[Cite as *State v. Perry*, 2012-Ohio-4888.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-125**
- vs -	:	
KYLE J. PERRY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 10 CR 000730.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

J. Charles Ruiz-Bueno, Charles Ruiz-Bueno Co., L.P.A., 36130 Ridge Road, Willoughby, OH 44094 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Kyle J. Perry, appeals the judgments of the Lake County Court of Common Pleas denying his motions to suppress evidence from two alleged unconstitutional automobile searches, and denying his motion in limine seeking to limit testimony regarding his cellular-telephone location via triangulation. Appellant also appeals the judgment of conviction after trial by jury on the basis of insufficient evidence and ineffective assistance of counsel. Additionally, appellant appeals the entry of sentence, arguing the trial court erred in failing to merge certain offenses for sentencing

and in failing to grant credit for jail time served. For the following reasons, the judgment is affirmed.

{¶2} Appellant was implicated in a series of burglaries after stolen items were recovered from automobiles during two respective warrantless searches. As the investigation unfolded, additional incriminating items were later recovered in appellant's temporary residence at the Mosley Select Suites Hotel after a search warrant for the premises was executed.

{¶3} A 14-count indictment was filed against appellant, charging him with the following: five counts of burglary, second-degree felonies in violation of R.C. 2911.12(A)(2), with a firearm specification attached to one count; three fifth-degree felony counts of receiving stolen property, in violation of R.C. 2913.51(A); two fourth-degree felony counts of receiving stolen property, in violation of R.C. 2913.51(A), each with firearm specifications attached; three counts of having weapons under disability, third-degree felonies in violation of R.C. 2923.13(A)(2), each with firearm specifications attached; and one count of engaging in a pattern of corrupt activity, a first-degree felony in violation of R.C. 2923.32(A)(1).

{¶4} Soon thereafter, appellant filed a multitude of pre-trial motions. First, appellant filed multiple motions to suppress, arguing that the evidence obtained during the automobile searches on May 22, 2010, and July 20, 2010, should have been suppressed.

{¶5} During the hearing on the motions, Officer Steven Shum of the Wickliffe Police Department testified concerning the automobile search on May 22, 2010. Officer Shum explained that he initiated a traffic stop around 1:00 a.m. of an automobile which

failed to display a rear license plate. Appellant was the driver of the automobile and one Jimmie Ivery was the passenger. Officer Shum testified he had familiarity with both appellant and Ivery, as he knew they were both involved in at least one prior burglary. As Officer Shum inquired about the status of a rear license plate, he detected a "strong odor" of marijuana from inside the car. Based on the strong odor, and after back-up arrived, Officer Shum asked the occupants to step out of the vehicle so that an automobile search could be executed. During the search, Ivery admitted that he had been smoking marijuana earlier that day in response to what would be found in the cabin and whether anyone had been smoking. Officer Shum noted that Ivery denied that any marijuana was in the car. The search uncovered "little tiny bits" of what Officer Shum believed to be marijuana located on the floor in front of the passenger seat. Officer Shum testified the amount was so small it was immeasurable. The officer observed dark gloves, a black stocking cap, and two pairs of shoes in the back seat area. Additionally, the officer noted that the occupants were wearing dark dress pants and the dome light of the automobile had been removed. A search of Ivery also uncovered two blue plastic pen lights.

{¶6} Based on his suspicions, which arose from the marijuana residue, the strong odor, Ivery's admission, the missing rear license plate, the removed dome light, and the dark clothing, Officer Shum proceeded to open and search the trunk of the automobile, suspecting that more criminal activity was afoot. In the trunk, Officer Shum did not find drugs but did find "burglary tools," including pry bars, a sledge hammer, a ball-joint tool, a duffle bag, a ski mask, ear warmers, and another set of gloves. The license plate and several screws were also located in the truck, casting doubt on

appellant's excuse that he had no screws to affix the plate to his car. More importantly, a Toshiba laptop computer, a pair of binoculars, a Minolta digital camera, and an Olympus digital camera were uncovered. Officer Shum explained that, at that point, he believed the electronics were "probably stolen"; thus, he seized the electronic equipment and tools for further investigation. Appellant and Ivery were sent on their way.

{¶7} Officer Isaac Petric of the Wickliffe Police Department testified to the second stop on July 20, 2010, at 2:40 a.m. Officer Petric testified he saw Ivery driving a vehicle. Officer Petric had a familiarity with Ivery due to his past dealings with law enforcement. Officer Petric ran Ivery's name through dispatch, and it was discovered that Ivery's license was suspended. As a result, Officer Petric initiated a stop. Ivery, driving appellant's vehicle, pulled into the Mosley Select Suites, where appellant happened to be staying. Ivery pulled into an aisle of the parking lot, but not into a parking space. Soon after the stop, Officer Petric confirmed through dispatch that Ivery had a warrant out for his arrest. After Ivery was placed under arrest, the decision to impound the vehicle was made. Officer Shum arrived on scene and executed an inventory search of the automobile, finding a plastic bag containing jewelry. At some point, appellant, apparently recognizing his car in the front parking lot, exited the hotel from the lobby area and inquired into the stop and the status of his automobile. Officer Petric informed him that his car was being towed and the driver had been arrested.

{¶8} Upon consideration, the trial court denied appellant's motions to suppress.

{¶9} The matter proceeded to a jury trial. After four days of testimony, the jury found appellant guilty on all 14 counts and each respective specification. Appellant was sentenced to a total of 21 years in prison.

{¶10} Appellant now appeals and asserts seven assignments of error, which are addressed out of numerical order.

{¶11} Appellant's second assignment of error states:

{¶12} "The trial court committed prejudicial error by denying Defendant-Appellant's Motion to Suppress regarding the search of the vehicle's trunk on May 22, 2010."

{¶13} An appellate court's review of a decision on a motion to suppress involves issues of both law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. During a suppression hearing, the trial court acts as the trier of fact and sits in the best position to weigh the evidence and evaluate the credibility of the witnesses. *Id*., citing *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Accordingly, an appellate court is required to uphold the trial court's findings of fact provided they are supported by competent, credible evidence. *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19 (1982). Once an appellate court determines if the trial court's factual findings are supported, the court must then engage in a de novo review of the trial court's application of the law to those facts. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, ¶13, citing *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, ¶19.

{¶14} Appellant first argues that the evidence obtained during the May 22, 2010 search was improper. Appellant does not contest the initial stop. Appellant additionally does not contest the continued seizure or the search of the passenger compartment of

the vehicle based on the smell of marijuana. However, appellant argues that it was unreasonable to extend the search to the trunk of the automobile based solely on the smell of marijuana coming from the interior cabin.

{¶15} Proceeding to the facts and law upon which the trial court relied, there are problematic elements. The most significant is the extension of the search from the interior of the car to the trunk. It is well established that police action of stopping an automobile and detaining its occupant is a seizure under the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648 (1979), paragraph two of the syllabus. Thus, an automobile stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Whren v. United States*, 517 U.S. 806, 810 (1996). However, a mere conclusion that an officer had probable cause to conduct a reasonable search does not end an inquiry into the constitutionality of a warrantless search. A determination still must be made as to whether there existed an exception to the warrant requirement of the Fourth Amendment in order to uphold the warrantless search. *See State v. Moore*, 90 Ohio St.3d 47, 51 (2000). ("Having concluded that Sergeant Greene had probable cause to conduct a reasonable search, we must determine whether there existed an exception to the warrant requirement of the Fourth Amendment in order for Sergeant Greene to have searched defendant's person and his vehicle.")

{¶16} It is well founded that searches conducted without a warrant are per se unreasonable, subject only to certain "carefully drawn" and limited exceptions. *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶10, citing *Jones v. United States*, 357 U.S. 493, 499 (1958) and *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971).

One such exception is at issue in appellant's second assignment of error—the automobile exception. In *United States v. Ross*, 456 U.S. 798 (1982), the United States Supreme Court outlined the contours of the automobile exception to the warrant requirement:

> **{¶17}** The 'automobile exception' to the Fourth Amendment's warrant requirement established in *Carroll v. United States*, 267 U.S. 132, applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. *Id*. at paragraph (a) of the syllabus.

{¶18} This exception rests on the impracticability of requiring a warrant for an automobile—the mobility of which is readily apparent. The inherent mobility of an automobile creates a certain exigency: there is a danger that the contraband will be removed, lost, or destroyed if a warrant is not immediately obtained. *State v. Moore*, 90 Ohio St.3d at 52, citing *Cupp v. Murphy*, 412 U.S. 291, 294-296 (1973). As explained by the United States Supreme Court: "[T]he car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). Thus, under this exception, there is no need to justify the search by demonstrating a separate exigency. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999).

{¶19} However, the Ohio Supreme Court did not extend the search of a vehicle to the trunk in *Moore*. Instead, as appellant correctly notes, probable cause to search

the interior cabin of the vehicle does not automatically extend to the trunk. Rather, "[a] trunk and a passenger compartment of an automobile are subject to different standards of probable cause to conduct searches." *State v. Farris*, 109 Ohio St.3d 519, 2006-Ohio-3255, ¶51. In *Farris*, the Ohio Supreme Court determined that the automobile exception did *not* apply. *Id*. at ¶52. That is, the court held that the odor of burnt marijuana emitting from the passenger compartment of an automobile, standing alone, does not establish the requisite separate probable cause to extend the search to the trunk. *Id*. There, the officer detected "only a light odor of marijuana, and the troopers found no other contraband within the passenger compartment," thus lacking probable cause to search the trunk. *Id*.

{¶20} As recently explained by the Second Appellate District:

{¶21} The Fourth Amendment limits searches to places where evidence of criminal activity is likely to be found. *Farris* stands for the proposition that the odor of burnt marijuana in a vehicle's passenger compartment, standing alone, doesn't present a likelihood that the vehicle's trunk contains marijuana. The point of distinction is whether the character or nature of drugs found 'in plain view' (or smell) in the passenger compartment presents a likelihood that the vehicle's trunk contains drugs or other contraband, such that a search of the trunk is justified by the automobile exception to the warrant requirement. *State v. Griffith*, 2d Dist. No. 24275, 2011-Ohio-4476, ¶20.

{¶22} Turning to the case sub judice, the trial court correctly cited the standard outlined in *Farris*, *supra*, and noted distinguishable factual findings. Here, unlike in *Farris*, Officer Shum testified that he detected a "very strong" odor of marijuana. Though the trial court found this to be a raw odor, we find the record does not, in fact, indicate whether this was a raw or burning scent. After searching the interior compartment, Officer Shum additionally found little "bits of marijuana" in the cabin. Further, Ivery conceded that he had been smoking marijuana earlier that day. Officer Shum also testified during redirect and recross examination that he had suspicions of further criminal activity due to the absence of a rear license plate and an interior dome light, suggesting efforts to conceal the vehicle's identification and movements inside it. He was also suspicious of the occupant's dark clothing and the presence of a black stocking cap, dark gloves, and two pen lights—all of which came to the officer's attention during the search of the interior and of Ivery. Though these suspicions of theft were not part of the trial court's suppression analysis (it instead only focused on the officer's suspicions of drug usage), the court nonetheless detailed these other items when setting forth its findings of fact.

{¶23} We find the evidence and circumstances detailed above afforded Officer Shum probable cause to believe that, based on the totality of the circumstances, appellant and Ivery were actively engaged in criminal activity and that additional evidence of criminal activity would be discovered in the trunk. The trial court noted the fact that Officer Shum's observations were in no small part due to his 20-year tenure as an officer and his experience in dealing with marijuana. Therefore, having determined that probable cause existed to search the vehicle, as the Ohio Supreme Court noted in

Moore, supra, we apply the automobile exception to permit the warrantless search of the trunk of the vehicle. This is consistent with the holding of this court in a companion case, *State v. Ivery*, 11th Dist. No. 2011-L-081, 2012-Ohio-1270, and also in *State v. Stone*, 11th Dist. No. 2007-P-0048, 2008-Ohio-2615.

{¶24} It may be true, as appellant argues, that had Officer Shum elected to use the drug-sniffing dog, the dog would not have indicated the presence of drugs in the trunk. However, the failure to use an on-scene drug-sniffing dog does not negate the determination of probable cause based on other circumstances. Here, after the search of the cabin, probable cause was already established based on other factors, including suspicions of criminal activity not related to the odor of marijuana.

{¶25} Appellant additionally argues there is evidence of a pretextual intent to search the trunk. First, appellant argues that Officer Shum made the decision to search the trunk at the moment of the stop, indicating a pretext. In his testimony, Officer Shum indicated he intended to search the entire vehicle, including the trunk, based on the odor of marijuana alone. However, Officer Shum did not search the trunk until more evidence was discovered in the interior cabin. Appellant additionally argues that Officer Shum had more than ten interactions with appellant and was aware of his criminal history. However, the record does not suggest that Officer Shum's decision to search the trunk was based on his familiarity with appellant or Ivery. Officer Shum affirmed that he had no pre-disposed thoughts about what might be in their vehicle.

{¶26} Appellant's second assignment of error is without merit.

{¶27} Appellant's third assignment of error states:

{¶28} "The trial court committed prejudicial error by denying Defendant-Appellant's Motion to Suppress regarding the pre-textual tow and inventory of the vehicle stopped on July 20, 2010."

{¶29} Next, appellant argues that evidence obtained during the July 20, 2010 stop should be suppressed. In particular, appellant asserts that his car, which was pulled over in the Mosley Select Suites parking lot, did not need to be impounded or inventoried because he was on scene, was a validly-licensed driver, and could have easily moved his car to a parking spot. Appellant therefore concludes the impoundment was merely a pretext for an investigatory search.

{¶30} It must be reiterated that warrantless searches are per se unreasonable under the Fourth Amendment, subject to only a few well-defined and carefully-limited exceptions. *City of Xenia v. Wallace*, 37 Ohio St.3d 216, 218 (1988). One such exception is at issue here—the inventory search. The United States Supreme Court recognized this exception in *South Dakota v. Opperman*, 428 U.S. 364 (1976), explaining that a routine inventory search of a lawfully-impounded vehicle is reasonable pursuant to the Fourth Amendment when performed in accordance with standard, established local procedures, and when the search is not a pretext for an investigatory search. *Id*. at syllabus. The Ohio Supreme Court adopted this rule in *State v. Hathman*, 65 Ohio St.3d 403 (1992), paragraph one of the syllabus: "To satisfy the requirements of the Fourth Amendment to the United States Constitution, an inventory search of a lawfully impounded vehicle must be conducted in good faith and in accordance with reasonable standardized procedure(s) or established routine."

{¶31} There are two portions of an inventory search: (1) the impoundment of the vehicle and (2) the inventory of the items therein. *See State v. Wotring*, 11th Dist. No. 2010-L-009, 2010-Ohio-5797, ¶15 and *State v. Robinson*, 2d Dist. No. 23175, 2010-Ohio-4533, ¶30 ("although the inventory exception and impoundment are often intermingled, they involve different considerations"). Here, the inventory of the automobile occurred on scene prior to the impoundment of the vehicle. Though this is not contested as unreasonable by appellant, it is worth noting that an inventory search need not be made at the impound lot, but instead can be made on scene. At one point, the Eighth Appellate District adhered to the rule that an automobile must be lawfully impounded at the station house *prior* to a valid inventory search. *State v. Smith*, 80 Ohio App.3d 337 (8th Dist.1992). However, the Eighth District acknowledged that such a rule was effectively overturned by the Ohio Supreme Court's decision in *Hathman*, *supra*. *See State v. Bailey*, 8th Dist. No. 67333, 1995 Ohio App. LEXIS 3980, *6 (Sept. 14, 1995).

{¶32} The United States Supreme Court in *Opperman* explained that automobiles are impounded to preserve the interests of public safety and "efficient movement of vehicular traffic." 428 U.S. at 368. Moreover, the Court listed three distinct justifications for an inventory search of a lawfully-impounded vehicle: (1) to protect the owner's property while it remains in police custody; (2) to protect the police against claims or disputes over lost or stolen property; and (3) to protect the police from any possible danger. *Id*. at 369. *See also Colorado v. Bertine*, 479 U.S. 367 (1987) and *State v. Peagler*, 76 Ohio St.3d 496, 501 (1996).

{¶33} The overarching rationale for allowing such an exception tailored to the above-framed justifications is the recognition "that police officers are not vested with discretion to determine the scope of the inventory search." *Bertine* at 376 (Blackmun, J., concurring), citing *Opperman*, 428 U.S. at 382-383. "This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of a crime." *Id*. Indeed, inventory searches "are an administrative or caretaking function, rather than an investigative function." *State v. Pullen*, 2d Dist. No. 24620, 2012-Ohio-1858, ¶13, citing *Opperman*, 428 U.S. at 370. Thus, "an inventory search must not be a ruse for a general rummaging in order to discover evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990). As inventory searches are unrelated to criminal investigations, probable cause is not the governing standard, "but rather the validity of the search is judged by the reasonableness standard." *State v. Sanders*, 8th Dist. No. 97120, 2012-Ohio-1540, ¶13, citing *State v. Hobbs*, 8th Dist. No. 85889, 2005-Ohio-3856, ¶20.

{¶34} Naturally, what is "reasonable" must be judged against the facts on a case-by-case basis. However, the United States Supreme Court in *Opperman* and *Bertine* has provided an instructive roadmap on important "reasonable" considerations. For instance, in *Opperman*, several factors weighed in the state's favor: (1) the automobile was lawfully impounded pursuant to a standard procedure; (2) the owner was not present to make other arrangements for the vehicle's safekeeping; (3) valuable belongings were noticed in plain view; and (4) there was no suggestion that the impoundment was a pretext for concealing an investigatory police motive. *Opperman*, 428 U.S. at 375-376.

{¶35} The Second Appellate District has previously explained the burden of proof for suppression motions concerning inventory searches:

> **{¶36}** A police officer's bare conclusory assertion that an inventory search was done pursuant to police department policy is not sufficient, standing alone, to meet the state's burden of proving that a warrantless search was reasonable because it fits within the inventory search exception to the warrant requirement. Rather, the evidence presented must demonstrate that the police department has a standardized, routine policy, demonstrate what that policy is, and show how the officer's conduct conformed to that standardized policy. *State v. Wilcoxson*, 2d Dist. No. 15928, 1997 Ohio App. LEXIS 3566, *9-10 (July 25, 1997).

{¶37} In the present case, there is a municipal ordinance dictating when impoundment is proper. The applicable provision of the Wickliffe Ordinances, Section 303.08(a)(9), states that "[p]olice officers are authorized to provide for the removal of a vehicle * * * [w]hen any vehicle has been operated by any person who is driving * * * while his license has been suspended or revoked and is located upon a public street or other property open to the public for purposes of vehicular travel or parking." The ordinance does not outline the scenario whereby other acceptable transportation methods are or could be available. The Wickliffe Police Department's Towing Procedures state that "[t]hose vehicles impounded by the Wickliffe Police Department shall be carefully inventoried and documented by the impounding officer or an assisting

officer" and that all accessible areas or areas where items of value would be stored should be checked.

{¶38} Here, Officer Petric testified to the specifics of this protocol, the department's adherence to the ordinance, and his conformance to it during the stop. Specifically, Officer Petric explained that, as soon as the decision was made to arrest Ivery, the decision to impound the vehicle was also made, pursuant to the ordinance. The trial court, in making its findings of fact, determined that, although the car was not on a public street, it was still situated on property open to the public for purposes of travel. The record supports this finding as Officer Petric testified that the automobile was parked only a few feet from the road into the parking lot of the Mosley Select Suites, essentially blocking entry/exit into the lot. That is, the automobile was not placed in a parking spot, but instead was in a lane designated for travel.

{¶39} At the time of the stop, appellant, who had loaned Ivery his automobile, was staying at the Mosley Select Suites. Appellant's chief argument is that the impoundment was unreasonable because appellant was on scene and capable of moving his automobile to a parking spot (about ten feet away), he was not incapacitated, and he had a valid driver's license. Certainly, appellant's argument is appropriate in the context of the interests outlined above: if the validly-licensed owner of the car is present and need only move the car a few feet, vehicular traffic is not impaired and public safety is not jeopardized. In fact, assuming there was any traffic in the hotel parking lot at 3:00 a.m., it may be more appropriate to have the car moved in a more expeditious fashion rather than wait 15 to 20 minutes, as the record established, for a tow truck.

{¶40} Additionally, all three justifications for an inventory are utterly frustrated in this situation: if the owner is present and perfectly able to move the vehicle, then there is no need to "protect the owner's property" while it remains in police custody because the owner can take hold of the property immediately. There would be no need to protect the police against claims or disputes over lost or stolen property. Further, there would be no need to protect the police from any possible danger if the car was simply moved. Thus, appellant contends the impoundment was a pretext for an investigatory search, evidenced by the appropriate alternative arrangements which were clearly available. While the ordinance indicates the officer is "authorized" to remove a vehicle under the circumstances set forth therein, the propriety of exercising that authority would be subject to attack if there was a reasonable alternative to the tow and attendant inventory search.

{¶41} One commentator notes the importance of this factual determination concerning whether the owner is present and capable of making other less intrusive, more convenient arrangements in lieu of impoundment:

> **{¶42}** Implicit in [*Opperman's*] approach to inventories was the rationale that the impounding of the illegally parked vehicle was lawful because the owner was not present to make other arrangements for the automobile. That theory has not been pursued in subsequent litigation and merits clarification. It is one way of ensuring that the impoundment is not a pretext to conduct a search. Katz, *Ohio Arrest, Search, and Seizure*, Section 13:09 (2011 Ed.).

{¶43} Indeed, this "alternative measures" question plays a role in the totality-of-the-circumstances determination of a pretextual search and the quintessential inquiry of reasonableness. *See State v. Kemp*, 8th Dist. No. 95802, 2011-Ohio-4235, ¶18 ("the car's owner was under a FRA suspension, which meant that the car was not allowed to be on the road with any driver"); *State v. Goss*, 9th Dist. No. 10CA009940, 2012-Ohio-857, ¶11 ("Officer Medla decided to tow the vehicle after arresting Goss and discovering that his only passenger could not take the vehicle"); *State v. Pullen*, 2012-Ohio-1858, ¶20 ("By the time Pullen's mother arrived at the scene, the officers had already begun the inventory search of the vehicle and had no duty to turn the car over to her").

{¶44} However, notwithstanding appellant's arguments, in adopting the rule in *Hathman*, the Ohio Supreme Court relied on *Bertine*, *supra*, which gave approval to routine impoundments conferred by standardized police procedures *even if less intrusive alternatives for the removal of the vehicle were readily available*. In *Bertine*, the United States Supreme Court stated:

> **{¶45}** The Supreme Court of Colorado also expressed the view that the search in this case was unreasonable because * * * Bertine himself could have been offered the opportunity to make other arrangements for the safekeeping of his property. * * * And while giving Bertine an opportunity to make alternative arrangements would undoubtedly have been possible, we said in *Lafayette*: '[T]he real question is not what could have been achieved,' but whether the Fourth Amendment *requires* such steps * * *.

> **{¶46}** The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means.
>
> **{¶47}** We conclude that here, as in [*Illinois v.*] *Lafayette* [462 U.S. 640,] reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure. (Footnote omitted.) *Id.* at 373-374.

{¶48} *Bertine* therefore makes it clear that the existence of other available options to move the automobile is not necessarily dispositive on the question of reasonableness. *See State v. Gordon*, 95 Ohio App.3d 334, 339 (8th Dist.1994). ("The fact that this court might, as a matter of hindsight, be able to devise equally reasonable rules requiring a different procedure does not render a search executed pursuant to established standard procedures, such as those in this case, constitutionally infirm.") While the determination of alternative measures *may* indicate a pretext in some situations, any evidence of such an unconstitutional investigatory pretext cannot be determined on this record. It is not clear from the record exactly *when* appellant arrived on scene. During the suppression hearing, no officer was able to testify as to when appellant came out of the hotel and into the parking lot to inquire what was happening with his car. As Officer Petric acknowledged, the inventory search may have already been completed and the tow truck en route by the time appellant arrived. This is plausible as the inventory occurred in the field prior to the physical impoundment of the

vehicle. The trial court accepted that the search had begun *before* appellant arrived on the scene. It is clear that, when appellant asked what was happening with his car, Officer Petric immediately told him it was being towed, suggesting that the search was in progress and the truck was already called.

{¶49} Further, Officer Petric was unequivocal in his testimony that Ivery's criminal past had no bearing on the decision to impound the automobile. Instead, the decision to place Ivery under arrest, based on the warrant for his arrest, and the fact that the automobile was blocking a throughway influenced the decision. Clearly, Ivery was unavailable to move the car as he had no valid operator's license. Officer Petric additionally explained he was not aware that appellant, the owner of the car, lived at the Mosley Select Suites until appellant walked from the hotel lobby to the parking lot. Both Officer Petric and Officer Shum additionally testified that appellant did not ask to move his car. If it was clear from the record that appellant was present and available to move his car prior to commencement of the inventory, the challenge would be subject to a different analysis.

{¶50} As the state met its burden of establishing that there was a routine impoundment protocol pursuant to local law that was properly followed, it was incumbent upon appellant to provide some evidence suggesting a pretextual investigative intent. *See State v. Pullen*, 2012-Ohio-1858, ¶45 (O'Grady, J., concurring). ("[T]he failure to show whether the crack cocaine was seized before his mother arrived [to move the vehicle] is chargeable to Defendant, not the State. On this record, there was no basis to suppress the evidence officers seized.")

{¶51} As a final matter, it must be noted that an identical challenge to this very same impoundment was advanced by Ivery in his respective appeal and upheld as constitutional by this court on the authority of *Bertine*, *supra*. *State v. Ivery*, 2012-Ohio-1270, ¶37. ("In the present case, there was no indication by the officers that the search was performed in order to find evidence of criminal behavior[.]")

{¶52} Appellant's third assignment of error is without merit.

{¶53} Appellant's fourth assignment of error states:

{¶54} "The trial court committed prejudicial error by denying Defendant-Appellant's Motion in Limine regarding the State's use of expert testimony regarding triangulation pinpointing with cell phone towers in contradiction of Ohio Criminal Rule 16[K], and by allowing such testimony at trial."

{¶55} In his fourth assignment of error, appellant takes particular exception to the testimony of AT&T Radio Engineer Joseph R. Mouse. Appellant argues Mr. Mouse offered an expert opinion regarding the approximate whereabouts of a certain cell phone at the time of the various thefts. Such an opinion was not proper and should have been excluded, appellant contends, because it was in direct contravention to Crim.R. 16(K). The rule requires a written report to be filed 21 days before trial, "summarizing the expert witness's testimony, findings, analysis, conclusion, or opinion, and shall include a summary of the expert's qualifications." Crim.R. 16(K). As Mr. Mouse was deemed a fact witness, no such report was filed in this case. The purpose of the rule is to avoid unfair surprise by providing notice to the defense and allowing the defense an opportunity to challenge the expert's findings, analysis, or qualifications,

possibly with the support of an adverse expert who could discredit the opinion after carefully reviewing the written report.

{¶56} Evid.R. 702 provides:

{¶57} A witness may testify as an expert if all of the following apply:

{¶58} (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶59} (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶60} (C) The witness' testimony is based on reliable scientific, technical, or other specialized information[.]

{¶61} A trial court's evidentiary rulings are reviewed under an abuse of discretion standard. *State v. Poling*, 11th Dist. No. 2008-A-0071, 2010-Ohio-1155, ¶19, citing *State v. Sweeney*, 11th Dist. No. 2006-L-252, 2007-Ohio-5223, ¶22. Even where a court abuses its discretion in the admission of evidence, we must review whether the defendant suffered material prejudice due to the ruling. *Id*.

{¶62} The trial testimony of Mr. Mouse placed a phone number ending in "6676" in the general vicinity of the theft offenses at particular times. This was accomplished by reviewing the date and time a call was placed, then determining which cell-phone tower provided the service; a method known as "triangulation." The phone number on the account was listed to one Lisa Reed, which was ultimately linked to Ivery's phone—not appellant's. This very point was elicited on cross-examination by trial counsel.

Thus, this portion of the trial testimony placed Ivery's phone in the vicinity of the theft offenses in support of the alternative complicity charges. As appellant was seen, at times, with one identified as Ivery during the commission of the theft offenses, the presence of Ivery's phone could have directly implicated appellant. Thus, to this extent, the question of whether the testimony was properly admitted should be considered.

{¶63} Here, the trial court determined Mr. Mouse was "an expert in so far as he possesses knowledge outside the realm of the normal juror." However, the trial court ultimately concluded that Mr. Mouse was "testifying as to factual matters rather than opinion matters" and that such testimony was not unduly prejudicial. After a review of the record, we determine that this finding was not an abuse of discretion, and the testimony was properly admitted.

{¶64} First, the record reflects, and trial counsel acknowledged, that the state previously disclosed via supplemental discovery that it intended to call witnesses to testify concerning the authenticity of the cell phone records and also provide technical insights into how cell phones operate in conjunction with different tower sites to provide geographical information. The record indicates, and trial counsel acknowledged, that these records were made available to him. Thus, appellant was effectively put on notice as to the nature of the testimony.

{¶65} Next, a review of the testimony indicates that Mr. Mouse did not make independent findings, nor did he form a conclusion or opinion about the reliability of triangulation. Mr. Mouse testified to how a cell phone works, how the device utilizes nearby towers for connectivity, and how the service provider records this information. This testimony constituted general background information interpreting cell phone

records. Mr. Mouse additionally explained different numbering codes in the phone records and also identified calls on the records to their corresponding cell phone towers. Again, Mr. Mouse simply interpreted records and explained the general method by which the service provider uses nearby towers to place calls. That is, Mr. Mouse factually explained the contexts of the complex and detailed phone records. Mr. Mouse then simply compared the locations on the phone records to locations on the tower site maps by matching the relevant numbers recorded by the service provider. Any layperson could make this determination by examining the respective exhibits—it did not require the use of an expert. Further, on cross-examination, trial counsel elicited the points that the phone was not registered to appellant, and above all, the location of a device bears no relation to the location of an individual person, but only a rough approximation.

{¶66} Finally, trial counsel during sidebar also acknowledged that he contacted a prospective expert witness concerning the use of cell phone towers to determine a person's location. Trial counsel explained that he was unable to properly summarize the immense information (hundreds of pages of cellular phone records) to formulate an understandable question. However, trial counsel also explained the following: "I could not, from the conversation that I had [with the prospective expert], elicit from him in my opinion testimony that on the whole, cell phone tracking technology is unreliable."

{¶67} Parenthetically, we note that witness Angela Lott, a customer representative with Verizon Wireless, testified concerning *appellant's* cell phone records. Appellant does not object to this witness's testimony in his merit brief. Indeed, Ms. Lott only testified to the records she brought from Verizon. Further, unlike Mr.

Mouse, she did not testify as to how a cell phone works, or how a cell phone tower would trace a signal.

{¶68} Appellant's fourth assignment of error is without merit.

{¶69} Appellant's first assignment of error states:

{¶70} "Defendant-Appellant was denied effective assistance of counsel by the trial court which inured to his prejudice at trial."

{¶71} In order to prevail on an ineffective assistance of counsel claim, appellant must demonstrate that trial counsel's performance fell below an objective standard of reasonable representation, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus, adopting the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim can be disposed of by showing a lack of sufficient prejudice, there is no need to consider the first prong, i.e., whether trial counsel's performance was deficient. *Id.* at 142, citing *Strickland* at 695-696. There is a general presumption that trial counsel's conduct is within the broad range of professional assistance. *Id.* at 142-143.

{¶72} Though not individually framed, compounded in this assignment of error is appellant's initial claim that appellant's motion to appoint new counsel should have been granted. Appellee has separately responded to this claim; thus, we will initially determine the propriety of the trial court's denial of appellant's motion to substitute counsel.

{¶73} "Decisions relating to the substitution of counsel are within the sound discretion of the trial court." *State v. Jones*, 91 Ohio St.3d 335, 343 (2001), citing

Wheat v. United States, 486 U.S. 153, 164 (1988). In *Jones*, the Ohio Supreme Court set forth several factors to consider in weighing whether a trial court abused its discretion in denying a motion to substitute counsel. *Id*. at 342. These factors include "'the timeliness of the motion; the adequacy of the court's inquiry into the defendant's complaint; and whether the conflict between the attorney and client was so great that it resulted in a total lack of communication preventing an adequate defense.'" *Id*., quoting *United States v. Jennings*, 83 F.3d 143, 148 (C.A.6, 1996).

{¶74} Here, it is clear from the record appellant harbored feelings of suspicion and, at times, animosity toward his appointed trial counsel, an attorney with the Lake County Public Defender's Office. As a result, appellant filed two pre-trial notices of ineffective assistance and a motion to disqualify or substitute counsel. However, many of these suspicions seemed to be mildly alleviated by the trial court, and at one point, appellant affirmed on the record he was satisfied with trial counsel's work in the latest motion to suppress. The trial court went to great lengths to explore the relationship between appellant and his trial counsel. The trial court held two hearings on the motions on May 5, 2011, and July 8, 2011. There, appellant explained to the trial court his dissatisfaction with counsel, including his belief that trial counsel did not review the discovery. Appellant also requested either he represent himself pro se, or that the attorney who represented him in a separate Cuyahoga County case represent him again. During the hearing, the trial court conducted an extensive inquiry into each of appellant's complaints and the overall relationship between appellant and his trial counsel.

{¶75} Ultimately, the trial court was satisfied that trial counsel was providing suitable representation. Trial counsel had filed multiple motions to suppress, including at least one motion solely at the behest of appellant. The trial court explained to appellant the serious and likely detrimental nature of pro se criminal representation at the trial level, including the overwhelming complexities of various criminal legal doctrines and the danger of conflating questioning with testimony, raising potential Fifth Amendment quagmires. Additionally, given the overwhelming scope of the case (ultimately 33 witnesses were called at trial), the trial court opined that any new counsel, such as the requested attorney from Cuyahoga County, would have difficulty preparing for trial in a short amount of time, whereas trial counsel was already familiar with the case from arguing the various motions.

{¶76} Appellant additionally argues his trial counsel was ineffective *during* his trial for multiple reasons. First, appellant contends there was a complete lack of trust and confidence throughout the attorney-client relationship which undermined his ability to participate in the defense. However, appellant does not demonstrate how he was prejudiced in any way during trial from this representation. For instance, appellant contends trial counsel was unprepared to cross-examine the state's witness on a critical point regarding cell phone location. The record does not support this assertion. As explained above, trial counsel cross-examined Mr. Mouse in an effort to undercut the cell phone triangulation process. In fact, the record indicates that trial counsel elicited counter-points on cross-examination from multiple witnesses. Further, appellant argues his trial counsel failed to call a known witness regarding cell phone triangulation. Again, this position is not supported by the record. Rather, as explained above, trial counsel

indicated that he *did* contact a prospective expert witness but did not believe the witness would provide any helpful testimony.

{¶77} Appellant's first assignment of error is without merit.

{¶78} Appellant's fifth assignment of error states:

{¶79} "The evidence adduced at trial was insufficient to convict Defendant-Appellant."

{¶80} The test for determining the issue of sufficiency is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307 (1979). Thus, the claim of insufficient evidence invokes a question of due process, the resolution of which does not allow for a weighing of the evidence. *State v. Lee*, 11th Dist. No. 2010-L-084, 2011-Ohio-4697, ¶9. Crim.R. 29(A) requires the trial court to grant a motion for acquittal if the evidence is insufficient to sustain a conviction on the charged offenses.

{¶81} First, though appellant's name was not listed on the room at the Mosley Select Suites, there is ample testimony to conclude this was "appellant's room." This is an important consideration because nearly all of the stolen items were uncovered in this hotel room. Kriste Simmons testified that she visited appellant in "his" hotel room multiple times. Robin Schneider also testified that she visited appellant on a consistent and regular basis at the Mosley Select Suites. Further, Mosley Select Suites' security guard Thomas Babb testified that he frequently observed appellant and was also called about noise complaints concerning the room. Babb stated that every time he

investigated a noise complaint, appellant was in the room. There was sufficient evidence before the jury to determine that appellant lived in the room.

{¶82} Additionally, as explained above, a witness from AT&T, Joseph Mouse, and a witness from Verizon, Angela Lott, testified to the general location of cell phones linked with Ivery and appellant using respective phone records and maps of service areas. These records implicated both appellant and Ivery in many of the charges. Evidence presented indicates that cell phone towers in the region of the theft offenses received signals from one, or both, of these cell phones.

{¶83} On counts 1 through 5, burglary, the state had the burden of proving that appellant did, by force, stealth, or deception, knowingly trespass in occupied structures or in a separately-secured or occupied portion of occupied structures that is a permanent or temporary habitation of the respective victims, when a person other than appellant was present or likely to be present, and with purpose to commit in the habitation a criminal offense, namely theft. R.C. 2911.12(A)(2). Appellant argues there were no witnesses who connected him to any of these alleged burglaries.

{¶84} On count 1, Ruth McLeod testified that her home in Madison Township was broken into on May 5, 2010, and personal belongings were stolen, including a Toshiba laptop and an Olympus digital camera. The laptop and camera were uncovered during the search of appellant's car on May 22, 2010. Additionally, cell phone records indicate that both Ivery and appellant were in the vicinity of McLeod's residence on May 5, 2010.

{¶85} On count 2, Jean and Wesley Moon testified that their home in Madison Township was broken into on May 14, 2010. Personal belongings, including a Minolta

digital camera and a pair of Bushnell binoculars, were taken. The digital camera and binoculars were uncovered during the search of appellant's car on May 22, 2010. Additionally, cell phone records place Ivery and appellant around the area of the crime on the night and time in question. Further, Mrs. Moon, present during the burglary, was able to identify a vehicle leaving her home similar to the one operated by appellant on May 22, 2010.

{¶86} On count 3, Timothy Herubin testified that his apartment in Willoughby Hills was broken into and several personal belongings, including a 42-inch Phillip LCD Television and a Beretta "Tomcat" .32 caliber handgun, were taken. Mr. Herubin was able to identify a television like the one taken from his home. This identification was made from a photograph taken from appellant's hotel room at the Mosley Select Suites. Herubin stated that the television looked similar to his because the "Phillips" decal was situated on the same place and it also appeared to be 42 inches. Witness Michael Arnett, who was responsible for the video surveillance system in the complex, alleged he saw an African-American male (inferring Ivery) and a Caucasian male (inferring appellant) walking in a hallway in the complex. He also claims to have recognized the duo once again as the perpetrators on the surveillance video. Though this testimony was, in part, later discredited, the jury could have still believed Arnett's version of events. A firearm specification was attached to count 3, involving the stolen Beretta handgun. The jury had a sufficient basis to connect appellant to the stolen handgun through the testimony of Herubin and Arnett.

{¶87} On count 4, Helen Nekic testified her home in Timberlake, Ohio, was broken into sometime on June 5, 2010, or in the morning of June 6, 2010. Many unique

items were stolen, including four sets of sterling silverware, a bed comforter, blankets, and pillows. The bed comforter was later found in use on appellant's bed in his room at the Mosley Select Suites. Additionally, cell phone records place appellant and Ivery in Timberlake near the vicinity of Nekic's residence on these days. Specifically, the records indicate that Ivery's phone moved from a location near the Mosley Select Suites to Timberlake, Ohio.

{¶88} With regard to count 5, Sergio Difranco explained that his residence in Willoughby Hills, Ohio, was broken into. Some of his stolen property, such as a Tag Heuer watch, was later recovered in appellant's hotel room.

{¶89} On counts 6 through 10, receiving stolen property, the state had the burden of proving that appellant received, retained, or disposed of property, knowing or having reasonable cause to believe that the property had been obtained through the commission of a theft offense. R.C. 2913.51(A). Appellant contends there was no forensic evidence that connected him to the stolen property.

{¶90} There is no requirement that forensic evidence connect a party directly to stolen property. Requiring a latent print reading on all recovered or suspected stolen property is simply not necessary. In fact, "[p]ossession of stolen property for purposes of the receiving stolen property statute, R.C. 2913.51, may be constructive as well as actual." *State v. Hankerson*, 70 Ohio St.2d 87, syllabus (1982). "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *Id*., following *State v. Wolery*, 46 Ohio St.2d 316, 329 (1976).

{¶91} On count 6, Harry and Laura Risinger testified to items being stolen from their home in West Springfield, Pennsylvania, valued over $500 including a Forehand & Wadsworth .32 caliber revolver. Testimony further indicates that the Risinger home was equipped with an alarm which sounded when the break-in occurred. Neighbor Raymond Brzozowski, unsettled by the blaring siren, went to the Risinger lot to investigate. Mr. Brzozowski testified to seeing individuals in a Cadillac with an Ohio license plate ending in "4749," which was linked to appellant. The stolen items were later uncovered in appellant's hotel room. On count 9, the Risingers also testified regarding their stolen Forehand & Wadsworth .32 caliber revolver. This weapon was also uncovered in appellant's hotel room, providing a basis for the finding that the property was a weapon and for the firearm specification.

{¶92} With regard to count 7, Deborah and Stanley Freeland testified to personal belongings stolen from their home in excess of $500. These items were later recovered in appellant's hotel room. Similarly, on counts 8 and 10, Curtis and Betty Jo Eaton testified to their stolen belongings being worth over $500. One such stolen item, a handgun, provided a basis for the firearm specification attached to count 10.

{¶93} With regard to counts 11, 12, and 13, having weapons under disability, the state had the burden of proving that appellant knowingly acquired, had, carried, or used a firearm and that appellant had been convicted of a felony offense of violence. R.C. 2923.13(A)(2). Appellant argues there was no evidence he was in possession or control or had knowledge of any weapons.

{¶94} As explained above, possession need not be "actual," but instead can be constructive. This court has held this proposition is also true as applied to weapons: "A

person can either actually or constructively possess a firearm to satisfy the element of 'having' in the offense [of *having* weapons under disability]." *State v. Scarl*, 11th Dist. No. 2003-P-0125, 2004-Ohio-7227, ¶72, citing *State v. Messer*, 107 Ohio App.3d 51 (9th Dist.1995) and *State v. Hardy*, 60 Ohio App.2d 325, 327 (8th Dist.1978). In *Scarl*, we explained that "constructive possession can be established by the fact that a defendant had access to a weapon and had the ability to control its use." *Id*. at ¶73, citing *State v. Thomas*, 11th Dist. No. 95-T-5253, 1996 Ohio App. LEXIS 4545 (Oct. 11, 1996). Further, "physical possession or ownership of the weapon is not necessary, and mere access to a weapon can establish guilt." *Id*., citing *State v. Wolery*, 46 Ohio St.2d 316 (1976). Additionally, "circumstantial evidence can be used to support a finding of constructive possession." (Citation omitted.) *Id*. at ¶74.

{¶95} Evidence from trial indicates the following weapons were recovered from appellant's room under a dresser at the Mosley Select Suites: a Harrington & Richardson Arms .32 caliber revolver (count 11); a Forehand & Wadsworth .32 caliber revolver (count 12); and a Sturm Ruger .357 magnum revolver (count 13). Firearms Examiner Mitch Wisniewski testified that all three weapons were operational. Though appellant was not present when the warrant for the hotel room was executed, we conclude that the presence of the weapons in appellant's established room constitutes constructive possession.

{¶96} Finally, as to count 14, engaging in a pattern of corrupt behavior, the state had the burden of proving that appellant, while associated with an enterprise, conducted or participated in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity. R.C. 2923.32(A)(1).

{¶97} R.C. 2923.31(C) defines "enterprise" to include the following: "any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity." Enterprise includes illicit as well as legitimate enterprises.

{¶98} Though the statute describes what an enterprise may include, it does not actually define what an enterprise requires. Such an omission has been previously recognized by appellate courts in Ohio. To better understand this statute, the Twelfth Appellate District recently analyzed the definition of "enterprise" and adopted a "streamlined" definition from the federal case of *Boyle v. U.S.*, 556 U.S. 938 (2009), noting "'an association-in-fact enterprise is simply a continuing unit that functions with a common purpose.'" *State v. Barker*, 12th Dist. No. CA2011-08-088, 2012-Ohio-887, ¶10, quoting *Boyle* at 2245-2246.

{¶99} Appellant contends, with little specificity, that there was no basis to support his conviction under this count. Based on the evidence adduced at trial involving the various dealings of Ivery and appellant, there is a sufficient basis on which to conclude that the duo engaged in an enterprise which carried out the common purpose to engage in theft.

{¶100} After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of all charges proven beyond a reasonable doubt. Appellant's fifth assignment of error is without merit.

{¶101} Appellant's sixth assignment of error states:

{¶102} "The trial court committed prejudicial error by sentencing Defendant-Appellant without proper consideration of allied offenses of Engaging in a Pattern of Corrupt Activity, Burglary, Receiving Stolen Property, and Weapons under Disability."

{¶103} Under his sixth assignment of error, appellant argues that the court committed a sentencing error by failing to include lesser offenses with the charge of engaging in a pattern of corrupt activity. Appellant contends that counts 1 through 13 should have merged with count 14 because the charges are allied offenses of similar import. In so doing, appellant explains his sentence would be reduced from 21 years to nine years. However, the record belies this assertion. The jury was instructed that the incidents of corrupt activity alleged to make up the pattern of corrupt activity consist of all the burglary charges (counts 1 though 5) and all the receiving stolen property charges (counts 6 through 10). The three counts of weapons under disability were not included in the "pattern," because they have no bearing on the concept of "enterprise" in this case. The question on review is therefore whether the charges of burglary and receiving stolen property merge with engaging in a pattern of corrupt activity.

{¶104} R.C. 2941.25(A) codifies the doctrine of merger, explaining that, "[w]here 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."

{¶105} R.C. 2941.25(B) provides the converse:

{¶106} 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.

{¶107} The Ohio Supreme Court in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶48, set forth a new standard for determining whether merger is apposite: "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), 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." The court went onto explain, "[i]f 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." *Id.*

{¶108} "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id.* at ¶51.

{¶109} Here, the state relies on the Twelfth Appellate District case *State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222. There, the appellant argued that the trial court erred by failing to merge the charges of trafficking in marijuana and engaging in a pattern of corrupt activity. *Id*. at ¶63. The court concluded that the act of trafficking marijuana was committed with a separate animus from engaging in a pattern of corrupt activity. *Id*. at ¶66. The court held: "Engaging in a pattern of corrupt activity requires an additional state of mind from trafficking in marijuana to form an enterprise.

Appellant possessed the intent to traffic in drugs, which does not require him to form an enterprise." *Id*. at ¶67.

{¶110} In reviewing the facts of this case under the *Johnson* test, it is clear that commission of a single offense could not establish a "pattern" of corrupt activity. Therefore, the commission of each individual offense, standing alone, would not result in committing the offense of engaging in a pattern of corrupt activity. *State v. Reyes*, 6th Dist. No. WD-03-059, 2005-Ohio-2100. Further, it is the establishment of the enterprise for the purpose of committing crimes that the statute proscribes. The corrupt activity does not actually require the *commission* of the underlying offense. R.C. 2923.31(I) defines "corrupt activity" as "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in" a wide variety of conduct.

{¶111} In addition to receiving property knowing or having reason to believe the property was stolen (counts 6 through 10) and knowingly trespassing in an occupied structure to commit theft when a person other than appellant was present or likely to be present (counts 1 through 5), appellant had to conduct or participate in, directly or indirectly, the affairs of the enterprise. As explained above, the record indicates that appellant and Ivery engaged in an enterprise with the common purpose to commit theft offenses. Occasionally, the duo would use Ivery's resources, such as his sister's car, and sometimes they would use appellant's resources, such as his personal automobile. The intermingling of resources required the duo to sustain a relationship and act in concert.

{¶112} Evidence of the offense of engaging in a pattern of "corrupt activity" can be established in a number of ways, including planning, purchase of equipment, staking out potential targets, or a variety of other behaviors. The formation of an enterprise and engaging in activity in furtherance of that enterprise is evident in this case. Under the facts and circumstances, it was proper not to consider the offenses allied.

{¶113} Appellant's sixth assignment of error is without merit.

{¶114} Appellant's seventh assignment of error states:

{¶115} "The trial court committed prejudicial error by sentencing Defendant-Appellant without proper calculation of credit for time served."

{¶116} In appellant's final assignment of error, he contends that the trial court erred in failing to grant credit for jail time served. The trial court afforded appellant no credit for time served. Appellant argues he should receive a credit of 220 days. Appellant has calculated this figure from January 11, 2011, to his sentencing on August 18, 2011. On January 11, 2011, the trial court ordered a warrant to convey appellant, who, at the time, was incarcerated in the Cuyahoga County Jail awaiting disposition on a separate case, to the Lake County Sheriff's Department for arraignment on January 21, 2011. The entry explained that appellant was to remain in Lake County Jail until further order of the court.

{¶117} R.C. 2967.191 mandates a reduction of a prison term for related days of confinement:

{¶118} The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum

> term or the parole eligibility date of the prisoner by the total number of days that the prisoner was confined for any reason *arising out of the offense for which the prisoner was convicted and sentenced* including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, and confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term. (Emphasis added.)

{¶119} The statute essentially codifies the Equal Protection principle that defendants shall not be subjected to disparate treatment based on economic status; that is, for instance, defendants unable to make bail while awaiting trial must be credited for the time they are confined. *See State v. Mason*, 7th Dist. No. 10 CO 20, 2011-Ohio-3167, ¶14, citing *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856.

{¶120} As the statute indicates, "a defendant is not entitled to jail-time credit for any period of incarceration arising from facts that are separate or distinguishable from those on which the current (or previous) sentence was based." *State v. Chafin*, 10th Dist. No. 06AP-1108, 2007-Ohio-1840, ¶9.

{¶121} The state argues the Cuyahoga County Court of Common Pleas already gave appellant credit for the time he served in Lake County. Appellant does not confirm or deny the crediting of any time from the Cuyahoga County court, but instead argues any such time is a "nullity" because those charges arose from the same set of facts that comprised the offenses for which he was sentenced in Lake County.

{¶122} The record concerning this assignment of error is limited. A formal motion for jail-time credit was filed by appellant, responded to by the state, and ruled upon by the trial court *after* the notice of appeal was filed with this court. As such, the arguments contained therein, and any attached exhibits before the trial court for consideration, are not part of the record. However, the following is evident from the record: First, appellant was incarcerated in Cuyahoga County before he was arraigned on charges in Lake County; the Lake County trial court had to issue a warrant so that appellant could be conveyed. Next, the trial court, on the record, noted that appellant would stay incarcerated in Lake County so that he could more regularly meet with his defense. Finally, after trial, appellant was returned to Cuyahoga County to ultimately face charges there. Thus, it is evident by Lake County's refusal to credit this time that it considered appellant essentially "borrowed" from Cuyahoga County, and it would be up to that jurisdiction to apply the credit.

{¶123} This case presents similar facts as *State v. Mason*, 2011-Ohio-3167. There, Mason argued he should have been credited 27 days, which was the time he served in the Columbiana County jail after sentencing on unrelated charges in Stark County. The Seventh Appellate District, noting the evidentiary burden in such a case, explained:

> Mason is not entitled to jail-time credit for days he served on an unrelated case. See R.C. 2967.191. Absent evidence that Stark County did not include these days as time served or other evidence indicating that Mason was being held at the time on the Columbiana County charges, Mason has failed to meet his evidentiary burden. *Id.* at ¶22.

See also State v. McGrath, 8th Dist. No. 97207, 2012-Ohio-816, ¶17 ("It is the defendant's burden to show the error in the calculation of jail-time credit"); *State v. Parsons*, 10th Dist. No. 03AP-1176, 2005-Ohio-457, ¶9 ("We are unable to determine whether the trial court erred and appellant has failed to satisfy his burden"); *State v. Slager*, 10th Dist. Nos. 08AP-581-582 & 08AP-709-710, 2009-Ohio-1804, ¶25 ("If the defendant fails to demonstrate error, and no miscalculation in the jail-time credit is apparent from the record, any claimed error must be overruled").

{¶124} On this record, there is no indication that Cuyahoga County failed to include those days as time served. In fact, per the Cuyahoga County Court of Common Pleas' docket, we take notice that appellant received 456 days for time served credited on his cases in Cuyahoga County. Further, there is no indication that the charges arose from the same set of facts that comprised the offenses for which he was sentenced in Lake County. Appellant highlights the testimony of Sergeant Kwiatkowski of the Walton Hills Police Department, where the witness explained that he aided in the investigation with the Wickliffe Police Department. However, with nothing more, this does not establish that the same set of facts provided the basis for both charges.

{¶125} Appellant's seventh assignment of error is without merit.

{¶126} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.