[Cite as *State v. Gibson*, 2011-Ohio-5614.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1047 (C.P.C. No. 10CR-03-1949)
Eddie D. Gibson, Jr.,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 1, 2011

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Eddie D. Gibson, Jr., appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm in part and reverse in part that judgment and remand the matter for resentencing.

Factual and Procedural Background

{¶2} On February 3, 2010, appellant and his wife agreed to purchase two cars from a car dealership in Columbus, Ohio. Three weeks later, appellant and his wife returned to the dealership to pay for the cars. Appellant presented the dealership with a check signed by appellant that indicated it was drawn from a private account at the Federal Reserve Bank in Atlanta, Georgia. The dealership's salesmen brought the check to Eric Tincher, the dealership's general manager, who had concerns about the validity of the check. Tincher told appellant that it would not release the cars until the check was honored and that he would contact him when that occurred. Appellant agreed and completed the paperwork for the sale of the cars.

{¶3} The dealership presented the check to its bank for payment. However, the bank returned the check unpaid, indicating that it was a counterfeit check. As a result, the dealership contacted the Columbus Police Department. The police told Tincher to have appellant come to the dealership to pick up the cars. When appellant returned to the dealership, the police arrested him.

{¶4} As a result of these events, a Franklin County Grand Jury indicted appellant with one count of forgery in violation of R.C. 2913.31 and one count of possessing criminal tools in violation of R.C. 2923.24. Appellant entered a not guilty plea to the charges and proceeded to represent himself at trial.

{¶5} During the trial, the dealership's employees testified to the above events. Robert Love of the Federal Reserve Bank in Atlanta, Georgia, testified that the Federal Reserve Bank provides financial services to other financial institutions and that an individual cannot open a private account at that bank. He testified that appellant did not

have an account at the Federal Reserve Bank in Atlanta, Georgia, and that the check was not a valid check. While the check contained the bank's proper routing number, Love testified that the account number on the check was not a valid account number for the Federal Reserve Bank in Atlanta.

{¶6} Appellant testified on his own behalf and admitted that he created the check at his home. Appellant contended that he possessed an account with the United States Treasury Department (hereinafter "the Treasury") that he could use even though he never opened an actual account at the Federal Reserve Bank and he never deposited money into any account at the Federal Reserve Bank.

{¶7} Appellant's theory begins with letters he sent to Timothy Geithner, the Secretary of the Treasury in April 2009. In the first letter, appellant set forth his beliefs about the United States financial system and notified Geithner that he wished to establish his account with the Treasury. The letter informed Geithner that he had 30 days to "honor or reject" his claim. Three weeks later, having received no response from Geithner, appellant mailed him another letter. Appellant indicated in the letter his understanding that Geithner agreed to everything he wrote in the previous letter by not responding. Accordingly, appellant asserted that he had established a private account with the Treasury. He presented what he characterized as a "private indemnity bond" that he prepared in the amount of $100 billion for deposit into his account.[1] Geithner only had 10 days to "honor or reject" this letter.

[1] In appellant's theory, a bond is his promise of his own worth. (Tr. 255.) In a subsequent mailing, appellant increased the bond to $150 billion.

{¶8} In October 2009, appellant mailed another letter to Dennis Lockhart, the President of the Federal Reserve Bank in Atlanta, Georgia. Appellant wrote that Lockhart was required to open appellant's "private side account" pursuant to the arrangements he made with Geithner. The letter included a copy of a check appellant intended to use to utilize the funds in his account.

{¶9} Appellant did not receive responses to any of his letters.

{¶10} Accordingly, in December 2009, he delivered notices of the establishment of his private account with the Treasury to a large number of federal, state and local elected and appointed officials. On February 5, 2010, appellant mailed Geithner another letter in which he reiterated his contention that the parties had agreed to the creation of his private account. He also included a copy of the check that he would use to pay for the two cars he agreed to purchase. Appellant gave Geithner only three days to reject his claim. Having received no response, appellant went to the dealership with the check to pay for the cars.

{¶11} The jury found appellant guilty of both counts and the trial court sentenced him accordingly.

{¶12} Appellant now appeals and assigns the following errors:

> [1.] APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.
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> [2.] THE FORGERY AND PCT STATUTES WERE UNCONSTITUTIONALLY APPLIED BY THE STATE AGAINST APPELLANT IN VIOLATION OF THE CONTRACT CLAUSES IN ARTICLE I, SECTION 10 OF THE U.S

> CONSTITUTION AND ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION, AND APPELLANT'S RIGHT TO CONTRACT UNDER THE 14TH AMENDMENT TO THE U.S CONSTITUTION AND ARTICLE I, SECTION 1 OF THE OHIO CONSTITUTION.
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> [3.] THE FORGERY AND PCT STATUTES WERE UNCONSTITUTIONALLY APPLIED BY THE STATE AGAINST APPELLANT IN VIOLATION OF THE FREE EXERCISE CLAUSES OF THE 1ST AMENDMENT TO THE U.S CONSTITUTION AND ARTICLE I, SECTION 7 OF THE OHIO CONSTITUTION.
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> [4.] JURY BIAS AND RACIAL AND RELIGIOUS PREJUDICE AGAINST THE APPELLANT DEPRIVED HIM OF A FAIR TRIAL UNDER THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND THE COURT'S FAILURE TO EITHER GRANT APPELLANT'S POST-TRIAL REQUEST FOR DISMISSAL, OR GRANT A NEW TRIAL OR EVEN HOLD A HEARING BASED ON SAID ALLEGATIONS CONSTITUTED AN ABUSE OF DISCRETION.
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> [5.] THE RESTITUTION WAS NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE, AND ENTERING CONVICITONS FOR ALLIED OFFENSES OF FORGERY AND PCT VIOLATED DOUBLE JEOPARDY.

Second and Third Assignments of Error—Constitutional Challenges

{¶13} In these assignments of error, appellant presents two as-applied constitutional challenges to his convictions. He argues that the state's prosecution in this case violated his rights to exercise his religion and to contract. We disagree.

{¶14} First, appellant did not raise a constitutional challenge to these prosecutions in the trial court based on freedom of religion. Constitutional challenges not raised in the trial court are forfeited and may not be asserted in the first instance in this court. *State v. Kenney*, 10th Dist. No. 09AP-231, 2009-Ohio-5584, ¶11 (citing *State v. Awan* (1986), 22

Ohio St.3d 120, syllabus). Accordingly, we decline to consider this constitutional challenge.

{¶15} Arguably, appellant did argue in the trial court that the state's prosecution violated his constitutional right to contract. Therefore, we will address that argument.

{¶16} The state initially argues that appellant had no contracts that were impaired in this case. We agree. Whether a contract exists is a question of law. *Zelina v. Hillyer,* 165 Ohio App.3d 255, 2005-Ohio-5803, ¶12. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained-for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration. *Kostelnik v. Helper,* 96 Ohio St.3d 1, 2002-Ohio-2985, ¶16. In order to have a valid contract, there must be a "meeting of the minds" as to the essential terms of the contract, such that "a reasonable person would find that the parties manifested a present intention to be bound to an agreement." *Zelina* at ¶12. A "meeting of the minds" is usually manifested by an offer by one party and acceptance by the other. *TLG Electronics, Inc. v. Newcome Corp.* (Mar. 5, 2002), 10th Dist. No. 01AP-821.

{¶17} Appellant argues that contracts were established between him and the Treasury and the Federal Reserve by their failure to respond to his offers. We disagree.

{¶18} Generally, one party's silence after receiving an offer does not constitute acceptance of an offer. *Blazavich v. CNA Ins. Cos.* (June 30, 1998), 10th Dist. No. 97AP-1282. Silence may constitute an acceptance when the relation between the parties justifies the offeror's expectation of a reply to reject the offer. Id. (citing *Richard A. Berjian, D.O., Inc. v. Ohio Bell Tel. Co.* (1978), 54 Ohio St.2d 147, 152, citing 1 Williston on Contracts (3 ed.1957) 319, Section 91). There is no evidence that appellant had any

relation or previous dealings with the recipients of his so-called offers. Nor are there any other circumstances that would suggest that silence could constitute acceptance. See Restatement (Second) Contracts, Section 69(1). Because appellant did not have contracts with the Treasury or the Federal Reserve, there can be no violation of his right to contract.

{¶19} We overrule appellant's second and third assignments of error.

First Assignment of Error—Sufficiency and Manifest Weight of the Evidence

{¶20} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. Whether the evidence is legally sufficient to support a verdict is a question of law. Id.

{¶21} In determining whether the evidence is legally sufficient to support a conviction, " ' the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶34 (quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus). A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4.

{¶22} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79-80 (evaluation

of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶23} Appellant was found guilty of forgery and possession of criminal tools. To find appellant guilty of forgery in this case, the state had to prove that appellant, with purpose to defraud or knowing that he is facilitating a fraud, either forged a writing (the check) so that it purports to be genuine when it was actually spurious, or uttered or possessed with purpose to utter, a writing (the check) that appellant knew was forged. R.C. 2913.31(A)(2) and (3).

{¶24} A number of the words in this offense have specific definitions. Pursuant to R.C. 2901.22(A), a person acts with purpose "when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." Defraud means to "knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." R.C. 2913.01(B).

{¶25} In relevant part, "forge" means "to fabricate or create, in whole or in part and by any means, any spurious writing." R.C. 2913.01(G). Further, "utter" means "to issue, publish, transfer, use, put or send into circulation, deliver, or display." R.C. 2913.01(H).

{¶26} Appellant argues that the state failed to prove that the check he presented to the dealership was spurious. We disagree. First, we note that spurious is not defined by the statute. When a statute fails to ascribe a definition to a word used, courts resort to the common, everyday meaning of the word. *Am. Fiber Sys., Inc. v. Levin,* 125 Ohio St.3d 374, 2010-Ohio-1468, ¶24. Pursuant to Webster's Third New International Dictionary (1966), "spurious" is defined in relevant part as "outwardly similar or corresponding to something without having its genuine qualities: FALSE, COUNTERFEIT." Merriam-Webster's Online Dictionary further defines "spurious" as "of falsified or erroneously attributed origin: FORGED." See http://www.merriam-webster.com/dictionary/spurious.

{¶27} Appellant testified that he created and printed the check at his home. He testified that the account number he used on the check was a red number on the back of his social security card. (Tr. 228.) He argued that his account was in the Atlanta, Georgia branch of the Federal Reserve because the letter "F" at the beginning of the red number corresponded to that branch of the Federal Reserve. (Tr. 229.) Robert Love of the Federal Reserve Bank in Atlanta, Georgia, testified that appellant did not have an account at the Federal Reserve Bank and that the check was not a valid check. This is sufficient evidence to prove that appellant created a spurious check.

{¶28} Appellant argues that even though the check was not honored, it was not spurious. Appellant contends the government breached its contractual obligations when it refused to honor the check. We have already determined, however, that appellant did not establish a contractual relationship with any governmental agency.

{¶29} Appellant also argues that the state failed to prove that he intended to defraud the dealership. Again, we disagree. Appellant created an imaginary account with the Federal Reserve and presented a false check bearing that imaginary account number to the dealership with the intent to buy two cars. This is sufficient evidence for a jury to conclude that appellant intended to defraud the dealership by deception. See *State v. Lutz*, 8th Dist. No. 80241, 2003-Ohio-275, ¶38.

{¶30} For the state to prove appellant guilty of possessing criminal tools, it would have to prove that he possessed an instrument (the check) with purpose to use it criminally. R.C. 2923.24(A). Appellant argues that, because he did not commit forgery, he cannot be convicted of possessing criminal tools, because he did not intend to commit an underlying offense. We disagree, as we have concluded that sufficient evidence supported his forgery conviction.

{¶31} Appellant also contends that his convictions were against the manifest weight of the evidence. We disagree.

{¶32} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *Thompkins* at 387. Although there may be sufficient evidence to support a judgment, a court may nevertheless conclude that a judgment is against the manifest weight of the evidence. Id.

{¶33} When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and 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. at 387. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.; *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶12.

{¶34} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶6. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " Id. (quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Accordingly, we afford great deference to the jury's determination of witness credibility. *State v. Redman*, 10th Dist. No. 10AP-654, 2011-Ohio-1894, ¶26 (citing *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶55). See also *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶35} Appellant argues that the jury lost its way because he never sought to gain a benefit or injure the dealership and he acted in accordance with his honest beliefs. We disagree. At its barest level, this case concerned appellant's attempt to purchase two new cars with a counterfeit check written on a non-existent account. This is overwhelming evidence that he intended to obtain a benefit by deception. *Lutz* at ¶78. Additionally, the jury was aware of appellant's theory and nevertheless found him guilty.

The jury obviously concluded that his theory was just a scheme to defraud. Based on the evidence, we cannot say that the jury lost its way and created a manifest miscarriage of justice.

{¶36} Appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Accordingly, we overrule appellant's first assignment of error.

Fourth Assignment of Error—Juror Bias

{¶37} Appellant alleged in a post-trial motion in support of his motion for acquittal pursuant to Crim.R. 29 that some members of the jury told his stand-by counsel that they were afraid of him because they believed appellant to be an Arian racist involved with militia groups. Appellant claimed that the juror's comments indicated that the jury considered evidence outside of the record and unlawfully biased the verdict. Appellant did not submit an affidavit in support of his allegations. The trial court denied appellant's motion.

{¶38} Appellant made his allegation of juror bias in the context of his motion for acquittal pursuant to Crim.R. 29. He now claims that the juror bias deprived him of a fair trial and warranted a new trial. Even if we construe his motion as a motion for new trial based on juror misconduct pursuant to Crim.R. 33(A)(2), the trial court did not err when it denied the motion.

{¶39} The decision to grant or deny a motion for new trial is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71, paragraph one of the syllabus.

{¶40} Crim.R. 33(A)(2) provides that a new trial may be granted for jury misconduct. Pursuant to Crim.R. 33(C), however, affidavits are required to support a motion alleging grounds under Crim.R. 33(A)(2). *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶34. A trial court does not abuse its discretion by denying a motion or a hearing on such motion for new trial on Crim.R. 33(A)(2) grounds if no affidavits are submitted with the motion. *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603, ¶118 (citing *Toledo v. Stuart* (1983), 11 Ohio App.3d 292, 293); *State v. Salinas*, 10th Dist. No. 09AP-1201, 2010-Ohio-4738, ¶42. Appellant did not submit an affidavit to the trial court to support the allegations in his motion. Accordingly, the trial court did not abuse its discretion by denying appellant's post-trial motion without a hearing.

{¶41} We overrule appellant's fourth assignment of error.

Fifth Assignment of Error—Sentencing Issues

{¶42} Appellant presents two arguments concerning his sentence. The trial court placed appellant on two years of community control and notified him that if he violated the terms of his community control, he would receive an 18-month prison term for his forgery conviction and a 12-month prison term for his possessing criminal tools conviction. The trial court also ordered appellant to make restitution to the car dealership in the amount of $314.91.

{¶43} Appellant first argues that the trial court's order of restitution is not supported by the evidence. We agree.

{¶44} Appellant did not object to the trial court's restitution order. He has, therefore, forfeited all but plain error. *State v. Policaro*, 10th Dist. No. 06AP-913, 2007-Ohio-1469, ¶6. Under Crim.R. 52(B), plain errors affecting substantial rights may be

noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id*; State v. Litreal,* 170 Ohio App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim.R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Barnes (*quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus).

{¶45} R.C. 2929.18(A)(1) authorizes a trial court to order an offender to pay restitution in an amount based on the victim's economic loss. Specifically, R.C. 2929.18(A)(1) states that "the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense." The state must prove the amount of this economic loss with competent, credible evidence from which the trial court can calculate the amount of restitution within a reasonable degree of certainty. *State v. Champion*, 10th Dist. No. 05AP-1276, 2006-Ohio-4228, ¶7. We will, therefore, examine whether there was competent, credible evidence to support the trial court's order of restitution. *State v. Morgan*, 11th Dist. No. 2005-L-135, 2006-Ohio-4166, ¶21; *Pollicaro* at ¶8 (affirming restitution amount supported by competent and credible evidence).

{¶46} The trial court awarded restitution in the amount of a check that the car dealership gave to appellant. The check was to make up for the difference in price

between one of the cars he originally agreed to purchase and the actual cost of the car that he ultimately agreed to buy.[2] Eric Tincher, the dealership's general manager, initially testified that he believed the check has been cashed. (Tr. 150.) Later, however, he admitted that he did not know if the check had been cashed, just that it had been issued. (Tr. 161.) Given his inconsistent and uncertain testimony, Tincher's testimony was not competent, credible evidence that the dealership was injured because of appellant's conduct. Tincher could not testify that appellant cashed the check and, therefore, caused the dealership a loss.

{¶47} Second, appellant claims that his convictions are allied offenses of similar import that should have been merged for sentencing. Again, appellant did not request merger or object to his sentence in the trial court and has, therefore, forfeited this argument on appeal absent plain error. *State v. Taylor*, 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶34 (citing *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶127). A trial court commits plain error, however, when it imposes multiple sentences for allied offenses of similar import. *State v. Underwood,* 124 Ohio St.3d 365, 2010-Ohio-1, ¶31.

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

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

[2] Appellant received this check when he gave the dealership his check, before they knew that his check would be dishonored.

{¶49} To determine whether offenses are allied and of similar import and therefore subject to merger, "the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, ¶48 (citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119).

{¶50} If the offenses can be committed by the same conduct, then "the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Johnson* at ¶49 (quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. 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. However, if the answer to both questions is in the affirmative, then the offenses are allied offenses of similar import and will be merged. *Taylor* at ¶38; *Johnson* at ¶50.

{¶51} Here, we must first determine whether it is possible to commit the offenses of forgery and possessing criminal tools with the same conduct. We answer that question in the affirmative. *State v. Willis*, 192 Ohio App.3d 579, 2011-Ohio-797, ¶35. Next, we must determine whether the facts in this case establish that the offenses were committed by the same conduct. *Taylor* at ¶40. We conclude that they were. As indicted, the possession of criminal tools and forgery counts were each based on a counterfeit check he presented to the dealership. Indeed, appellant was indicted for committing both offenses on the same day. By presenting the check to the dealership, he necessarily

possessed the exact same check. *Willis* at 36 (forgery and possessing criminal tools counts not allied offenses where counts involved different documents). Under these facts, the forgery and possession of criminal tools counts arose from and were committed by the same conduct. Accordingly, the trial court erred by not merging the convictions for purposes of sentencing.

{¶52} For these reasons, we sustain appellant's fifth assignment of error and remand the matter for resentencing. *State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, ¶25.

{¶53} In conclusion, we overrule appellant's first, second, third, and fourth assignments of error but sustain his fifth assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part and we remand the matter for resentencing.

Judgment affirmed in part; reversed in part;
cause remanded for resentencing.

FRENCH and DORRIAN, JJ., concur.

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