[Cite as *State v. McClurkin*, 2013-Ohio-1140.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-944
v.	:	(C.P.C. No. 09CR-05-3046)
Vaughn A. McClurkin,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 26, 2013

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

Vaughn A. McClurkin, pro se.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Vaughn A. McClurkin, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} Early in the morning of June 4, 2008, A.M. went to sleep in her bed with her young son. A few hours later, she was awoken by someone touching her vagina. She could not see the person's face because he was wearing a mask. The man put his hands over her mouth and led her out of the bedroom to the living room. On the way, the man found a pillowcase and put it over A.M.'s head and also handcuffed her hands behind her back. The two sat down on a couch and the man began looking through the names in A.M.'s cell phone and talking to her. While the two sat on the couch and talked, the man put a knife to A.M.'s stomach and took her nightgown off. The man then put his fingers

inside her vagina. The man told A.M. to get on the floor and on top of him. He then engaged in vaginal intercourse with her, both on the floor and then again when they moved back to the couch. At various times throughout the two-hour ordeal, the man licked her vagina with his tongue, attempted to have anal sex with her, and forced her to perform fellatio on him. The pillowcase remained on A.M.'s head the entire time so she never saw the man's face. After the man was finished, he took A.M. back into her bedroom and left the house, but not before taking her purse. A.M. called her father, who called the police to report what occurred. They arrived shortly thereafter and took A.M. to the hospital for treatment.

{¶ 3} Because A.M. never saw her attacker's face, she was able to provide police only a general height and weight description of the man who raped her. Due to that, the police investigation into the rape was hampered. However, one month later, A.M. informed the police that she had received two late night hang-up calls. The police discovered that the two calls came from appellant's phone number. The police took no further action while they waited for DNA test results from samples they obtained from A.M. and from the scene.

{¶ 4} In early December 2008, before police obtained those results, A.M. again came to the police. She told them of some messages she had received on her MySpace account. Because of the content of the messages, she thought they could be from her attacker. After seeing some more messages which appeared to contain information only the attacker would have known, the police also thought that they could be from her attacker. The police subpoenaed MySpace.com to discover the origins of the account being used to send the messages to A.M. They obtained the IP address of the computer used to create the account and the time and day it was created. The account was created three hours before A.M. received the first message from the account. Police also obtained two other IP addresses that the account used to send other messages.

{¶ 5} One set of IP addresses indicated to the police a Time Warner internet account. The police subpoenaed Time Warner in order to obtain subscriber information for those IP addresses. The Time Warner subpoena revealed that the subscriber assigned to that IP address was appellant's mother. Appellant lived with his mother at the time. Police discovered that the other set of IP addresses belonged to The Ohio State University ("OSU") network. The police also sent a subpoena to the university. The OSU subpoena

revealed that the computers assigned to those IP addresses were both located at the university's campus in Marion in the Delaware Center Student Services building. They were computers located in two general computer labs that were open to all students in the building. Police discovered that appellant was taking classes in the Delaware center building in the autumn quarter of 2008. More specifically, the police obtained appellant's class schedule for that quarter and discovered one time where appellant would have been in the building for a class when, at the same time, the unknown user accessed the MySpace account used to contact A.M.

{¶ 6} Then, on December 5, 2008, with the assistance of the FBI, police captured a private chat between A.M. and the MySpace account used to send her the original messages. In this conversation, the unknown person revealed more knowledge of the attack to A.M. The police again subpoenaed MySpace.com to discover the origins of these private messages. These messages came from the IP address associated with appellant's mother's Time Warner account. In fact, the user accessed the account only three minutes before the private conversation with A.M. began.

{¶ 7} In January 2009, the police finally received tests results from the DNA samples. There were some unknown DNA samples found in the room and on swabs from A.M. that did not match A.M.'s boyfriend's DNA. As a result of this and the computer investigation linking appellant to these crimes, police executed a search warrant at appellant's mother's house in order to obtain a DNA sample from appellant and to search the residence. During the search, police took a DNA sample from appellant. They also collected multiple computers from the house and a receipt dated January 5, 2009 with appellant's name on it that indicated one of the computers in the house had an operating system reinstall, which to the police indicated that most of the information on the computer would have been wiped clean. In appellant's room, they also found a pair of gloves as well as a set of handcuffs. Investigation of the hard drive from one of the computers found in the house revealed numerous chats and interactions between the computer and the MySpace account of A.M.

{¶ 8} Appellant's DNA sample and the handcuffs found in his room were sent for laboratory examination. The examination discovered A.M.'s DNA on the handcuffs found in appellant's room. A.M. told police that there was no reason why her DNA would be on the set of handcuffs, unless these were the handcuffs used during her rapes. Further

examination of the DNA on anal and vaginal swabs taken from A.M. found that DNA to be consistent with appellant's DNA.

{¶ 9} Based on this information, a Franklin County Grand Jury indicted appellant with five counts of rape in violation of R.C. 2907.02, each with a sexually violent predator specification pursuant to R.C. 2941.148, and counts of aggravated burglary in violation of R.C. 2911.11 and aggravated robbery in violation of R.C. 2911.01. Appellant entered not guilty pleas to the charges and proceeded to a jury trial.

{¶ 10} At trial, A.M. testified about the events that occurred on the morning of June 4, 2008. The police recounted the investigative steps they took as well. Multiple witnesses testified about the DNA samples and tests that were involved in this case. First, Adam Garver, a DNA forensic scientist with the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified that he examined the rape kit collected at the hospital following A.M.'s rapes. He found seminal fluid on vaginal and anal swabs as well as amylase, a component of saliva, on the skin stain swabs collected between A.M.'s thighs. (Tr. 399-400.) Garver did not find any other sample suitable for DNA testing. Another BCI employee, Kristin Slaper, testified about her multiple analyses of DNA samples in this case. The first time, she examined articles of clothing and the pillowcase that A.M. had on the night of the rapes, as well as stains found on the couch of A.M.'s house. She concluded that the stain on the couch was negative for the presence of semen. She further concluded that the DNA she did find on the samples were consistent with the victim's DNA and an unknown male. She was able to exclude A.M.'s boyfriend as a contributor to the DNA samples, but because she did not have any other known DNA samples from other suspects, she could do no more.

{¶ 11} Subsequently, Slaper received swabs with appellant's DNA and also the handcuffs found in appellant's room. Slaper found DNA on the handcuffs that was a mixture of at least three people and that was consistent with both A.M.'s and appellant's DNA. Slaper also concluded that appellant was not a contributor to the DNA samples found on A.M.'s nightgown, the pillowcase she had on the night of the rapes, or the couch. An unknown peak was also found on the nightgown sample. Last, Slaper found a mixture of DNA on an unlabeled swab taken from A.M. Although she could not make a conclusion regarding appellant, she did find a "peak" in the sample that could not have been contributed by appellant.

{¶ 12} One other forensic witness, Shawn Weiss, testified to additional analysis he performed of DNA found on vaginal and anal swabs taken from A.M. His company is able to perform a more sensitive and more specific testing analysis than BCI does for male DNA samples. As a result of his analysis, Weiss could not exclude appellant or his male relatives as contributors to the DNA samples found on those swabs.

{¶ 13} Appellant did not testify. However, A.M. did testify that she and appellant had been good friends for a long time before and even after the attack. He was always very nice to her and her son and she never thought that appellant committed these offenses.

{¶ 14} The jury found appellant guilty of all seven charges but did not render a verdict as to the sexual violent predator specifications, which the trial court later dismissed at the state's request. The trial court imposed consecutive three-year prison terms for each conviction for a total prison sentence of 21 years.

II. The Appeal

{¶ 15} Appellant, through counsel, appealed from the judgment of conviction and sentence. Shortly after appellant's appointed counsel filed its brief, appellant requested this court to strike that brief and to allow him to represent himself in this appeal. We granted appellant's requests. In his subsequent pro se brief, appellant assigned the following assignments of error:

> I. The state adduced insufficient evidence to support defendant-appellant's conviction and that the convictions are contrary to the manifest weight of the evidence in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio State Constitution.
>
> II. Defendant-appellant was denied effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio State Constitution.
>
> III. Defendant-appellant was deprived a fair trial due to prosecutorial misconduct, discriminatory prosecution, mischaracterization of the evidence to the jury, and withholding of Brady material in violation of his rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio State Constitution.

> IV. The trial court abused its discretion and erred to the prejudice of the defendant-appellant and deprived him of his rights to a fair trial in violation of his rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio State Constitution.
>
> V. The jury lost its way and its verdicts were the product of coercion by the prosecution.
>
> VI. Defendant-appellant was deprived of a fair trial due to obstruction of justice and tampering with evidence by Detective David Cunningham in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio State Constitution.
>
> VII. The cumulative effect of numerous errors deprived defendant-appellant of a fair trial in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio State Constitution.

{¶ 16} For ease of analysis, we address the assignments of error out of order and, where appropriate, collectively.

A. Fair Trial Issues

{¶ 17} In appellant's third, fourth, and fifth assignments of errors, he presents a number of different arguments in which he contends he was deprived a fair trial. We will address those arguments here.

{¶ 18} Appellant first argues that the state, in bad faith, selectively continued this prosecution even though they allegedly had DNA evidence indicating the presence of an unknown attacker. Appellant also argues that the prosecution improperly mischaracterized evidence, "encouraged the jury to accept their evidence supported by experts" even though DNA implicated an unknown attacker, and engaged in misconduct by introducing the DNA evidence as well as other evidence and again by "mischaracterizing" that evidence. We disagree.

{¶ 19} Appellant claims throughout his brief that because police found DNA from an unknown person at the scene of the attack and on the handcuffs found in his room, he must have been innocent of these offenses because that unknown person committed them. This claim underlies most of the arguments in his brief, such as, that the

prosecution mischaracterized the evidence and improperly prosecuted him because they knew that he did not commit the offenses. Appellant's claim is premised on the belief, however, that the unknown person whose DNA was found at the scene must have committed the offenses. We disagree with this underlying premise. The presence of unknown DNA does not inescapably lead to the conclusion that appellant did not commit the offenses. This argument omits the fact that appellant could not be excluded as a contributor to other DNA samples found at the scene and also fails to recognize all the other evidence that implicated him as the person who raped A.M. Thus, we reject appellant's arguments that the state mischaracterized evidence or improperly continued this prosecution.

{¶ 20} Additionally, in reviewing allegations of prosecutorial misconduct, the test is whether the conduct is improper and whether the conduct prejudicially affected the substantial rights of the accused. *State v. Guade*, 10th Dist. No. 11AP-718, 2012-Ohio-1423, ¶ 20, citing *State v. White,* 82 Ohio St.3d 16, 22 (1998). " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *Columbus v. Bishop,* 10th Dist. No. 08AP-300, 2008-Ohio-6964, ¶ 53, quoting *Smith v. Phillips,* 455 U.S. 209, 219 (1982). Therefore, prosecutorial misconduct will not be grounds for reversal unless the accused has been denied a fair trial. *Id.*, citing *State v. Maurer,* 15 Ohio St.3d 239, 266 (1984).

{¶ 21} The state did not engage in improper conduct in its prosecution of appellant or presentation of evidence. Although DNA evidence of some unknown person was found at the scene, there was other evidence, including other DNA evidence, that pointed to appellant as the person who committed these crimes. Appellant simply disputes the interpretation and impact of the DNA evidence the state presented. Appellant has not shown prosecutorial misconduct.

{¶ 22} Appellant also argues that the trial court was not impartial, was biased against him, and improperly allowed the state "hybrid representation" in his case. Appellant does not point to any comments or actions taken by the trial court that show bias or antipathy toward appellant. Nor does he explain what he means by "hybrid representation" in his case. That term normally refers to a situation when a criminal defendant seeks to represent themselves but also wants to have an attorney act as co-

counsel. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, ¶ 29. It has no application to prosecutors representing the state. These claims are not well-taken.

{¶ 23} We find no errors that deprived appellant of a fair trial. Accordingly, we overrule these portions of appellant's third, fourth, and fifth assignments of error.

B. Evidentiary Issues

{¶ 24} Appellant also argues in his third, fourth, and fifth assignments of error that the trial court admitted irrelevant and prejudicial evidence and failed to provide a limiting instruction to the jury regarding the evidence.

{¶ 25} In large part, these arguments revolve around the prosecution's presentation of the DNA evidence already discussed and appellant's argument that the DNA evidence absolved him of these offenses. For the same reasons we rejected those arguments above, we also reject them here.

{¶ 26} Appellant also argues that the trial court improperly admitted a large number of pictures of his mother's house, where appellant lived, taken during the police search. We first note that trial counsel did not object to the admission of the pictures, forfeiting all but plain error. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 43. 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). 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 (10th Dist.). 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*, 53 Ohio St.2d 91 (1978), paragraph three of syllabus.

{¶ 27} Appellant does not explain how the introduction of pictures taken of his mother's house affected the outcome of his trial. Absent this showing, we do not find that the trial court plainly erred by admitting the pictures taken of the house.

{¶ 28} We also conclude that the trial court did not err by not providing a limiting instruction regarding the pictures or the DNA evidence. Appellant did not request such

an instruction. By not requesting the instruction, appellant has forfeited all but plain error. *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio-6677, ¶ 60; *State v. Wiley*, 2d Dist. No. 2011-CA-8, 2012-Ohio-512, ¶ 29. A trial court's failure to give a limiting instruction sua sponte is not plain error. *State v. Schaim*, 65 Ohio St.3d 51, 61 (1992), fn. 9; *State v. Kinney*, 4th Dist. No. 07CA2996, 2008-Ohio-4612, ¶ 21; *State v. Rawls*, 10th Dist. No. 03AP-41, 2004-Ohio-836, ¶ 23.

{¶ 29} We find no merit to appellant's evidentiary claims. Accordingly, we overrule these portions of appellant's third, fourth, and fifth assignments of error.

C. Fourth Amendment—Unreasonable Search and Seizure

{¶ 30} Appellant first argues in his sixth assignment of error that a detective of the Hilliard Police Department violated his Fourth Amendment rights by seizing property from his mother's house beyond that stated in the detective's search warrant.

{¶ 31} Appellant's original trial counsel did file a motion to suppress in which he argued that the police "went beyond the scope of said warrant in executing their search." No hearing was held on this motion, however, and appellant's counsel effectively withdrew the motion before trial, stating that "it was filed by prior counsel on the case, and I think it was to preserve any potential issue." (Tr. Vol. I, 13.) Trial counsel did not request a hearing on the motion and did not argue the motion at that time. Instead, trial counsel told the trial court that there was nothing more and that he was ready to proceed with the trial. By trial counsel's comments before trial, he effectively withdrew the motion to suppress. In light of that withdrawal, the issue was not brought to the trial court's attention, and appellant has forfeited the issue on appeal absent plain error. *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-4513, ¶ 22. Appellant cannot demonstrate any error, let alone plain error, because the warrant that authorized the search of the house is not part of the record in this case. That makes it impossible to determine whether the police acted in conformance with that warrant.

{¶ 32} Appellant also claims that the detective contaminated the DNA evidence and planted evidence on his computer. These claims are not supported by any evidence and are bare speculation. Consequently, they are not well-taken.

{¶ 33} We overrule appellant's sixth assignment of error.

D. The Weight and Sufficiency of the Evidence

{¶ 34} In appellant's first assignment of error, the argument is presented that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶ 35} 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). Whether the evidence is legally sufficient to support a verdict is a question of law. *Id.*

{¶ 36} In determining whether the evidence is legally sufficient to support a conviction, " '[t]he 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*, 61 Ohio St.3d 259 (1991), 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).

{¶ 37} 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. Yarbourgh*, 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.").

{¶ 38} 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.*

{¶ 39} 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.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983); *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶ 12.

{¶ 40} 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*, 10 Ohio St.3d 77, 80 (1984). 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*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus (credibility determinations are primarily for the trier of fact).

{¶ 41} Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11, citing *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶ 15. "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.* In that regard, we first examine whether appellant's convictions are supported by the manifest weight of the evidence. *State v. Gravely*, 188 Ohio App.3d 825, 2010-Ohio-3379, ¶ 46 (10th Dist.).

1. The Identity of the Perpetrator

{¶ 42} Appellant argues throughout his brief that the state failed to prove that he was the person who committed these offenses. Appellant points out that A.M. never saw the person who raped her, and he again argues that the presence of DNA from an unknown person proves his innocence. Again, we disagree.

{¶ 43} A.M. could not identify the person who committed these crimes. However, the state presented circumstantial evidence to prove that appellant committed these offenses. The identity of a perpetrator may be established by the use of direct or circumstantial evidence. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046; *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶ 48. The Supreme Court of Ohio has held that "[a] conviction can be sustained based on circumstantial evidence alone." *State v. Franklin*, 62 Ohio St.3d 118, 124 (1991), citing *State v. Nicely*, 39 Ohio St.3d 147, 154-55 (1988). In fact, circumstantial evidence may be more certain, satisfying and persuasive than direct evidence. *State v. Ballew*, 76 Ohio St.3d 244, 249 (1996).

{¶ 44} As we have already concluded, the presence of an unknown person's DNA at the scene and even on the handcuffs does not lead to appellant's innocence. Appellant's argument omits the fact that the state presented DNA evidence indicating that A.M.'s DNA was found on handcuffs found in appellant's bedroom. A.M. testified that her attacker put handcuffs on her before raping her. Appellant also could not be excluded as a contributor to other DNA evidence found on A.M.'s body.

{¶ 45} Additionally, the electronic evidence implicating appellant was considerable. The MySpace account used to contact A.M. after the rapes was created using an IP address associated with appellant's mother's cable subscription. A computer found in her home had communications in its hard drive to A.M.'s MySpace account. Other communications from that account came from computers at an OSU building in Delaware, where appellant took classes and would have access to the computers. Those communications contained content that would implicate the person writing them as the person who committed the rapes. Although the state did not present evidence personally placing appellant in front of any of the computers used in this case, the circumstantial evidence is great that he was the person writing these messages to A.M and, therefore, the person who raped A.M.

{¶ 46} We cannot say that the jury lost its way by concluding that appellant was the person who raped A.M.

2. Aggravated Burglary and Aggravated Robbery Convictions

{¶ 47} Having resolved the issue of identity, appellant also argues that there was no evidence to prove that he entered A.M.'s home by stealth or otherwise with a weapon, or that once inside, he committed any theft offense. We disagree.

{¶ 48} In order to convict appellant of aggravated burglary, the state had to prove that appellant, among other things, trespassed in an occupied structure by force, stealth, or deception, and either inflicted or attempted to inflict physical harm or had a deadly weapon or dangerous ordnance. R.C. 2911.11. Aggravated robbery requires the state to prove that appellant, in attempting or committing a theft offense, either had a deadly weapon or inflicted or attempted to inflict serious physical harm. R.C. 2911.01.

{¶ 49} A.M. testified that when she went to sleep the night of the rapes, she locked the doors and closed the windows to her house. A police officer who went to A.M.'s house that morning testified that he found a broken window and an open door. This evidence indicates the use of force or deception to gain entry into A.M.'s house. Additionally, A.M. testified that her attacker had a knife that he put up to her neck in order to make her comply with his demands. That testimony supports the conclusion that appellant had a dangerous weapon. Finally, A.M. also testified that before appellant left her house, he took her purse, which contained her wallet. That testimony supports the conclusion that appellant committed a theft offense. In light of A.M.'s testimony, we cannot say that the jury lost its way by concluding that appellant committed aggravated burglary and robbery.

3. Conclusion

{¶ 50} Considering all the evidence, we cannot say that jury lost its way and created a manifest miscarriage of justice. Appellant's convictions are not against the manifest weight of the evidence. This conclusion also resolves appellant's argument that his convictions are not supported by sufficient evidence. *Gravely*. Accordingly, we overrule appellant's first assignment of error.

E. Sentencing

{¶ 51} In appellant's fourth assignment of error, he argues that his offenses were allied offenses of similar import that should have merged for purposes of sentencing. Appellant did not raise the merger issue at sentencing and therefore has forfeited this argument on appeal absent plain error. *State v. Taylor*, 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶ 34, citing *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712, ¶ 55 (10th Dist.); *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. Gibson*, 10th Dist. No. 10AP-1047, 2011-Ohio-5614, ¶ 47, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31.

{¶ 52} 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.

{¶ 53} 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*, 38 Ohio St.3d 116, 119 (1988); *Gibson* at ¶ 48-49.

{¶ 54} 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.

{¶ 55} Appellant was found guilty of five separate counts of rape, each count alleging a different sexual act. Under those circumstances, multiple rape counts do not merge. *State v. Davic*, 10th Dist. No. 11AP-555, 2012-Ohio-952, ¶ 16; *State v. Williams*, 8th Dist. No. 94616, 2011-Ohio-925, ¶ 61. Neither can the aggravated robbery and burglary convictions merge, because separate conduct is required to commit the offenses. Aggravated burglary is committed upon entry into the victim's house, R.C. 2911.11(A)(2), while aggravated robbery occurs when a defendant attempts or commits a theft offense

under certain circumstances. R.C. 2911.01(A). *State v. Turner*, 2d Dist. No. 24421, 2011-Ohio-6714, ¶ 26; *State v. Ragland*, 5th Dist. No. 2010CA00023, 2011-Ohio-2245, ¶ 82-90. Neither can those convictions merge with any of the rape counts, as the conduct committing those offenses are not the same. Appellant's convictions are not allied offenses of similar import and do not merge. Accordingly, we overrule this portion of his fourth assignment of error.

F. Ineffective Assistance of Counsel

{¶ 56} Appellant argues in his second assignment of error that he received ineffective assistance of trial counsel. We disagree.

{¶ 57} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 133, citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley*, 42 Ohio St.3d 136, 143 (1989), quoting *Strickland* at 697. ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶ 58} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶ 133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland* at 689. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 204.

{¶ 59} To support this assignment of error, appellant points to a number of alleged failures of his trial counsel. However, he does not even attempt to demonstrate how these failures would have prejudiced him. Absent such a showing, we cannot find ineffective assistance of counsel. Appellant's second assignment of error is overruled.

G. Cumulative Error

{¶ 60} Lastly, appellant argues in his seventh assignment of error that the cumulative effect of the errors argued in his other assignments of error constitute

cumulative error such that he was denied his constitutional right to due process and a fair trial. We disagree.

{¶ 61} Pursuant to the doctrine of cumulative error, a judgment may be reversed where the cumulative effect of errors deprives a defendant of his constitutional rights, even though the errors individually do not rise to the level of prejudicial error. *State v. Johnson*, 10th Dist. No. 10AP-137, 2010-Ohio-5440, ¶ 34, citing *State v. Garner*, 74 Ohio St.3d 49, 64 (1995). Because we have found no merit to any of appellant's pro se assignments of error, the doctrine of cumulative error is inapplicable, and appellant's seventh assignment of error is overruled.

III. Conclusion

{¶ 62} We overrule appellant's seven assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.