*, 78 Ohio St.3d at 387.

{¶38} Appellant first argues the state failed to prove beyond a reasonable doubt that he committed 1) the Howard, Re and Slagle burglaries, 2) breaking and entering into the Fridley's garage, and 3) the thefts at both the Slagle's home and the Fridley's

garage. Finally, appellant argues the state failed to prove the Fridley and Slagle thefts were felonies rather than misdemeanors.

{¶39} Burglary is defined as follows:

{¶40} "No person, by force, stealth, or deception, shall * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense." R.C. 2911.12(A)(2).

{¶41} Appellant maintains that the state did not prove that he entered the Howard home with the purpose of committing an offense. The criminal offense appellant was alleged to have committed in the Howard burglary was a theft, according to the instructions to the jury. A theft is committed by knowingly obtaining or exerting control over the property, with a purpose to deprive the owner of his property without consent. R.C. 2913.02(A)(2).

{¶42} Appellant argues that the evidence did not show he committed a theft. Instead, appellant argues that his actions in "returning" the Labrador to the Howard home, after almost hitting the dog with his vehicle, were at most a trespass. In further support of his contention, appellant points out that Howard did not find anything missing or out of place, and did not initially contact the police until prompted by a relative in the sheriff's department.

{¶43} Appellant's conviction for the Howard burglary is not against the manifest weight of the evidence. Howard testified that he came home to find appellant standing in the doorway of his home holding one of his Labradors by the collar. Howard further stated that he had placed the dog in a locked cage, and had also closed the door to his

home before leaving. This evidence indicates appellant entered the Howard home without permission and removed the dog from his locked cage. The jury heard appellant's "explanation" from Howard and clearly chose to disbelieve appellant's intent and purpose in being in the home with Howard's dog.[3] Instead, it can reasonably be inferred that appellant entered Howard's home to take his Labrador. After reviewing the record and weighing all of the evidence, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice requiring reversal of appellant's conviction for burglary of the Howard home.

{¶44} Appellant next argues that there was no evidence identifying him as the perpetrator of the Re burglary. In particular, appellant states that there was no physical evidence linking him with the crime, nor were any stolen items belonging to Re found in his possession. In addition, Harris, the sole witness to the burglary, was unable to identify the individual she saw entering and exiting the Re home, and was further unable to positively identify appellant's blue van as the one she saw leaving the Re's driveway.

{¶45} "In order to warrant a conviction, the evidence presented must establish beyond a reasonable doubt the identity of the accused as the person who actually committed the crime." *State v. Harris,* Butler App. No. CA2007-11-280, 2008-Ohio-4504, ¶12, citing *State v. Lawwill,* Butler App. No. CA2007-01-014, 2008-Ohio-3592, ¶11. "The identity of the accused may be established by direct or circumstantial evidence." *Harris* at ¶12, citing *Lawwill* at ¶11.

{¶46} It is well-established that "circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt

3. "[W]e should not reverse a judgment merely because the record contains evidence that could reasonably support a different conclusion. It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events * * * Our role is simply to insure the decision is based upon reason and fact." *State v.*

beyond a reasonable doubt." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶75, quoting *State v. Heinish* (1990), 50 Ohio St.3d 231, 238. "Circumstantial evidence is the 'proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts.'" *State v. Wells*, Warren App. No. CA2006-02-029, 2007-Ohio-1362, ¶11, quoting *State v. Griesheimer*, Franklin App. No. 05AP-1039, 2007-Ohio-837, ¶26.

{¶47} Appellant's conviction for the Re burglary is supported by the manifest weight of the evidence. There is no direct evidence identifying appellant as the perpetrator of the Re burglary. Nonetheless, there is circumstantial evidence that appellant committed the offense. See, generally, *State v. Jamison* (1990), 49 Ohio St.3d 182. First, appellant utilized the same plan, system, method and/or modus operandi in both the Re burglary and the Howard burglary, where he was positively identified by Howard. Both burglaries occurred in early November, 2008. In addition, both burglaries occurred during the afternoon, when it was more likely the homeowner would be away from home. Both the Re and Howard residences were in close proximity to appellant's work. In addition, a blue van was seen at both the Re and Howard residences. Thus, it can reasonably be inferred from this evidence that the person who committed the Howard burglary was the same person who perpetrated the Re burglary.

{¶48} In addition, Miller testified that he was mowing his property in early November when he dicovered appellant on his property in a blue van. When Miller questioned appellant about his reason for being on the property, appellant's response aroused Miller's suspicions, especially in light of the fact Miller was aware of thefts in the neighborhood. It was because of these suspicions that Miller wrote down the license

Murphy, Ross App. No. 07CA2953, 2008-Ohio-1744, ¶31.

plate number of the van and reported it to the police. Appellant's appearance on Miller's property, with a questionable reason for being there, is also further support for a reasonable inference that appellant was the person who committed the Re burglary.

{¶49} Although Harris was unable to positively identify appellant or his van, she did witness a white male and a blue van at the Re home around 12:30 in the afternoon. Harris watched the man try the front door, then walk around the side of the Re home to the back door, then return to the front door where he entered. Harris later saw the man emerge with something two to three feet long wrapped in black.

{¶50} Re testified that the one of his weapons, the AR 15, was two to three feet long and that one of the other weapons taken was a Remington shotgun. Re also stated that a black backpack, which was lying near one of the weapons, was also missing. Finally, Re testified his door was locked and that appellant did not have permission to enter his home.

{¶51} We find that all of these facts present sufficient circumstantial evidence that appellant was the man Harris witnessed entering the Re's home, and that appellant's actions at the Re home constituted a burglary. Based upon this evidence, we find appellant's conviction for burglary of the Re home is not against the manifest weight of the evidence.

{¶52} Next appellant contends that the state failed to prove he committed the Slagle burglary or theft. In particular, appellant argues that his possession of Slagle's rings proves receiving stolen property, but does not prove that appellant committed a burglary or a theft. Appellant also maintains that Slagle's glass jar filled with change was never found in his possession. In addition, appellant argues the state failed to demonstrate a trespass in Slagle's home. Lastly, appellant argues that there is no

physical evidence or eyewitness testimony that placed him in the Slagle home.

{¶53} It is well-established that "circumstantial evidence is sufficient to sustain a conviction if that evidence would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶75, quoting *State v. Heinish* (1990), 50 Ohio St.3d 231, 238. See, also, *State v. Walker* (1978), 55 Ohio St.2d 208, 212; *State v. Nevius* (1947), 147 Ohio St. 263, 274-75. Indeed, the body or substance of a crime "may be established by circumstantial evidence where the inference of the happening of the criminal act complained of is the only probable or natural explanation of the proven facts and circumstances." *Nevius* at paragraph five of the syllabus.

{¶54} The unexplained possession of recently stolen property may give rise to a permissible inference from which a jury may conclude, beyond a reasonable doubt, that the accused is guilty of burglary and/or theft. *State v. Bice*, Clermont App. No. CA2008-10-098, 2009-Ohio-4672, ¶31. See, also, *Methard v. State* (1869), 19 Ohio St. 363; *State v. Conway*, 2008-Ohio-3001, ¶10; *State v. Griggs* (Sept. 18, 1990), Franklin App. No. 89AP-1417, 1990 WL 135916, at *1.

{¶55} However, "[t]he possession of stolen property must be recent after the theft in order to afford a just basis for an inference of guilt on the part of the possessor. The term 'recent,' when used in connection with recently stolen goods, is a relative term incapable of exact definition. Except perhaps in extreme cases, no definite time can be fixed as to when, as a matter of law, possession is or is not recent. What is 'recent' possession varies, within a limited range, with the conditions and the surrounding circumstances of each case, and is, within such range, ordinarily to be determined by the jury upon the facts of the particular case * * *." *State v. Hulett* (Aug. 22, 1985),

Paulding App. No. 11-84-12, 1985 WL 7384, at *4, quoting 50 Am. Jur. 348; Larceny par. 162 [sic.]. See, also, *Methard* at 367-68 (recent possession was one day after theft); *Bice* at ¶3-7, 12-14, 32, at *3, 6 (recent possession after a series of thefts was a few hours to ten days); *State v. Richey* (Nov. 15, 1991), Highland App. No. 768, 1991 WL 260793, at *1, 3, 6 (finding recent possession one to two and a half months after theft). "The purpose of the 'recency' requirement is to make certain that the person found in possession of the stolen property is either the thief or is otherwise aware of the nature of the property in his possession." *Richey* at *6, citing 3 Torcia, Wharton's Criminal Law (14 Ed.1980) 327, Section 361.

{¶56} Appellant's conviction for the Slagle theft is not against the manifest weight of the evidence. Slagle testified that he planned on wearing both rings to a sports banquet, but was unable to locate them and believed they were misplaced. Although the state neglected to obtain testimony about the date that Slagle first noticed his rings missing, we believe the recency requirement is met based upon other facts elicited at trial. First, appellant's employer testified that he hired appellant in August, 2008. Second, appellant's employer also testified that appellant's lunch hours in mid to late October to early November were getting longer and more erratic. Third, the other three incidents, for which appellant was also indicted, all occurred between October and November of 2008. Therefore, it is possible that appellant took Slagle's rings during this same time period. Because appellant was in possession of Slagle's recently stolen property, for which no other explanation for possession was offered, the jury was permitted to conclude beyond a reasonable doubt that appellant committed the theft of the rings. *Bice*, 2009-Ohio-4672 at ¶31.

{¶57} We also find appellant's conviction for the Slagle burglary is not against

the manifest weight of the evidence. Contrary to appellant's argument, the state did present evidence of a trespass in Slagle's home. Slagle testified that he left his rings in different places, including the console of his vehicle. However, after the police asked Slagle to search his home to determine whether any other items of his property were taken, Slagle reported that a large glass jar of coins was missing from his home. Therefore, because the jar of coins was taken from inside Slagle's home, it is reasonable to infer that the rings were also inside the home when they were taken. In addition, Slagle noted the isolated location of his house and testified that he did not always lock his doors. Prior to the incident, he was not concerned with securing the doors when he left the property for short trips to town, or while he was chopping wood somewhere on his six-acre property. Finally, as stated above, the unexplained possession of the recently stolen property allows an inference that appellant is also guilty of a burglary. *Bice*, 2009-Ohio-4672 at ¶31.

{¶58} The dissenting opinion proposes that there is a dearth of sufficient and credible evidence supporting the Slagle theft and burglary. Regarding the Slagle theft, the dissent believes the majority improperly concludes that the rings were "recently" stolen by compounding inferences. Similarly, regarding the Slagle burglary, the dissent believes the majority committed the same infraction to reach the conclusion that appellant trespassed in Slagle's home to steal the rings.

{¶59} While reasonable, we believe that the concerns expressed by the dissent do not render the evidence supporting the Slagle theft and burglary insufficient or incredible. Despite Slagle's uncertainties regarding his last contact with and the precise location of the rings, the remaining facts surrounding the Slagle theft and burglary comport with appellant's plan or modus operandi.

{¶60} Regarding the Slagle theft and the "recentness" issue, the record supports our analysis without resorting to an improper combination of inferences. Although the state failed to obtain a precise date as to when Slagle discovered the rings were missing, Slagle immediately recalled the absent rings when phoned by the investigator in November 2008. The rings were found in appellant's blue van. Slagle's home was located in close proximity to appellant's workplace. Because the facts surrounding the Slagle theft align neatly with the facts from the other incidents, we do not believe it to be an impermissible leap to presume that the rings were stolen around the same time frame.

{¶61} Turning to the Slagle burglary and the trespass issue, we similarly find credible and sufficient evidence in the record to support our analysis without an improper compounding of inferences. Speaking of the rings, Slagle testified that "there's [sic] only a couple of places I ever leave them, and I checked both of those places. And they weren't there." Slagle later mentioned his initial belief that "they may have been taken out of my vehicle. *One* of the places I would leave them * * * is in my console of my vehicle." (Emphasis added.) Considering this testimony, it is reasonable to conclude that the rings were stolen from Slagle's residence in view of the other facts in the record, i.e., the isolated house, unlocked doors, missing coin jar, and the fact that appellant broke exclusively into homes rather than vehicles. As the other incidents indicate, trespassing in homes was part of appellant's modus operandi or plan.

{¶62} In conclusion, after reviewing the record and weighing all of the evidence, we find that the jury did not lose their way and create such a manifest miscarriage of justice that we would be required to reverse appellant's conviction for the Slagle burglary and theft.

{¶63} Finally, appellant argues the state did not prove he committed the Fridley breaking and entering or theft. In particular, appellant contends the state failed to offer proof of each element of the offense of breaking and entering, and that there was no physical evidence or eyewitness testimony linking him to the offense. Appellant further contends that his possession of the pawn slip for the Fridley's stolen chainsaw may have made him guilty of receiving stolen property, but not guilty of breaking and entering or theft.

{¶64} Breaking and entering is defined as follows:

{¶65} "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense * * * or any felony." R.C. 2911.13(A)

{¶66} As stated previously, the unexplained possession of recently stolen property may give rise to an inference of guilt that an accused committed a burglary and/or theft. *Bice*, 2009-Ohio-4672 at ¶31. In *State v. Simon*, Lucas App. No. H-04-026, 2005-Ohio-3208, the Sixth District Court of Appeals extended this inference to the offense of breaking and entering. Id. at ¶17-18. We concur with the Sixth District's decision, and hold that this inference also applies to the crime of breaking and entering.

{¶67} Appellant's conviction for the Fridley theft is supported by the manifest weight of the evidence. Fridley testified that she discovered that her tools and equipment were missing on the morning of October 3 2008, or one and one-half months before appellant was found in possession of the pawn ticket for her chain saw. We believe the recency requirement is met based on the relatively short period of time that elapsed between Fridley's discovery of the theft and the pawn ticket discovered by the sheriff in appellant's van. Therefore, appellant's unexplained possession of the pawn

ticket for Fridley's recently stolen chainsaw allowed the jury to make an inference that appellant committed the theft. See *Richey*, 1991 WL 260793, at *1, 3, 6.

{¶68} The manifest weight of the evidence also supports appellant's conviction for the Fridley breaking and entering. Appellant argues the state failed to offer proof that by force, stealth or deception, he trespassed in the Fridley's outbuilding with the purpose to commit a theft offense. However, possession of a recently stolen item can also give rise to a permissive inference that appellant committed a breaking and entering. See *Simon* at ¶17-18. Also, Fridley testified that she never gave appellant permission to be in her garage or to take any of her property.

{¶69} There was no evidence that appellant used force or deception to gain entry to Fridley's garage. Nevertheless, the state may offer proof of force, deception, *or* stealth, to sustain a conviction for breaking and entering. "Ohio courts have defined 'stealth' as 'any secret, sly or clandestine act to avoid discovery and to gain entrance into or to remain within a residence of another without permission.'" *State v. Hibbard*, Butler App. Nos. CA2001-12-276, CA2001-12-286, 2003-Ohio-707, ¶30, quoting *State v. Ward* (1993), 85 Ohio App.3d 537, 540. Although no direct evidence of stealth was presented at trial, the state did offer circumstantial evidence of stealth. See *In re C.W.,* Butler App. No. CA2004-12-312, 2005-Ohio-3905, ¶25-26.

{¶70} Ensuring a homeowner is not present before committing a breaking and entering, has been held to be sufficient evidence of stealth. See, e.g., *State v. Cayson* (May 14, 1998), Cuyahoga App. No. 72712, 1998 WL 241949, at *2, fn. 2 (stealth found where offender cruised a neighborhood looking for open garages with no homeowners present); *State v. Trikilis,* Medina App. Nos. 04CA0096-M, 04CA0097-M, 2005-Ohio-4266, ¶32 (stealth shown where offender acted in a "secret" fashion to avoid detection

by waiting until a garage was unoccupied before entering). We observe that both the Howard and Re burglaries were committed during the afternoon, when the owners were most likely to be away from their homes. Assuming that it was appellant's plan, system, method and/or modus operandi to commit thefts when homeowners were at work or otherwise away from their homes, it is likely appellant committed the Fridley breaking and entering at approximately the same time of the day in order to better escape detection. In addition, Fridley testified that she came home on the Thursday evening the day before she discovered the theft, which indicates that she was away from her home during the day.

{¶71} Furthermore, an inference of stealth may be sustained based upon evidence that an offender used the "secluded nature of a location to avoid discovery and gain entry." *State v. Campbell*, Crawford App. No. 3-07-27, 2008-Ohio-1647, ¶19. In this case, Fridley testified that the garage was 30 to 40 yards from the house, the property was in a "[v]ery wooded area," and neighbors are not able to see either her house or the garage. See, also, *State v. Wolhfeil* (Apr. 2, 1987), Cuyahoga App. No. 51983, 1987 WL 9133, at *2 (stealth present where offender entered a "back entrance secluded from view").

{¶72} After reviewing the record and weighing all of the evidence, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice which would require us to reverse appellant's conviction for the Fridley breaking and entering and theft.

{¶73} Appellant's final argument is that the state failed to prove that the value of the items taken from Slagle and Fridley warranted conviction of a fifth-degree felony, rather than a first-degree misdemeanor, because neither the value of Slagle's rings nor

the value of Fridley's chainsaw was more than $500.

{¶74} "R.C. 2913.02(A) defines theft without reference to value and sets forth all that the state must prove to secure a conviction." *State v. Smith*, 121 Ohio St. 3d. 409, 2009-Ohio-787, ¶6. "Subsection (B)(2) of the statute classifies theft as a misdemeanor of the first degree but also states, '[i]f the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree.'" Id., quoting R.C. 2913.02(B)(2). "While the special findings identified in R.C. 2913.02(B)(2) affect the punishment available upon conviction for the offense, they are not part of the definition of the crime of theft set forth in R.C. 2913.02(A)." Id. at ¶7. Although value is not an essential element of theft, the fact-finder is required to make a special finding, from the evidence presented, in order to determine the degree of the offense. Id. at ¶13, 16.

{¶75} Appellant first contends Slagle testified that he purchased his class ring for less than $500 and did not testify as to the value of his father's wedding ring. Appellant further argues the jar of coins was never "connected" to him, and thus could not be properly considered for the purpose of enhancing the theft to a fifth-degree felony.

{¶76} Appellant is correct in that Slagle testified that he bought his class ring for $489 or $11.01 less than the fifth-degree felony threshold. Slagle attempted to offer a value for his father's wedding ring; however, appellant's trial counsel objected to the testimony.

{¶77} In *State v. Bradford*, Greene App. No. 2002 CA 125, 2004-Ohio-769, the Second District Court of Appeals had a similar situation where no direct testimony on the value of a victim's stolen rings was offered. Id. at ¶9-10. The Second District found that

the jury was allowed to infer the value of the jewelry was between $500 and $5,000 where the victim testified that the "rings were made of gold and set with rubies, diamonds, and sapphires" and "the jury saw the actual jewelry that was stolen." Id. at 10.

{¶78} In this case, Slagle did not place a value on the 60-year-old wedding ring. However, Slagle did testify that the ring had been taken to a jewelry store to have it appraised and cleaned and have the "stones" checked. Moreover, the rings were admitted into evidence at the trial. Therefore, the jury was allowed to see and/or examine the actual wedding ring taken by appellant. We believe, consistent with *Bradford*, that the jury could have inferred the ring was at least worth $11.01 which, when added to the value of Slagle's class ring, made the value of the items taken more than $500.

{¶79} Slagle further testified that, upon searching his home, he found that a large glass jar full of coins was missing. Slagle stated that he had been collecting the coins for several years, and that the last time the jar was full it contained approximately $2,000 in change. When added to the value of the rings, the total value of items taken from Slagle is over the $500 threshold needed to make the theft a fifth-degree felony. Therefore, the state clearly proved the value of the items taken from Slagle was more than $500 and less than $5,000.

{¶80} Finally, appellant maintains that the only evidence offered by Fridley was the value of the chainsaw pawned by appellant. Fridley testified the chainsaw was purchased for less than $300, which is below the $500 level needed to be a fifth-degree felony.

{¶81} In addition to Fridley's testimony regarding the chainsaw's value, the state

offered the invoice for the chainsaw into evidence which listed the price at $299.95. However, Fridley also testified that she and her husband had spent approximately $4,000 replacing all of the items taken from their garage. When added together, the value of chainsaw plus the value of the other tools and equipment taken from Fridley's garage is more than $500 and less than $5,000, making it a fifth-degree felony. Thus, the state offered proof to allow the jury to make a special finding that the Fridley theft was a fifth-degree felony rather than a first-degree misdemeanor.

{¶82} In conclusion, we find that the state offered sufficient evidence that appellant committed the offenses, appellant's convictions are supported by the manifest weight of the evidence, and the state proved the thefts were fifth-degree felonies. Therefore, appellant's second assignment of error is overruled.

{¶83} Assignment of Error No. 3:

{¶84} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY IMPROPERLY SENTENCING APPELLANT."

{¶85} In his last assignment of error, appellant presents two arguments with regard to sentencing. First, appellant maintains that some of the offenses for which he was convicted and sentenced are allied offenses of similar import. Second, appellant maintains that the trial court failed to comply with the purposes of felony sentencing and the factors related to sentencing, when it imposed appellant's sentence. We do not agree.

{¶86} "R.C. 2941.25, Ohio's multiple-count statute, prohibits the imposition of multiple punishments for the same criminal conduct." *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2010-Ohio-596, ¶98, citing *State v. Brown,* Butler App. No. CA2009-05-142, 2010-Ohio-324, ¶7. In order to determine whether

offenses are allied offenses of similar import under R.C. 2941.25, the Ohio Supreme Court has established a two part analysis. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶16. First, "courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id., quoting *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, paragraph one of the syllabus. "If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. *Williams* at ¶16, citing *Cabrales* at ¶31.

{¶87} Appellant maintains that the following offenses are allied pursuant to R.C. 2914.25: (1) the Re and Slagle burglaries and thefts; (2) the Fridley breaking and entering and the theft of the tools and equipment; and (3) the theft and receiving stolen property convictions related to Slagle's property.

{¶88} In order to commit the offense of burglary pursuant to R.C. 2911.12(A)(2), one must, "by force, stealth, or deception * * * [t]respass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense."

{¶89} In order to commit the offense of theft as defined by R.C. 2913.02(A)(1), one must "knowingly obtain or exert control over either the property or services" of another "with purpose to deprive the owner of property or services * * * [w]ithout the

consent of the owner or person authorized to give consent."

{¶90} Even in an abstract comparison of the elements, we do not find that burglary and theft are allied offenses of similar import. While burglary requires one to act with purpose to commit a criminal offense, it does not necessarily mean that the offense must be theft. Similarly one may commit a theft without trespassing in an occupied structure. Therefore, we find burglary and theft are not allied offenses, and appellant was properly sentenced for both crimes. See *State v. Wright*, Champaign App. No. 2001-CA-3, 2001-Ohio-6981, at 3. See, also, *State v. Mitchell* (1983), 6 Ohio St.3d 416, 418-19 (finding aggravated burglary and theft were not allied offenses).

{¶91} In order to commit the offense of breaking and entering pursuant to R.C. 2911.13(A), one must, "by force, stealth, or deception, * * * trespass in an unoccupied structure, with purpose to commit therein any theft offense, * * * or any felony." When compared in the abstract to the elements of theft, as defined previously, we do not find that breaking and entering and theft are allied offenses of similar import because the commission of one will not necessarily result in commission of the other. "A theft is not necessary for a breaking and entering conviction – the purpose to commit any felony will suffice." *State v. Talley* (1985), 18 Ohio St.3d 152, 156. Similarly, one does not have to commit the offense of breaking and entering in order to commit a theft offense. Thus, appellant was properly sentenced for both breaking and entering and theft.

{¶92} Finally, in order to commit the offense of receiving stolen property as defined by R.C. 2913.51(A) one must "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." When compared in the abstract with the elements of theft, as defined above, we find that receiving stolen property is an allied

offense of theft because the commission of one offense necessarily results in the commission of the other. This is because a theft is necessary in order to commit the offense of receiving stolen property as the offender must receive, retain, or dispose of the stolen property when he commits the theft. See *Maumee v. Geiger* (1976), 45 Ohio St.2d 238, 242; *Yarbrough,* 104 Ohio St.3d 1, at ¶99-102. Because we find that theft and receiving stolen property are allied offenses, we must determine whether the offenses were committed separately or with a separate animus. *Williams*, 124 Ohio St.3d 381, at ¶16.

{¶93} The state urges this court to find the offenses were committed separately or with a separate animus because the receiving stolen property charge was based on appellant's possession of Slagle's rings, while the theft charge was based on Slagle's rings *and* Slagle's glass jar of coins. We do not agree. Instead, we find that there is no indication that the theft was committed separately, because it was part of the same conduct. See *State v. Gest* (1995), 108 Ohio App.3d 248, 263. Nor do we find the offenses were committed with a separate animus, as the intent behind both offenses was to benefit from taking Slagle's property. See *State v. Slager*, Delaware App. No. 08 CAA 11 0067, 2010-Ohio-1797, ¶20. Therefore, because theft and receiving stolen property are allied offenses of similar import, the trial court erred when it failed to merge the offenses during sentencing.

{¶94} In conclusion, we find that the Re and Slagle burglaries and thefts are not allied offenses and the Fridley breaking and entering and theft are not allied offenses. Therefore, the trial court was not required to merge any of these offenses for sentencing purposes. However, because the Slagle theft and receipt of stolen property are allied offenses of similar import, appellant's sentence is reversed with regard to these

offenses, and the case is remanded to the trial court to resentence appellant accordingly.

{¶95} Appellant next argues the trial court failed to be guided by the requirements of R.C. 2929.11(A) and (B) in reaching its sentencing decision. In particular, appellant suggests that his 19-year sentence was "harsh" in light of the overriding purposes set forth in R.C. 2929.11(A), to protect the public and punish the offender. Appellant also maintains the trial court did not follow R.C. 2929.11(B) and impose a sentence "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." Finally, appellant argues that the trial court did not properly apply the sentencing factors in R.C. 2929.12 when ordering the sentence as the more "serious factors" were not applicable to the case.

{¶96} "Trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, ¶ 100. "In applying *Foster* * * * appellate courts must apply a two-step approach. First, they must 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 shall be reviewed under an abuse-of-discretion standard." *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4.

{¶97} A sentence is not clearly and convincingly contrary to law where the trial court "consider[s] the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, * * * properly applie[s] postrelease control, and * * * sentence[s] *

* * within the permissible range." Id. at ¶18. In addition, so long as the trial court gives "careful and substantial deliberation to the relevant statutory considerations" the court's sentencing decision is not an abuse of discretion. Id. at ¶20.

{¶98} Applying this analysis to the length of the sentencing imposed, we find the trial court's sentences are not clearly and convincingly contrary to law. The trial court expressly stated in both judgment entries that it "considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and * * * balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12." The trial court also properly applied a mandatory three-year period of postrelease control, and sentenced appellant to 19 years, which is within the permissible range for the offenses for which appellant was convicted.[4]

{¶99} We further find that the trial court did not abuse its discretion in ordering appellant to serve 19 years. After reviewing the record, we find the trial court gave careful and substantial deliberation to the *relevant* statutory considerations. In particular, the trial court focused on the recidivism factors, noting appellant was on a two-year conditional release program through Campbell County, Kentucky when the offenses were committed. The trial court also observed appellant had three previous misdemeanor convictions and five prior felony convictions. In addition, the trial court noted appellant had been given prior opportunities for probation, supervision and parole. The trial court also addressed appellant, stating that, "despite these prior sanctions, those opportunities to turn your life around, you continue to engage in criminal activity." Although the trial court did not indicate which of the more serious factors were

4. Appellant was convicted of (1) three second-degree felonies which carry a prison term of two to eight years each, however the trial court only ordered six years for each offense; (2) five third-degree felonies which carry a prison term of one to five years each, however the trial court only ordered four years for each offense; and (3) four fifth-degree felonies which carry a prison term of six to twelve months each, and the

applicable, the court expressly indicated during the sentencing hearing that it had weighed these factors in reaching its decision. Therefore, we do not find the trial court's decision to sentence appellant to 19 years was unreasonable, arbitrary, or unconscionable.

{¶100} Finally, appellant argues that the imposition of consecutive sentences was not proper based on the Supreme Court's decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711. This court has previously dealt with this issue, and found that imposition of consecutive sentences has not been affected by the *Oregon* decision. See *State v. Lewis,* Warren App. Nos. CA2009-02-012, -016, 2009-Ohio-4684, ¶3-10.

{¶101} In conclusion, appellant's third assignment of error is overruled in part but sustained in part with regard to the sentences imposed for theft and receiving stolen property, which are allied offenses of similar import and must be merged.

{¶102} Judgment affirmed in part, reversed in part, and remanded.

BRESSLER, P.J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶103} While I concur with the remainder of the majority's decision, I respectfully dissent from the majority's conclusion that the Slagle burglary and theft are supported by sufficient evidence and not against the manifest weight of the evidence.

{¶104} Following his arrest, three rings were discovered in appellant's van. Mark Slagle offered testimony that two rings belonged to him. I agree with the majority that a permissible inference of theft and/or burglary may arise from possession of recently

trial court ordered twelve months for each offense. See R.C. 2929.14.

stolen property. *State v. Bice*, Clermont App. No. CA2008-10-098, 2009-Ohio-4672, ¶31. However, no evidence or testimony was offered to support an inference that Slagle's rings were "recently" stolen.

{¶105} At trial, Slagle testified that he was the athletic director for an area school district and he intended to wear the rings to a school sports banquet. While he was getting ready for the banquet, he was unable to locate the rings. Slagle stated that he initially believed the rings had been misplaced. Although the prosecution questioned Slagle about November 2008 when the Sheriff first informed him that the rings had been recovered, no testimony was elicited regarding when Slagle initially noticed that the rings were missing.

{¶106} The majority infers that the theft and burglary occurred between mid-to-late October and early November since the other incidents occurred during that time and appellant's lunch hours were "getting longer and more erratic" during that period. The majority uses this inference establishing a time period as support for the further inference of recentness for the Slagle incidents, ultimately concluding that appellant stole the rings because he was in possession of "recently" stolen property. However, the majority cannot compound the inference establishing the time period to support the second inference of recentness because it is well-established that an inference cannot solely be built upon another inference. *State v. Cowans* (1999), 87 Ohio St.3d 68, 78, 1999-Ohio-250; *State v. Cooper*, 147 Ohio App.3d 116, 2002-Ohio-617, ¶38.

{¶107} In this case, the prosecution failed to elicit any evidence specifically establishing a timeframe for the Slagle theft and/or burglary. Slagle testified that he noticed the rings were missing around the time of a school "sports banquet." It is common knowledge that school sports banquets can occur several times throughout the

year, principally at the end of each fall, winter and spring sports season. Yet, there is no indication what date, or even the season, that the sports banquet in question was held to establish a timeframe for the Slagle incidents. As a result, the trier of fact is not permitted to use this inference related to the timing of the incidents to establish an inference of recentness.

{¶108} The majority offers a second theory to establish the timeframe based upon Slagle's immediate recollection of the absent rings during his November 2008 conversation with the investigator. Once again, the majority's theory is simply another inference to establish the alleged timing of the Slagle incidents; an inference which cannot be stacked to create the further inference of recentness.

{¶109} I find additional problems in the majority's analysis of the Slagle burglary. First, the majority concludes that the state proved evidence of a trespass into Slagle's home. Specifically, the majority reasoned that Slagle "testified that he left his rings in different places, including the console of his vehicle" and "because the jar of coins was taken from inside Slagle's home, it is reasonable to infer that the rings were also inside the home when they were taken."

{¶110} I find this theory disturbing in part because Slagle never testified that he stored or left his rings inside his home. Rather, the only place specifically mentioned by Slagle regarding where he kept his rings was the console of his vehicle. Additionally, Slagle testified that he believed the person who took his rings "might have taken them out of my vehicle." Yet, despite this testimony, the majority concludes that the rings were removed from Slagle's home; an inference that is not supported by the evidence.

{¶111} Rather than accept Slagle's testimony, the majority compounds yet another inference, urging that appellant was present inside Slagle's home because he

also stole a large, heavy antique watercooler jar filled with coins. The majority claims this supports a finding that the rings were inside Slagle's home. However, when asked by the police to search his home for other missing items, Slagle testified:

{¶112} "I went walking around checking the kind of things that somebody might have an interest in and have some value. And in the back I'm wondering – I have a gun cabinet that has several hunting guns mostly in there. And I was taking an inventory of those * * * And they were all there. And I just happened – I almost didn't notice again down at the base of that gun cabinet[,] I had an old-fashioned antique water cooler glass top. * * * because that thing is huge, and glass * * * And I always just put lose [sic] change in it. * * * there was just shy of $2,000 worth of change in the jug."

{¶113} As demonstrated by the Re burglary, appellant had a modus operandi for stealing weapons. Yet, instead of taking the easily portable and likely valuable weapons visible in Slagle's home, the thief chose to steal the awkward and cumbersome glass jar of coins. Such a conclusion is not supported by the testimony offered by Fridley where she stated that the person who stole her tools and equipment left a radial arm saw which was much larger, favoring items which were smaller and more portable.

{¶114} The majority suggests that "trespassing in homes" was part of appellant's modus operandi. A modus operandi is admissible because it provides a "behavioral fingerprint" associated with the crime in question to identify the defendant as the perpetrator. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶104. This court has routinely held that a modus operandi must be distinct and identifiable of the scheme, plan, or system used in the commission of the charged offense. *State v. Bromagen*, Clermont App. No. CA2005-09-087, 2006-Ohio-4429, ¶13; *State v. Siney*, Warren App. No. CA2004-04-04, 2005-Ohio-1081, ¶29. See, also, *State v. Lowe*, 69 Ohio St.3d 527,

531, 1994-Ohio-345 (modus operandi must be identifiable of the defendant); *State v. Jamison* (1990), 49 Ohio St.3d 182, 182, ("other acts must tend to show by substantial proof 'identity' or other enumerated purposes under Evid.R. 404(B)"). There is nothing unique or distinct about trespassing in homes. Rather, it is a common trait of almost all burglaries. As discussed above, there is simply no evidence establishing a trespass by appellant into Slagle's home except for the compounded inferences offered by the majority.

{¶115} The majority's use of compounded inferences in this case is troublesome. Specifically, to support appellant's convictions, the majority compounded an inference to establish the timing of the incident, an inference of recentness, an inference of possession, and an inference that appellant stole the glass jar of coins inside the home to establish the location of the rings. Other than pure speculation based upon multiple inferences, the prosecution offered no evidentiary nexus to link the rings, which testimony established were located in Slagle's vehicle, to the large jar of coins located in the home. Even construing the facts in this matter in favor of the prosecution, I cannot say that a rational trier of fact could find the essential elements of the Slagle theft and burglary beyond a reasonable doubt. These leaps in logic and compounding of multiple inferences are not permitted in a court of law. *Cowans,* supra. Accordingly, I respectfully dissent with respect to appellant's convictions for the Slagle burglary and theft.