[Cite as *State v. Ayers*, 2011-Ohio-4719.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
		CASE NOS. CA2010-12-119
Plaintiff-Appellee,	:	CA2010-12-120
	:	O P I N I O N
- vs -		9/19/2011
	:	
JAMES MICHAEL AYERS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case Nos. 08CR25386 & 10CR26562

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Fowler, Demos & Stueve, Jeffrey W. Stueve, 12 West South Street, Lebanon, Ohio 45036, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, James Michael Ayers, appeals from his convictions in the Warren County Court of Common Pleas for his role in a string of robberies taking place in the City of Lebanon, Warren County, Ohio, between October 4, 2008 and July 6, 2009. For the reasons outlined below, we affirm in part, reverse in part, and remand for further proceedings.

{¶2} On November 24, 2008, the Warren County Grand Jury returned an indictment

against appellant charging him with one count of breaking and entering, one count of theft, and one count of possession of criminal tools. The charges were based on his alleged role in a robbery at a Save-a-Lot store on October 4, 2008.

{¶3} On May 3, 2010, while charges from his November 24, 2008 indictment were still pending, the Warren County Grand Jury returned an additional 12-count indictment charging appellant with one count of abduction, one count of grand theft of a motor vehicle, one count of having weapons under disability, one count of unlawful possession of a dangerous ordnance, two counts of aggravated robbery, two counts of breaking and entering, two counts of grand theft, and two counts of kidnapping. These charges were based on his alleged role in three robberies taking place on January 8, 2009 at a Speedway gas station, on June 22, 2009 at Davidson Jewelers, and on July 6, 2009 at the same Save-a-Lot store he was charged with robbing previously.

{¶4} On November 8, 2010, appellant filed a motion requesting the trial court to sever all charges stemming from the November 24, 2008 and May 3, 2010 indictments. In support of this motion, appellant argued that "the charges against [him arose] from four separate dates and [were] not connected in any way." Thereafter, on November 16, 2010, the state filed a motion to consolidate the charges. That same day, the trial court, "[a]fter listening to the arguments of counsel in chambers," issued an order granting appellant's motion to sever the charges stemming from the January 8, 2009 Speedway robbery. The remaining charges resulting from the October 4, 2008 and July 6, 2009 Save-a-Lot robberies, as well as the June 22, 2009 Davidson Jewelers robbery, were then set for trial.

{¶5} On November 18, 2010, prior to the start of trial, appellant plead guilty to one count of breaking and entering, one count of theft, and one count of possession of criminal tools stemming from the October 4, 2008 Save-a-Lot robbery, as well as one count of breaking and entering and one count of grand theft stemming from the June 22, 2009

Davidson Jewelers robbery. Thereafter, once the two-day jury trial was complete, appellant was found guilty of one count of breaking and entering, one count of aggravated robbery, one count of grand theft, two counts of kidnapping, and one count of grand theft of a motor vehicle, all of which were accompanied by firearm specifications, resulting from the July 6, 2009 Save-a-Lot robbery.

{¶6} On December 2, 2010, prior to his sentencing hearing, appellant pled guilty to one count of aggravated robbery and one count of unlawful possession of a dangerous ordnance, both of which contained firearm specifications, stemming from the January 8, 2009 Speedway robbery. In exchange for his guilty plea, the state dismissed appellant's remaining abduction and having weapons under disability charges. Appellant was then sentenced to serve a total of 26 years in prison and ordered to pay restitution.

{¶7} Appellant now appeals from his convictions, raising five assignments of error for review. For ease of discussion, appellant's fifth assignment of error will be addressed out of order.

{¶8} Assignment of Error No. 5:

{¶9} "THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND STATE OF OHIO BY SUSTAINING A CONVICTION THAT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WITHOUT SUFFICIENT EVIDENCE."

{¶10} In his fifth assignment of error, appellant argues that the state provided insufficient evidence to support his conviction for one count of breaking and entering in violation of R.C. 2911.13(A), one count of aggravated robbery in violation of R.C. 2911.01(A)(1), one count of grand theft in violation of R.C. 2913.02(A)(1), two counts of kidnapping in violation of R.C. 2905.01(A)(2), and one count grand theft of a motor vehicle in violation of R.C. 2913.02(A)(1), stemming from the July 6, 2009 Save-a-Lot robbery.

Appellant also argues that his convictions were against the manifest weight of the evidence. Appellant's claims lack merit.

{¶11} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶12} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶19. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester*, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10

Ohio St.2d 230, paragraph one of the syllabus. Therefore, the question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶13} At trial, Frieda Gentry, the Save-a-Lot office manager, and Susan Patterson, a meat cutter at the Save-a-Lot store, testified that while preparing to open the store on the morning of July 6, 2009, two masked gunmen emerged from the back of the store, ordered them to get down on the floor, and told them to open the office safe, which, due to increased sales over the Fourth of July weekend, contained approximately $10,000.[1] When asked who gave the orders, Gentry testified that "[o]ne was taller and one was shorter. The taller one never said nothing." In further describing the gunmen, Gentry testified that appellant, whom she and Patterson had worked with at the Save-a-Lot store for nearly two years before he quit in the fall of 2007, matched the physical description of the "[t]aller one."

{¶14} Gentry and Patterson testified that once the safe was open, they were then ordered back to the "produce room," told to empty their pockets, which included their car keys, and, as Gentry testified, instructed "not to come out until someone come to get [them] and if [they] did he would shoot [them]." After entering the "produce room," a walk-in freezer used to store produce at 36 degrees, Gentry and Patterson heard a loud bang and a thud. Assuming that they were barricaded inside, Gentry and Patterson, who were afraid of being shot if they tried to escape, testified that they stayed in the freezer for over an hour before Helen Raby, the Save-a-Lot store manager, removed several wooden pellets blocking the

1. Police later discovered that the gunmen had entered the store by cutting a hole in a vent on the roof, which, once the two men climbed through the ductwork, allowed them to drop down into the store's "generator room" undetected.

door and found them huddled together inside. According to Raby, appellant "didn't like" the Save-a-Lot employees and had previously stated "that [they] would pay."

{¶15} Also at trial, Sergeant Andrew Mitchell of the Cincinnati Police Department testified that on July 7, 2009, while canvasing an area in west Cincinnati for a man accused of rape, he came across appellant "who had matched that suspect[s] description." However, Sergeant Mitchell testified that upon making contact with appellant, appellant immediately fled down an alley way and into neighboring yard. Once appellant was apprehended, Sergeant Mitchell located a handgun in a nearby trashcan, and found "one Ohio birth certificate and five social security cards as well as $4,141 in U.S. currency in small denominations" in appellant's pockets. Appellant later admitted to owning the handgun, a gun that "appeared to be the same type" used in the robbery, and was arrested.

{¶16} In addition, Officer Christopher Brock of the City of Lebanon Police Department assigned to investigate the robbery, testified that video surveillance, as well as DNA evidence obtained from a brown canvas glove found at the scene, led to the arrest of Melvin Ayers, appellant's father. When asked to identify Melvin in surveillance video, Officer Brock testified that Melvin, who stood approximately 5' 6" tall, was "the shorter of the two" gunmen. Melvin later pled guilty to his involvement in the crime.

{¶17} Continuing, Officer Brock testified that upon learning of appellant's arrest, he interviewed appellant at the Hamilton County Justice Center. According to Officer Brock's testimony, after telling appellant that he had obtained surveillance video depicting a man resembling his father taking off his mask and removing his gloves while fleeing from the scene, appellant "shook his head and said, yeah, that's really smart." Officer Brock then testified that appellant told him that "if he could talk to [his father] for about two minutes that he could probably guarantee he would admit to everything." Officer Brock, however, was unable to set up such a meeting.

{¶18} The state also presented evidence that Gentry's car, which went missing following the robbery, and which sustained significant damage, was located in an industrial area "close to the downtown area" of Cincinnati. This area was approximately one mile from where Melvin lived and from where appellant was arrested.

{¶19} Appellant did not provide any evidence in his defense.

{¶20} After a thorough review of the record, we cannot say the jury clearly lost its way by finding appellant guilty of one count of breaking and entering, one count of aggravated robbery, one count of grand theft, two counts of kidnapping, and one count of grand theft of a motor vehicle for his role in the July 6, 2009 Save-a-Lot robbery. As noted above, the state presented extensive uncontroverted evidence, albeit circumstantial, that clearly implicated appellant in the crimes. In turn, although appellant may disagree, based upon this evidence, we simply cannot say the trial court clearly lost its way so as to create a manifest miscarriage of justice requiring his conviction be reversed. See *State v. Sias*, Madison App. Nos. CA2010-01-001, CA2010-02-003, 2010-Ohio-3566, ¶8 ("appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances in which the evidence presented at trial weighs heavily in favor of acquittal"). Therefore, because appellant's conviction was not against the manifest weight of the evidence, we necessarily conclude that the state also presented sufficient evidence to support the jury's finding of guilt. Accordingly, having found no reason to disturb the trial court's finding of guilt, appellant's fifth assignment of error is overruled.

{¶21} Assignment of Error No. 1:

{¶22} "THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHTS UNDER THE CONSTITUTIONS OF THE UNITED STATES AND STATE OF OHIO AND OHIO STATUTES BY SENTENCING HIM TO CONSECUTIVE AND MULTIPLE SENTENCES ON ALLIED OFFENSES."

{¶23} In his first assignment of error, appellant argues that the trial court erred by failing to merge all charges stemming from the January 8, 2009 Speedway robbery, the June 22, 2009 Davidson Jewelers robbery, and the July 6, 2009 Save-a-Lot robbery, respectively. In support of this argument, appellant claims "[e]ach particular incident included one single act with one single purpose and therefore, the multiple crimes committed for each separate incident are allied offenses."

{¶24} Initially, it should be noted that appellant never raised an objection before the trial court or argued any of the charged offenses constituted allied offenses of similar import. Appellant, therefore, has waived all but plain error on appeal. *State v. Roy*, Butler App. No. CA2009-11-290, 2011-Ohio-1992, ¶6; *State v. Abdi*, Athens App. No. 09CA35, 2011-Ohio-3550, ¶40. However, although appellant has waived all but plain error, as the Ohio Supreme Court has previously stated, "the imposition of multiple sentences for allied offenses of similar import is plain error." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, at ¶96-102; *State v. Blanda*, Butler App. No. CA2010-03-050, 2011-Ohio-411, ¶20.

{¶25} That said, pursuant to R.C. 2941.25, Ohio's multiple-count statute, the imposition of multiple punishments for the same criminal conduct is prohibited. *State v. Brown*, Butler App. No. CA2009-05-142, 2010-Ohio-324, ¶7. The statute provides for the following:

{¶26} "(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.

{¶27} "(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."

{¶28} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a new two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. Id. at ¶46-52; *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2011-Ohio-413, ¶11. Under this new test, courts must first determine "whether it is possible to commit one offense and commit the other with the same conduct." (Emphasis sic.) *Johnson* at ¶48; *State v. McCullough*, Fayette App. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶14. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply whether it is possible for both offenses to be committed with the same conduct. *Craycraft* at ¶11, citing *Johnson* at ¶48; *State v. Lanier*, Hamilton App. No. C-080162, 2011-Ohio-898, ¶4.

{¶29} If it is found that the offenses can be committed by the same conduct, courts must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import and must be merged. *Blanda*, 2011-Ohio-411 at ¶15, citing *Johnson* at ¶50. However, if 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." *Johnson* at ¶51; *Craycraft* at ¶11-12; *Roy*, 2011-Ohio-1992 at ¶11. We are mindful of these standards while addressing appellant's arguments advanced under

his first assignment of error.

January 8, 2009 Speedway Robbery

{¶30} As it relates to the January 8, 2009 Speedway robbery, appellant argues that the trial court erred by failing to merge his aggravated robbery and unlawful possession of a dangerous ordnance convictions. In support of this claim, appellant argues that by entering the Speedway store and brandishing a sawed-off shotgun before fleeing with $296, he committed but "one single act with one single purpose, to wit: steal money." This argument lacks merit.

{¶31} To be guilty of aggravated robbery in violation of R.C. 2911.01(A)(1), a first-degree felony, the state was required to prove appellant, "in attempting or committing a theft offense," had a "deadly weapon on or about [his] person or under [his] control and either display[ed] the weapon, brandish[ed] it, indicate[d] that [he] possesse[d] it, or use[d] it." To be guilty of unlawful possession of a dangerous ordnance in violation of R.C. 2923.17(A), a fifth-degree felony, the state was required to prove appellant "knowingly acquire[d], ha[d], carr[ied], or use[d] any dangerous ordnance." "Dangerous ordnance," as defined by R.C. 2923.11(K), includes any "sawed-off firearm."

{¶32} Applying the *Johnson* analysis to the case at bar, the state concedes, and we agree, that it is possible to commit aggravated robbery in violation of R.C. 2911.01(A)(1) and unlawfully possess a dangerous ordnance in violation of R.C. 2923.17(A) with the same conduct. Id. at ¶48. However, although possible, under the facts of this case, we find appellant did not commit these offenses with a single act. Instead, as the record clearly indicates, appellant had the sawed-off shotgun prior to entering the Speedway store. In turn, by acquiring the unlawful dangerous ordnance prior to robbing the Speedway store, the offenses were undoubtedly committed with separate and distinct conduct, and not, contrary to appellant's claim, in a single act committed with a single state of mind. See, generally,

State v. Smith, Cuyahoga App. No. 95243, 2011-Ohio-3051, ¶80. Therefore, because the conduct leading to his aggravated robbery and unlawful possession of a dangerous ordnance convictions occurred separately, the trial court did not err by failing to merge these offenses for sentencing purposes. Accordingly, appellant's argument relating to the January 8, 2009 Speedway robbery is overruled.

June 22, 2009 Davidson Jewelers Robbery

{¶33} As it relates to the June 22, 2009 Davidson Jewelers robbery, appellant argues that the trial court erred by failing to merge his breaking and entering and grand theft convictions. Similar to his argument above, appellant claims that by breaking into Davidson Jewelers and taking approximately $30,000 in jewels from the display counter, he committed but "one single act with one single purpose, to wit: steal jewelry." This argument, again, lacks merit.

{¶34} Applying the *Johnson* analysis to the case at bar, we find the commission of breaking and entering in violation of R.C. 2911.13(A) will never result in the commission of grand theft in violation of R.C. 2913.02(A)(1). Id. at ¶51; see, generally, *Blanda*, 2011-Ohio-411 at ¶21. In order to be found guilty of breaking and entering, the state was required to prove appellant, "by force, stealth, or deception," trespassed in an unoccupied structure, "with purpose to commit therein any theft offense * * * or any felony." On the other hand, to be guilty of grand theft in violation of R.C. 2913.02(A)(1), the state was required to prove appellant, "with purpose to deprive the owner of property or services * * * knowingly obtain[ed] or exert[ed] control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent." These offenses simply cannot be committed with the same conduct. Therefore, although we may agree with appellant when he claims the offenses are "intertwined" insomuch as it was necessary for him to break into the jewelry store before he could make off with the jewels, because the conduct required to

commit one of these offenses will never result in the commission of the other, the trial court did not err by failing to merge these offenses for sentencing purposes. Accordingly, appellant's argument relating to the June 22, 2009 Davidson Jewelers robbery is overruled.

July 6, 2009 Save-a-Lot Robbery

{¶35} As it relates to the July 6, 2009 Save-a-Lot robbery, appellant argues that the trial court erred by failing to merge "all charges" against him. In support of this claim, appellant argues that he committed but "a single act with one single state of mind, to wit: break into the store and steal money," when he broke into a Save-a-Lot store with his father and ordered two store employees to open the safe at gunpoint before taking their car keys and barricading them in a freezer and fleeing the scene in a vehicle owned by one of the store employees with approximately $10,000. Although we disagree with appellant's general proposition alleging that the trial court erred by failing to merge "all charges," we find merit in appellant's claim as it relates to his aggravated robbery conviction and his grand theft conviction.

{¶36} As noted above, to be guilty of aggravated robbery in violation of R.C. 2911.01(A)(1), the state was required to prove appellant, "in attempting or committing a theft offense," had a "deadly weapon on or about [his] person or under [his] control and either display[ed] the weapon, brandish[ed] it, indicate[d] that [he] possesse[d] it, or use[d] it." To be guilty of grand theft in violation of R.C. 2913.02(A)(1), the state was required to prove appellant, "with purpose to deprive the owner of property or services," knowingly obtained or exerted control over either the property or services "[w]ithout the consent of the owner or person authorized to give consent."

{¶37} In this case, after a thorough review of the record, we find it clear that appellant's aggravated robbery charge arose from same conduct giving rise to the charge of grand theft. As noted above, once he broke into the Save-a-Lot store, appellant stole

approximately $10,000 after ordering two employees to open the store safe at gunpoint. Thereafter, once the robbery was complete, appellant then barricaded the two employees in the "produce room," a 36-degree freezer in which they were trapped for over an hour, took their car keys, and fled the scene in a vehicle owned by one of the employees. In turn, while the offenses of breaking and entering, kidnapping, and grand theft of a motor vehicle were not committed with the same conduct, i.e. a single act, committed with a single state of mind, appellant's convictions for aggravated robbery and grand theft certainly were. See *State v. Bridgeman*, Champaign App. No. 2010 CA 16, 2011-Ohio-2680, ¶54; see, also, *State v. White*, Franklin App. No. 10AP-34, 2011-Ohio-2364, ¶68; *State v. Hicks*, Cuyahoga App. No. 95169, 2011-Ohio-2780, citing *State v. Logan* (1979), 60 Ohio St.2d 126, syllabus. Therefore, because appellant's convictions for aggravated robbery and grand theft were allied offenses of similar import, the trial court's failure to merge these offenses at sentencing amounted to plain error. See *Blanda* at ¶23, citing *Johnson* at ¶50. Accordingly, because it was plain error for the trial court not to merge his aggravated robbery and grand theft convictions only, appellant's third argument relating to the July 6, 2009 Save-a-Lot robbery is sustained in part and overruled in part.

{¶38} In light of the foregoing, we find the trial court did not err by failing to merge appellant's aggravated robbery and unlawful possession of a dangerous ordnance convictions stemming from the January 8, 2009 Speedway robbery, nor did it err by failing to merge appellant's breaking and entering and grand theft convictions stemming from the June 22, 2009 Davidson Jewelers robbery. However, as it relates to the July 6, 2009 Save-a-Lot robbery, we find the trial court committed plain error by failing to merge appellant's aggravated robbery and grand theft convictions as these offenses are allied offenses of similar import under *Johnson*. Therefore, because we find merit to appellant's claim as it relates to his aggravated robbery and grand theft charges only, appellant's first assignment of

error is sustained in part, his conviction reversed in part, and the matter is remanded for resentencing. Upon remand, the state retains the right to elect which allied offense to pursue. *Craycraft*, 2011-Ohio-413 at ¶21, citing *State v. Whitfield*, 124 Ohio St .3d 319, 2010-Ohio-2, ¶24.

{¶39} Assignment of Error No. 2:

{¶40} "THE TRIAL COURT ERRED TO THE DETRIMENT OF THE APPELLANT BY ORDERING A TOTAL AMOUNT OF A PRISON SENTENCE THAT IS INCONSISTENT WITH THE COURT'S JUDGMENT ENTRY OF SENTENCE IN VIOLATION OF THE CONSTITUTIONS OF THE UNITED STATES AND STATE OF OHIO."

{¶41} In his second assignment of error, appellant argues that the trial court erred by sentencing him to serve a total of 26 years in prison because it ordered a "total sentence in excess of the court's judgment entry." However, based upon our findings under his first assignment of error, this argument is now rendered moot.

{¶42} Assignment of Error No. 3:

{¶43} "THE IMPOSITION OF CONSECUTIVE SENTENCES WAS CONTRARY TO LAW AND IN VIOLATION OF THE APPELLANTS RIGHTS UNDER THE CONSTITUTIONS OF THE UNITED STATES AND STATE OF OHIO."

{¶44} In his third assignment of error, appellant initially argues that the trial court erred by imposing consecutive sentences "without a statutory basis" and "without specific fact finding." However, contrary to appellant's claim, and as the Ohio Supreme Court specifically stated, "trial judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences unless the General Assembly enacts new legislation requiring that findings be made." *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6820, ¶39; see, also, *State v. McCree*, Butler App. Nos. CA2010-02-029, CA2010-02-030, 2011-Ohio-1993, ¶35-38.

The Ohio General Assembly has yet to enact such legislation. See *State v. Hernandez*, Warren App. No. CA2010-10-098, 2011-Ohio-3765, ¶58-60. Appellant's argument, therefore, is overruled.

{¶45} Also under his third assignment of error, appellant argues that the trial court erred by ordering the firearm specification attached to his grand theft of a motor vehicle conviction to run consecutively "with the imposed sentence for the firearm specifications ordered to be served for all other counts related to the July 6, 20[09] robbery of the Save-a-Lot store." According to appellant, the trial court erred because that "firearm specification was related to the same transaction as the firearm specifications for the robbery, kidnapping, and breaking and entering." However, similar to our findings under his second assignment of error, we also find this argument is now rendered moot. Accordingly, appellant's third assignment of error is overruled.

{¶46} Assignment of Error No. 4:

{¶47} "THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND STATE OF OHIO."

{¶48} In his fourth assignment of error, appellant argues that he received ineffective assistance of trial counsel. We disagree.

{¶49} To prevail on his ineffective assistance of counsel claim, appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *State v. Smith*, Warren App. No. CA2010-06-057, 2011-Ohio-1188, ¶63, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. The failure to make an adequate showing on either prong is fatal to appellant's ineffective assistance of counsel claim. *State v. Bell*, Clermont App. No. CA2008-05-044,

2009-Ohio-2335, ¶77, citing *Strickland* at 697.

{¶50} Initially, appellant argues that his trial counsel was ineffective when he "allowed" appellant "to agree to a sentence that included consecutive sentences and did not object to the imposition of consecutive and multiple sentences on allied offenses." However, while we may question appellant's claim that his trial counsel "allowed" him to enter into such agreement, based on our finding the trial court committed plain error by not merging his aggravated robbery and grand theft convictions stemming from the July 6, 2009 Save-a-Lot robbery under his first assignment of error, we also find this argument is now rendered moot.

{¶51} Next, appellant argues that his trial counsel was ineffective for "not requesting an oral hearing on the Motion for Severance." However, besides appellant's bare assertions otherwise, there is simply nothing in the record that indicates the trial court's decision to only sever the charges stemming from the January 8, 2009 Speedway robbery would have been different had the court held a hearing on his motion. In fact, as the trial court's November 16, 2010 order specifically states, such a decision was made only "[a]fter listening to the arguments of counsel in chambers." Appellant's argument, therefore, is overruled.

{¶52} Appellant also argues that his trial counsel was ineffective for "not objecting to [him] wearing prison clothing and being shackled during the jury voir dire and the jury trial." We disagree.

{¶53} In this case, after given the opportunity to speak in mitigation at his sentencing hearing, appellant stated, in pertinent part, the following:

{¶54} "[APPELLANT]: At the beginning of the trial you put the skirts on the table so [the jury] wouldn't see my restraints. Then the jury was brought in they was placed directly behind me so they could see my restraints.

{¶55} "I was forced to go in trial with a prison uniform on and the jury [knew] I was from prison. I feel in their judgment I was guilty in their eyes when they seen me. * * * Your

Honor, I'm at a loss for words. Truthfully, I don't know what to think. I just ask for the court to be [lenient] at least I can get out, have a productive life and be with my family."

{¶56} In response, the trial court stated the following:

{¶57} "[THE COURT]: You were not forced to wear prison garb, that's something that we're not required to dress you and that's something we discussed that you had an opportunity to have anybody you want bring clothing that were available and we don't have a wardrobe on hand for that purpose.

{¶58} "The rule of court they can get clothes to you prior to trial and that was something you were aware of days before and if you had money in the commissary and somebody available to shop I don't know, that's not the job of the court. The court's obligation is to allow you that opportunity but not to provide that for you.

{¶59} "You were under the skirts, I can only go by my conjecture or your conjecture of what the jury did. They looked at the evidence that was presented, they certainly were able to put together as they saw fit in reaching convictions on the cases that were tried."

{¶60} As it relates to his ineffective assistance claim resulting from his trial counsel's failure to object to him wearing prison garb, as the trial court found, and for which we agree, appellant was not "forced" to wear the prison garb throughout the trial. Instead, as the record clearly indicates, appellant was given the opportunity to have alternate clothing provided to him by "anybody" he wanted. Appellant, for whatever reason, did not take advantage of this opportunity. In turn, because the conduct for which appellant now complains of was a result of his own doing, any objection from his trial counsel relating to appellant wearing prison garb would have certainly been futile. Appellant's argument that he was denied effective assistance of counsel when his trial counsel failed to object to him wearing prison garb, therefore, is overruled.

{¶61} Furthermore, as it relates to his ineffective assistance claim resulting from his

trial counsel's failure to object to him being shackled, appellant cannot establish any resulting prejudice for, as the trial court found, the jury was unable to see the him in shackles as he was "under the skirts." See, e.g., *People v. Payne* (2009), 285 Mich.App. 181, 191 (finding no ineffective assistance of counsel for failing to object to defendant wearing shackles throughout trial where "defendant cannot show that the shackles prejudiced him because the jury never saw them"); *Davidson v. State* (Mo.App.2010), 308 S.W.3d 311, 316-317 (finding no ineffective assistance of counsel for failing to object to defendant wearing shackles throughout trial where the shackles were not actually visible to the jury); *Anderson v. State* (Fla.2009), 18 So.3d 501, 519 (finding no ineffective assistance of counsel for failing to object to defendant wearing shackles throughout trial where adequate precautions were taken to prevent jury from seeing or hearing shackles and where there was no evidence indicating jury was aware of defendant's shackles); *Zink v. State* (Mo.2009), 278 S.W.3d 170, 185-186 (finding no ineffective assistance of counsel for failing to object to defendant wearing shackles throughout trial where, although device impacted his gait while walking, the shackles were not visible to the jury). We find no error in the trial court's finding. Appellant's argument, therefore, is likewise overruled.

{¶62} Finally, appellant argues that his trial counsel was ineffective "for drawing attention to [him] being in prison clothing during jury voir dire and not striking a juror who witnessed a robbery." However, after a thorough review of the record, including a review of the voir dire transcript, we find the challenged actions nothing more than the product of sound trial strategy that falls squarely within the wide range of reasonable professional assistance. See *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, ¶206 (stating "counsel's actions during voir dire are presumed to be matters of trial strategy"); *State v. Reynolds*, Allen App. No. 1-02-70, 2003-Ohio-2607, ¶21 (stating "how an attorney chooses to conduct voir dire, including the use of peremptory strikes, constitutes trial strategy"). As this

court has consistently stated, "[e]ven debatable trial tactics do not constitute ineffective assistance of counsel." *State v. Gleckler*, Clermont App. No. CA2009-03-021, 2010-Ohio-496, ¶10; see *State v. Hoop*, Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20; see, also, *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101. Therefore, appellant's fourth assignment of error is overruled.

{¶63} Judgment affirmed in part, reversed in part, and remanded for further proceedings.

POWELL, P.J., and PIPER, J., concur.