[Cite as *State v. Wilson,* 2011-Ohio-430.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-251
v.	:	(C.P.C. No. 09CR-06-3791)
Mark A. Wilson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 1, 2011

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins*, *IV*, for appellee.

Davis Law Offices Co., *L.P.A.*, and *Jeffrey R. Davis*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Mark A. Wilson ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas convicting him of three counts of aggravated robbery, four counts of robbery, and two counts of having a weapon while under disability, along with the firearm specifications contained in two of the aggravated robbery counts and two of the robbery counts.

{¶2} This matter arises out of a series of robberies that occurred at three different restaurants in Franklin County, Ohio. The facts surrounding each incident were

adduced at trial as follows. The first robbery occurred in the early afternoon of October 3, 2008, at a Pizza Hut on Parsons Avenue. Joseph Kraft ("Kraft") testified that on this date he was working at this location when a man walked to the counter, and handed Kraft a plastic bag with a note inside of it. The note read, "Give me all the money." (Tr. 294.) Thinking it was not a serious demand, Kraft testified he "chuckled," and asked the man if it was a joke. According to Kraft, the man said, "No, don't be a hero," and pulled up his shirt to reveal the handle of a gun. (Tr. 294.) Realizing the man was serious, Kraft gave the man the money from the register, and the man ran out of the store.

{¶3} Kraft testified he called the police and described the man as missing teeth, wearing gray sweatpants, a red toboggan, and sunglasses, and carrying a black-handled gun. Police responded and walked down the alley in which it was said the man had run. Approximately 100 feet from the Pizza Hut, police discovered a red stocking cap, a black scarf, a gray sweatshirt, gray sweatpants, and a pellet gun. DNA testing was done on the items, and the results indicated appellant could not be excluded as a contributor of the DNA found on the sweatshirt and the pellet gun, but appellant could be excluded as a contributor of the DNA found on the red hat. The results also revealed appellant's DNA matched the DNA found on the sweatpants and the scarf. Fingerprints were taken from the front counter of the Pizza Hut and matched those of a man named Anthony Parks. Though asked, Kraft was unable to identify appellant out of a photo array.

{¶4} The next incident occurred on June 2, 2009, at Hunan King, a Chinese restaurant on Lockborne Road. At approximately 12:35 p.m. that day, owner Jie Liu ("Liu"), testified he was working when a man, later identified by Liu as appellant, entered the restaurant, asked for a menu, and said he would return at a later time. According to

Liu, approximately ten minutes later, appellant returned and ordered "pepper steak." (Tr. 385.) However, when Liu turned to prepare the order, appellant told Liu, "Don't move." (Tr. 396.) Liu turned back to see appellant pointing a gun at him. Liu testified appellant demanded all the money in the cash register and began counting to ten. Appellant also threatened that if Liu failed to comply, Liu would be shot. Liu gave appellant approximately $200 from the cash register, and then pressed the security alarm button after appellant left. Liu explained at trial that appellant "look like an old man, he lost a lot of tooth on his mouth," and was wearing a baseball cap with lettering on it, but he was unable to recall what the letters said. (Tr. 388.) Liu picked appellant out of a photo array prepared by the Columbus Police Department, and identified appellant in court as the man who robbed the restaurant.

{¶5} The third incident occurred on June 8, 2009, at a KFC restaurant on South High Street. Nicole Blankenship ("Blankenship"), testified she was working on this day when appellant entered the restaurant at approximately 1:15 p.m., and placed a food order. Appellant then handed Blankenship a note, that Blankenship initially thought was another food order. However, the note instructed her to open the register and not to scream or make any noise. Blankenship testified that as she read the note, appellant was saying this to her as well. Blankenship described that because she was afraid, she ran to the back of the restaurant, while appellant took the note and left. Blankenship described appellant as an older dark male who was missing teeth and wearing a hat, sunglasses, and a jacket. Blankenship identified appellant out of a photo array and also made an in-court identification of appellant.

{¶6} Janie Lopez ("Lopez") was working with Blankenship at KFC on June 8, 2009, and she saw appellant hand Blankenship a note and say something to her. Lopez testified Blankenship set the note down, and then "took off to the back, to the kitchen." (Tr. 280.) Lopez described that appellant had a plastic bag in his hands and was wearing a hat. Lopez also made an in-court identification of appellant.

{¶7} The final incident occurred on June 13, 2009, at the same Hunan King that was robbed on June 2, 2009. On June 13, Liu's wife, Yan Wu ("Wu"), was working, and she testified that between 5:00 and 6:00 p.m. that evening the only customer in the restaurant was a man picking up a to-go order. Appellant followed this customer in and when the man left with his order, appellant ordered "one large pepper steak and one large beef and broccoli." (Tr. 225.) Appellant had a scarf covering his mouth and though he tried to hold it in place, it kept falling down. Wu testified that when she asked appellant for payment, appellant pointed a gun at her and said, "Don't move." (Tr. 206.) Appellant instructed Wu to put the money from the register onto the counter and threatened to shoot her if she failed to comply. Appellant began counting to ten. After Wu gave appellant the money, he left the restaurant, and Wu called Liu and then the police. Wu described appellant as an older black man with a skinny face and "no teeth." (Tr. 219.) Wu testified appellant was wearing jeans, a red shirt, and a brown hat that read "Papa John Pizza." (Tr. 220.) Approximately a week later, Wu selected appellant out of a photo array and also made an in-court identification of appellant.

{¶8} On June 25, 2009, appellant was indicted by a Franklin County Grand Jury for three counts of aggravated robbery with firearm specifications, three counts of robbery with firearm specifications, three counts of having a weapon while under disability

("WUD"), and two counts of robbery. A jury trial commenced on March 1, 2010. Prior to the beginning of the jury selection process, the trial court dismissed, at the state's request, one of the WUD counts as well as the firearm specifications contained in one of the aggravated robbery counts and one of the robbery counts. Appellant elected to waive jury and have the two remaining WUD counts tried to the bench.

{¶9} After deliberations, the jury found appellant guilty of two counts of aggravated robbery with firearm specifications, two counts of robbery with firearm specifications, one count of aggravated robbery without specification, and two counts of robbery without specification. The jury found appellant not guilty of one count of robbery. Subsequently, the trial court found appellant guilty of the two WUD counts. A sentencing hearing was held on March 11, 2010, and the trial court imposed an aggregate sentence of 36 years incarceration.

{¶10} This appeal followed, and appellant brings the following three assignments of error for our review:

> I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEVERANCE OF CHARGES PURSUANT TO CRIMINAL RULE 14.
>
> II. COUNSEL FOR DEFENDANT WAS INEFFECTIVE IN FAILING TO ARGUE DEFENDANT'S MOTION FOR SEVERANCE AND IN FAILING TO RAISE THE MOTION AFTER CLOSING OF THE STATE'S CASE IN CHIEF.
>
> III. THE VERDICT ENTERED WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶11} In his first assignment of error, appellant contends the trial court erred in denying his motion, made pursuant to Crim.R. 14, to sever the charges of which the indictment was comprised. Appellant, through counsel, filed a motion on October 23,

2009, to sever the indicted charges. Shortly thereafter, a hearing was held on November 2, 2009, at which time appellant, dissatisfied with his attorney, sought the appointment of new counsel. The trial court granted appellant's request, and appointed new counsel at that time. On February 16, 2010, another hearing was held and again appellant raised complaints about his counsel. Also at this time, appellant raised concerns about joinder, and explained to the trial court why he did not want the indicted offenses to be tried together. The trial court declined to appoint new counsel, but stated it would take the October 23, 2009 motion to sever under advisement. On February 19, 2010, the trial court rendered a decision denying the motion for severance.

{¶12} Appellant did not renew his objection to joinder of the charged offenses at the close of either the state's evidence or all the evidence; therefore, he has waived all but plain error. *State v. Williams*, 10th Dist. No. 02AP-730, 2003-Ohio-5204, ¶29, citing *State v. Saade*, 8th Dist. No. 80705, 2002-Ohio-5564, citing *State v. Walker* (1990), 66 Ohio App.3d 518, 522; *State v. Brady* (1988), 48 Ohio App.3d 41, 44. Under the plain error test, a reviewing court must consider whether, "but for the existence of the error, the result of the trial would have been otherwise." *State v. Wiles* (1991), 59 Ohio St.3d 71, 86. As will be discussed, however, there is no error, plain or otherwise, in the trial court's denial of appellant's motion to sever counts in the indictment.

{¶13} As provided in Crim.R. 8(A), two or more offenses may be charged in the same indictment if they are of "the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." "The law favors joining multiple offenses in a single trial under Crim.R. 8(A) if

the offenses charged 'are of the same or similar character.' " *State v. Lott* (1990), 51 Ohio St.3d 160, 163, quoting *State v. Torres* (1981), 66 Ohio St.2d 340. Nonetheless, an accused may move to sever counts of an indictment on the grounds that he or she will be prejudiced by the joinder of multiple offenses. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶49.

{¶14} To succeed on a motion to sever, a defendant "must furnish the trial court with sufficient information so that it can weigh the considerations favoring joinder against the defendant's right to a fair trial." *Lott* at 163, quoting *Torres* at syllabus. An appellate court will not reverse a trial court's decision to deny severance unless the trial court has abused its discretion. Id. For an abuse of discretion to lie, a reviewing court must find that a trial court's ruling was unreasonable, arbitrary or unconscionable. *State v. Vasquez*, 10th Dist. No. 05AP-705, 2006-Ohio-4074, ¶6.

{¶15} The state can rebut a defendant's claim of prejudicial joinder in two ways. *LaMar* at ¶50. First, if the state shows that evidence of one offense would be admissible at a separate trial of the other offense as "other acts" evidence under Evid.R. 404(B), then joinder of the offenses in the same trial cannot prejudice the defendant. *State v. Tipton*, 10th Dist. No. 04AP-1314, 2006-Ohio-2066, ¶27, citing *LaMar* at ¶50; *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, ¶30; *State v. Coley*, 93 Ohio St.3d 253, 259, 2001-Ohio-1340. Second, a joinder cannot result in prejudice if the evidence of the offenses joined at trial is simple and direct, so that a jury is capable of segregating the proof required for each offense. Id., citing *State v. Johnson*, 88 Ohio St.3d 95, 109, 2000-Ohio-276; *State v. Mills* (1992), 62 Ohio St.3d 357, 362. These two tests are disjunctive, so that the satisfaction of one negates a defendant's claim of prejudice without having to

consider the other test. *State v. Gravely*, 10th Dist. No. 09AP-440, 2010-Ohio-3379, ¶38, citing *State v. Cameron*, 10th Dist. No. 09AP-56, 2009-Ohio-6479, ¶35, citing *Mills*.

{¶16} In the case at bar, appellant contends the evidence of the separate robberies would not be admissible as "other acts" evidence under Evid.R. 404(B). According to appellant, a person approaching a cashier with a note, wearing a baseball cap and sunglasses, and threatening use of a gun can "hardly be claimed as indicative of a certain person," and that once the jury learned his DNA was linked to one incident, they would automatically find him guilty on all charges. (Appellant's brief at 11-12.) The record, however, reveals more than the descriptors set forth by appellant, and we find the evidence presented here would be admissible under Evid.R. 404(B).

{¶17} Evid.R. 404(B) permits evidence of "other crimes, wrongs, or acts * * * as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," so long as such evidence of other acts is not offered to show propensity. Evidence of crimes may be introduced to prove identity if the defendant " 'committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes.' " *State v. Shedrick* (1991), 61 Ohio St.3d 331, 337, quoting *State v. Curry* (1975), 43 Ohio St.2d 66, 73. See also *State v. Lowe*, 69 Ohio St.3d 527, 1994-Ohio-345, paragraph one of the syllabus ("To be admissible to prove identity through a certain *modus operandi*, otheracts evidence must be related to and share common features with the crime in question.").

{¶18} In *Tipton*, this court was presented with a defendant charged with the robbery of two different gas stations that were robbed within ten minutes of each other.

Tipton moved for severance of the offenses, but the trial court denied the motion. On appeal, this court found that because the gas stations were located only ten miles and one highway exit from one another and because the stations were robbed within ten minutes of each other they were both temporally and geographically linked. We went on to find that the robberies followed a similar pattern as the defendant "entered the store, brandished a handgun, and demanded money from the cash register and safe," such that the evidence of one robbery could have been introduced at the trial of the other under Evid.R. 404(B) to prove identity.

{¶19} Similarly, in *State v. Payne*, 10th Dist. No. 02AP-723, 2003-Ohio-4891, a defendant was charged in a multi-count indictment stemming from three robberies that occurred at two florists and a credit union. The robberies occurred on April 25, May 11, and May 29 of 2001, and all occurred at gunpoint. The defendant argued that the indicted charges should have been severed for purposes of trial, but this court disagreed. The *Payne* court noted the defendant was identified at two of the three robberies and that "[t]he offenses charged and tried in the present case were of the same or similar character as each aggravated robbery was committed with the use of a firearm." Id. at ¶26.

{¶20} In the case sub judice, the evidence, like that in *Tipton* and *Payne*, would have been admissible in a trial of the other three pursuant to Evid.R. 404(B). The crimes here all occurred during business hours and all involved restaurants in the south-side area of Columbus so as to be geographically linked. All four robberies involved a black man with missing teeth that approached the register and demanded money from it. In three of the four robberies the evidence established the perpetrator placed a food order

prior to demanding money, and in fact, the same item, i.e., pepper steak, was ordered in each of the robberies at Hunan King. Also, in three of the four robberies, the evidence established the perpetrator showed a gun while making his demands. Both the Pizza Hut and the KFC robberies involved the use of a note and the presence of a plastic bag, and both Hunan King robberies involved the person counting to ten while waiting for the money. Moreover, appellant was identified by witnesses from three of the four robberies.

{¶21} Although the crimes here differed from one another in some respects, "admissibility under Evid.R. 404(B) 'is not adversely affected simply because the other [crimes] differed in some details.' " *Cameron* at ¶39, quoting *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶72, quoting *State v. Jamison* (1990), 49 Ohio St.3d 182, 187. We find the evidence here demonstrates the crimes followed a similar pattern and were geographically linked such that the evidence of any one of the robberies would have been admissible at the trial of each of the others under Evid.R. 404(B) to establish appellant's identity. *State v. Sealy*, 10th Dist. No. 09AP-1128, 2010-Ohio-6294 (four robberies by a man wearing dark clothing, brandishing a handgun, and demanding money followed a similar pattern for purposes of Evid.R. 404(B)).

{¶22} Because we have found the "other acts" test has been satisfied so as to rebut appellant's claim of prejudicial joinder, we need not consider the less stringent "simple and direct" evidence test. *Gravely*. Nonetheless, we note that in this case, the second test to rebut appellant's claim of prejudicial joinder has been satisfied as well. Though appellant states in his brief that the evidence fails to consist of simple and direct evidence, appellant's argument focuses not on the evidence itself, but rather the state's presentation of the same. According to appellant, the state used evidence from the

October robberies to "improperly" support the "questionable" identifications made in the June robberies. (Appellant's brief at 12.) We find no merit to this argument.

{¶23} Evidence is "simple and direct" if the jury is capable of segregating the proof required for each offense. *Cameron* at ¶40, citing *Mills*. "The rule seeks to prevent juries from combining the evidence to convict the defendant, instead of carefully considering the proof offered for each separate offense." Id. The evidence of each offense presented in the case sub judice is simple and direct and not confusing or difficult to separate. Though part of a crime spree, the offenses were separate, and the offenses were not so complex that the jury would have difficulty separating the proof required for each offense. *Gravely*; *Tipton*. Consequently, we conclude appellant has failed to demonstrate error, plain or otherwise, in the trial court's decision to deny appellant's motion to sever the indicted offenses.

{¶24} We also note the trial court instructed the jury to consider each count separately, and instructed as follows:

> One other thing that I did want to mention with regard to the fact that there are different locations, different incidents, the charges that are set forth in each count of the indictment constitute a separate and a distinct matter.
>
> You must consider each count and the evidence applicable to each count separately, and you must state your finding as to each count uninfluenced by your verdict as to any other count. The Defendant may be found guilty or not guilty of any one or all of the offenses that are charged in the indictment.

(Tr. 645-46.)

{¶25} A jury is presumed to follow the instructions of the court. *State v. Strickland* (Oct. 13, 1994), 10th Dist. No. 93APA10-1445, citing *Lakeside v. Oregon* (1978), 435

U.S. 333, 98 S.Ct. 1091. Because there is no indication the jury failed to do so in this case, appellant has not demonstrated actual prejudice. Id. Lastly, we note the jury did not render guilty verdicts on all counts, but rather, found appellant not guilty of one count of robbery. This demonstrates the jury was not only capable, but, in fact, did segregate the evidence required for each offense. *Strickland*.

{¶26} Accordingly, we find the trial court did not abuse its discretion when it denied appellant's motion for severance, and overrule appellant's first assignment of error.

{¶27} In his second assignment of error, appellant contends his trial counsel was ineffective for failing to argue the motion for severance and for failing to renew the motion after the state presented its case-in-chief.

{¶28} In Ohio, a properly licensed attorney is presumed competent. *State v. Davis*, 10th Dist. No. 09AP-869, 2010-Ohio-4734, ¶12, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. Id., citing *State v. Smith* (1985), 17 Ohio St.3d 98, 100. Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 1998-Ohio-343. Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶101.

{¶29} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*

(1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 2064. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. Id., 466 U.S. at 687, 104 S.Ct. at 2064. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. Id. To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. Id., 466 U.S. at 694, 104 S.Ct. at 2068.

{¶30} Appellant's argument under this assigned error is somewhat unique because he does not contend his counsel was ineffective for failing to file a motion to sever; and it is clear from the record that appellant's initial trial counsel filed such a motion on October 23, 2009. Also, the transcript reflects appellant himself raised the severance issue to the trial court at the February 16, 2010 hearing that appellant attended with his second court-appointed attorney. Rather, appellant asserts his second attorney was ineffective for failing to make arguments at the February hearing and for failing to renew the motion at the close of the state's case-in-chief.

{¶31} " 'Failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel, nor could such a failure be prejudicial.' " *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶54, quoting *State v. Henderson*, 8th Dist. No. 88185, 2007-Ohio-2372, ¶42, quoting *State v. Shannon* (June 16, 1982), 9th Dist. No.

10505. At the February 16, 2010 hearing, appellant's trial counsel recognized the futility of the motion:

> He did not want to proceed with the trial, his concern trying multiple counts of robbery to the jury.
>
> I've explained to him decisions in our Court of Appeals as well as the factual evidence in this case and the instructions to the jury that separate counts are to be considered separately, in fact, to adequately protect his rights.
>
> His concern is, if the jury convicts him of one thing, they'll convict him of the rest regardless. But the law is what it is. He did not appear satisfied. I'm not clear what [appellant] wants to see done. I know what he wants to see not done.

(Tr. 13-14.)

{¶32} Thus, we cannot say appellant's trial counsel failed to function as the "counsel" guaranteed by the Sixth Amendment.

{¶33} Further, we held in our disposition of appellant's first assignment of error that the evidence presented at trial demonstrated the indicted offenses were part of a common scheme or course of criminal conduct and properly joined. Counsel's failure to renew a motion to sever offenses does not constitute ineffective assistance of counsel where the offenses are part of a common scheme or course of criminal conduct and are properly joined. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 156.

{¶34} Additionally, even if appellant was able to show his trial counsel's performance was deficient, appellant is unable to show his defense was prejudiced as a result. "[A]ppellant could not have been prejudiced by counsel's failure to renew his objection [to joinder] because the trial court properly granted appellee's motion for joinder." *Cassell* at ¶55; *State v. Morris*, 11th Dist. No. 2008-T-0110, 2009-Ohio-6033

(appellant unable to demonstrate prejudice by counsel's failure to renew a motion for severance where the evidence relating to each charge was admissible under Evid.R. 404(B), and was otherwise simple and direct); *State v. McCrary*, 2d Dist. No. 23360, 2010-Ohio-2011; *State v. Brunelle-Apley*, 11th Dist. No. 2008-L-014, 2008-Ohio-6412; *State v. Hill*, 5th Dist. No. 2002-CA-00046, 2007-Ohio-56.

{¶35} Consequently, we conclude appellant has failed to demonstrate that he received ineffective assistance of counsel, and, accordingly, overrule appellant's second assignment of error.

{¶36} In his final assignment of error, appellant contends his convictions are against the manifest weight of the evidence.

{¶37} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine " 'whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id., quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶38} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson*, 10th Dist. No. 01AP-973, 2002-Ohio-1257; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶22; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶17.

{¶39} According to appellant, the jury lost its way "due to joinder of the seperate [sic] robbery charges." (Appellant's brief at 14.) It is appellant's position that joinder allowed the jury to improperly consider the evidence of the robberies, not as separate events, but as a combined event raising the "spectre of 'guilt transference.' " (Appellant's brief at 14.) We have already addressed the matter of severance raised in the first assignment of error, and found that these offenses were properly joined. Moreover, we also noted in that disposition that the not guilty verdict on one of the counts indicated the jury was not only capable, but, in fact, did segregate the evidence required for each

offense. Thus, we do not find that joinder of the offenses in the case sub judice presents a basis for reversal on manifest weight grounds.

{¶40} Moreover, appellant does not direct this court to any specific evidence upon which the jury made an improper reliance, nor does our review reveal any. The jury, as fact finder, was in the best position to weigh the evidence presented, along with the demeanor of the witnesses, in order to determine credibility. After carefully reviewing the record in its entirety, we conclude that the jury did not lose its way in resolving credibility determinations, nor did the convictions create a manifest miscarriage of justice. Consequently, we cannot say appellant's convictions are against the manifest weight of the evidence, and we overrule appellant's third assignment of error.

{¶41} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

BROWN, J., concurs.
TYACK, J., concurs separately.

TYACK, J., concurring separately.

{¶42} I agree with the bottom line reached by the majority of this panel, but not with one portion of the majority opinion. I therefore concur separately.

{¶43} I do not believe that counsel for a criminal defendant who has vigorously contested the joinder of offenses for trial has to object at the close of the state's evidence and/or the close of all the evidence to avoid a plain error analysis. By the close of the state's evidence and all the evidence, the damage has been done. The jury has heard

the damaging testimony. The decision about joinder has to be made before the trial has started, not in the middle of trial.

{¶44} However, in this case the charges were properly joined under Crim.R. 8(A), so no error occurred with or without a plain error analysis.

{¶45} I concur separately.

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