[Cite as *State v. Haddix*, 2012-Ohio-2687.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-075
	:	O P I N I O N
- vs -		6/18/2012
	:	
TYLER M. HADDIX,	:	
Defendants-Appell.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR27024

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

Thomas G. Eagle, 3386 N. State Route 123, Lebanon, Ohio 45036, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Tyler Haddix, appeals his convictions and sentence in the Warren County Court of Common Pleas for single counts of aggravated burglary and robbery.

{¶ 2} In the early morning hours of September 23, 2010, Ernest Bray heard noises coming from the garage attached to his home. When Bray went to investigate the noises, someone came from behind him and put a pillowcase over his head and pulled him to the

ground. Bray was then dragged into the kitchen of his home. There, the intruder took $107 from Bray's person and various pills, including Xanax, from the kitchen cabinets. At some point, Bray was able to lift the pillowcase from his head enough to see that the intruder was Haddix, his brother's stepgrandson.

{¶ 3} Bray observed Haddix break a cake plate and then sweep up the pieces with a broom. Around the time that Haddix was sweeping, Bray ran toward the family room of his home, and retrieved a baseball bat. Once Bray returned to the kitchen, he discovered that Haddix had run away. When police came to the scene, they found Haddix's sunglasses and necklace in Bray's home where the attack and theft occurred. The next day, Bray's daughter found a cross pendant in her father's garage and gave it to police. The state later obtained pictures of Haddix from his social networking webpage in which he is seen wearing the necklace and the pendant found in Bray's garage. Police also recovered fingerprints from the broom in Bray's kitchen, which were later determined to belong to Haddix.

{¶ 4} Police began searching for Haddix at various homes where he was purported to reside or visit. However, police were unable to find him. On November 10, 2010, Haddix was indicted on aggravated burglary, kidnapping, and robbery. Haddix turned himself in to authorities on December 6, 2010. According to Haddix, he had not turned himself in earlier because he wanted to spend time with his newborn son and because he believed that the charges were not serious. Haddix pled not guilty to the charges, and at some point prior to trial, the state dismissed the kidnapping charge.

{¶ 5} The matter was tried to a jury, and Haddix testified in his own defense. Haddix offered an alibi, and stated that he was asleep at the home of his father's girlfriend, Wanda Burden, at the time the incident at Bray's home occurred. Haddix also testified that he often helped Bray with yard work and that is why his necklace and sunglasses were found in Bray's home and why his fingerprints were on the broom in Bray's kitchen.

{¶ 6} After a two-day trial, the jury found Haddix guilty of aggravated burglary and robbery. The trial court sentenced Haddix to three years on the aggravated burglary charge and two years for the robbery charge, to run consecutive to each other for an aggregate sentence of five years. Haddix now appeals his convictions and sentence, raising the following assignments of error.

{¶ 7} Assignment of Error No. 1:

{¶ 8} THE TRIAL COURT ERRED IN EXCLUDING DEFENDANT'S EVIDENCE.

{¶ 9} Haddix argues in his first assignment of error that the trial court erred in excluding evidence that the victim, Ernest Bray, gave or sold illegal drugs to him in the past, thus establishing a motive for Bray to falsify the charges and his testimony during the state's case-in-chief.

{¶ 10} The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Ford,* 12th Dist. No. CA2009-01-039, 2009-Ohio-6046, ¶ 36. Absent an abuse of discretion, as well as a showing that appellant suffered material prejudice, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence. *Id.* An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Id.* When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

{¶ 11} According to Evid.R. 616, " In addition to other methods, a witness may be impeached by any of the following methods: (A) Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence." Impeachment evidence used pursuant to Evid.R. 616(A) must be relevant as required by Evid.R. 402. "Nevertheless, relevant impeachment evidence may still be excluded under Evid.R. 403(A) if its probative value is substantially outweighed by the

danger of unfair prejudice, confusing the issues, or misleading the jury." *State v. Atkinson*, 12th Dist. No. CA2009-10-129, 2010-Ohio-2825. ¶ 8.

{¶ 12} During cross-examination of the state's witnesses, including Bray himself, defense counsel asked questions insinuating that Bray provided Haddix with drugs. After the state objected to the questioning, the trial court sustained the objection. Defense counsel later proffered that the reason for asking the questions was to establish that Haddix's family had asked Bray to stop providing Haddix with drugs and that Bray would have felt threatened that Haddix's family was going to report his illegal drug sales to authority. The defense proffered that Bray would therefore have a motive to fabricate or exaggerate a story accusing Haddix of burglary and robbery to discourage Haddix or his family from turning Bray in to authorities.

{¶ 13} The probative value of any testimony regarding Bray providing Haddix with drugs would have been substantially outweighed by the danger of confusing the issues or misleading the jury. The defense was not able to explain why Bray would purposely thrust himself into police scrutiny by implicating Haddix if Bray's motive for falsifying his testimony was to silence Haddix from implicating Bray as a drug dealer. Furthermore, the record indicates that the defense was attempting to vilify the victim as a drug dealer, and therefore possibly attempting to suggest that Bray lacked truthfulness in both his accusations and his testimony. Evid.R. 616 does not swing open the door for cross-examination in an effort to establish a witness' prior bad acts or criminal character.

{¶ 14} Even though the accusations were properly excluded, the record reveals that the jury was well-aware of a possible connection between Bray and illegal drug use or sales. The jury heard testimony from various witnesses that Haddix's family asked Bray not to sell or give drugs to Haddix, that Haddix would return from Bray's home exhibiting signs of having taken narcotics, and that witnesses often saw people coming and going from Bray's home at

various times during the night. Haddix also testified that he unwillingly experienced "an opiate coma" after taking something provided by Bray, and that he confronted Bray for giving him the drugs.

{¶ 15} Further, the state made reference to Haddix's accusation that Bray was a drug dealer in its closing argument. "The defense wants you to believe [Bray is] a pill pusher, a druggy and all these other things." The state also made reference to Bray having been convicted of selling illegal fireworks and further stated "Nowhere [sic] was [Bray] convicted of anything with drugs." Between the testimony and the state's closing argument, the jury was aware of Haddix's claims that Bray was a drug dealer, and Haddix was not prejudiced by any inability to offer additional testimony that Bray was a drug dealer.

{¶ 16} After reviewing the record, we cannot say that the trial court abused its discretion by excluding evidence under the circumstances of this case. Haddix's first assignment of error is therefore overruled.

{¶ 17} Assignment of Error No. 2:

{¶ 18} THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EVIDENCE.

{¶ 19} Haddix argues in his second assignment of error that the trial court erred by allowing the state to comment upon his decision not to turn himself in to police or to tell police of his alibi as soon as he was aware of Bray's robbery and burglary claims.

{¶ 20} The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." After the United States Supreme Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), jurisprudence began to focus on the distinction between pre-arrest and post-arrest silence because some circumstances inherent in pre-arrest silence do not implicate one's Fifth Amendment rights.

{¶ 21} The Ohio Supreme Court focused on the distinction between pre-arrest and

post-arrest silence and determined that the "use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment privilege against self-incrimination." *State v. Leach*, 102 Ohio St.3d 135, 2004-Ohio-2147, ¶ 38. In *Leach*, the state told the jury in its opening statement and case-in-chief that Leach agreed to meet with police to discuss the accusations against him, but later called and said he would not speak to police without an attorney. The court concluded that the use of Leach's pre-arrest silence ran afoul of Leach's constitutional rights to remain silent and to have counsel.

{¶ 22} Throughout the course of its analysis, the court distinguished the use of silence as substantive evidence of guilt versus the use of silence to impeach a defendant who chooses to testify at trial. The court cited *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124 (1980), for the proposition that the use of pre-arrest silence to "*impeach* a criminal defendant's credibility" is not a violation of the Fifth Amendment. *Leach* at ¶ 21. (Emphasis in original.) The *Leach* court noted two important concepts as set forth by the United States Supreme Court in *Jenkins*. First, "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Id.* at ¶ 22, quoting *Jenkins* at 238. Second, "no governmental action induced the petitioner to remain silent before arrest, since the failure to speak occurred before he was taken into custody and given the *Miranda* warnings." *Id*. citing *Jenkins* at 240.

{¶ 23} Based on the difference between substantive evidence of guilt and impeachment, the court concluded, "thus, use of pre-arrest silence as impeachment evidence is permitted because it furthers the truth-seeking process. Otherwise, a criminal defendant would be provided an opportunity to perjure himself at trial, and the state would be powerless to correct the record." *Id*. at ¶ 33.

{¶ 24} Haddix argues that the state cannot use pre-arrest silence to impeach the defendant unless that defendant's testimony at trial is inconsistent with prior inconsistent

statements. In support of his supposition, Haddix cites *United States v. Hale*, 422 U.S. 171, 179, 95 S.Ct. 2133 (1975), wherein the United States Supreme Court held that the defendant's silence *during a police interrogation* "lacked significant probative value and that any reference to his silence under such circumstances carried with it an intolerably prejudicial impact" where the defendant's later statements were not inconsistent with the defendant's silence.

{¶ 25} However, since the time of *Hale* in 1975, the United States Supreme Court rendered the *Jenkins* decision discussed above, and the Ohio Supreme Court has decided the *Leach* case, both of which specifically state that impeachment of a defendant's credibility through the use of *pre-arrest silence* does not constitute a Fifth Amendment violation. These cases did not establish a requirement that any testimony offered at trial be inconsistent with pre-arrest silence as Haddix now asserts.

{¶ 26} We also note that defense counsel specifically asked Haddix about his decision to turn himself in well after he knew that police were looking for him. During Haddix's direct testimony, the following exchange occurred.

> [Q] Do your [sic] remember Tyler, I want you to tell the jury, why did you not immediately go to the police?
>
> [A] To be completely honest, was because of my son. I wanted to spend time with my son. * * *
>
> [Q] What did you eventually do, Tyler, in regard to the authorities?
>
> [A] I eventually did, once my son was born, I spent the most precious two months, he was born on October 6th and I spent every day with him until December 6th, exactly two months, and I turned myself in and I wasn't indicted for the –they were wanting to question me, but they didn't. I mean, you know like they weren't telling me they were on a big huge hunt for me or anything, because I wasn't indicted until November 22nd, I turned myself in December 6th. So, I mean it just shows that I wasn't – I didn't feel that it was that serious, I wasn't worried about it. Because I wasn't worried about it.

{¶ 27} Haddix also testified that during the early morning hours of September 23, 2010, he was sleeping at the house of his father's girlfriend, Wanda Burden. The state cross-examined Haddix regarding his not going to the police until December 6, 2010, and on his alibi.

> [Q] Let me ask you this, before the time you turned yourself in, you said in December, did you ever tell the police on September 23rd, from the 22nd to the early morning of the 23rd, where you were at * * *?
>
> [A] No.
>
> [Q] Why?
>
> [A] Like I said, on the simple fact that I had missed my court date, I missed it and I wanted to see my son be born and I already knew that my P.O. was going to -- already had me violated.[1]
>
> [Q] Court date for what?
>
> [A] For getting in the car wreck, my grandmother's car.
>
> [Q] Why would you have a court date for a car wreck?
>
> [A] Failure to control, an OVI.
>
> [Q] Ok, alcohol?
>
> [A] No, narcotics.
>
> [Q] Narcotics?
>
> [A] I told them I had been using pills.
>
> [Q] Let me ask you, just so we're clear, at no time, prior to the time you turned yourself in, did you contact a police officer about this case?
>
> * * *
>
> [A] I knew to contact him, yes, within –

1. Haddix is making a reference to his parole officer and that an OVI would be a violation of his parole terms.

> [Q] No, the question was before you turned yourself in on December 6th, I think that was the day right, 2010?
>
> [A] Yeah.
>
> [Q] You never talked to the police at all, gave them any information about Wanda Burden, your girlfriend, the 23rd, the 24th, the argument and all those details, is that correct?
>
> [A] Well, obviously not, no, I was turning myself in. I knew if they wanted to come and talk to me, they'd come talk to me, I was turning myself in.
>
> [Q] And, where were you all that time, from the 23rd to December?
>
> [A] I stayed at my dad's and a lot with [my girlfriend] * * *.

{¶ 28} This exchange demonstrates that the state was asking Haddix questions based on Haddix's own direct testimony that he wanted to wait to turn himself in so that he could spend time with his son, and that he had an alibi.

{¶ 29} Not only did Haddix testify, thereby casting aside his cloak of silence, but defense counsel brought up the fact that Haddix had not turned himself in as soon as he was aware of the accusations against him. Haddix chose to discuss the reasons for his silence, and cannot now claim that the state was not permitted to cross-examine him or impeach his credibility. To deny the state the ability to do so in this case would vitiate the truth-seeking process and otherwise insulate Haddix from cross-examination, which is the test of credibility.

{¶ 30} Haddix also argues that the state impermissibly commented on the date he filed his notice of alibi by asking Haddix whether he told officers about being at Wanda Burden's home. According to Crim.R. 12.1, a defendant is required to file a notice of alibi not less than seven days before trial. If a defendant complies with the time requirements of Crim.R. 12.1, the state is not permitted to suggest evidence of guilt because the defendant failed to come forward with an alibi sooner. *State v. Tolbert*, 70 Ohio App. 3d 372 (1st Dist.1990).

{¶ 31} However, there is no indication that the state commented on the date that

Haddix filed his notice of alibi. Instead, the state cross-examined Haddix on his own testimony that he avoided police and failed to provide police with his alibi because he was not worried about Bray's allegations and did not think they were "serious." Furthermore, most of the state's discussion of Haddix's alibi was directed at the fact that police went to the home of Wanda Burden the morning after the incident, where Haddix claimed to be, and the police did not find him there.

{¶ 32} The trial court did not abuse its discretion in permitting the state to cross-examine Haddix regarding the day he turned himself in to authorities and on his alibi. Haddix chose to testify in his own defense, and specifically raised the issue of the date he turned himself in, as well as his alibi, in his direct testimony. The state was therefore permitted to challenge Haddix's credibility regarding his testimony, and his second assignment of error is overruled.

{¶ 33} Assignment of Error No. 3:

{¶ 34} THE TRIAL COURT ERRED IN ALLOWING THE STATE'S EVIDENCE IN REBUTTAL.

{¶ 35} Haddix argues in his third assignment of error that the trial court erred by permitting the state to present rebuttal evidence of a police officer's investigation activities that were not provided in discovery or in advance of trial.

{¶ 36} During the state's case-in-chief, Deputy Thomas Naumovski testified that police went to four locations looking for Haddix following the incident at Bray's home, and that he had gone to three of the four locations personally. Naumovski was unable to recall the specific addresses he went to, and the addresses were not noted in his investigation report. After Haddix rested, the state re-called Deputy Naumovski and showed him a photograph of Wanda Burden's home. Naumovski verified that he had been at the house during the time Haddix claimed he was asleep in the house, and that Haddix was not there.

{¶ 37} Haddix asserts that the trial court erred in permitting the rebuttal testimony and use of the photograph because Deputy Naumovski's report did not contain information that he went to three of the four different addresses police visited during the investigation, and because the defense did not receive notice of the photograph prior to trial.

{¶ 38} The purpose of discovery is twofold: to allow a defendant to make an intelligent plea, and to ensure the defendant a fair trial by alleviating surprise. *State v. Moore*, 40 Ohio St.3d 63, 66 (1988). Crim.R. 16 regulates the discovery process, and sets forth under what circumstances each party is required to provide discovery. According to Crim.R. 16(L)(1),

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

{¶ 39} "The court does not abuse its discretion in admitting evidence undisclosed in discovery unless the record shows that the prosecutor's discovery violation was willful, that foreknowledge would have benefited the accused in preparing his defense, or that the accused was unfairly prejudiced." *State v. Otte*, 74 Ohio St.3d 555, 563, 1996-Ohio-108. The record does not indicate that the state's failure to produce a picture of the fourth house was willful. Instead, Deputy Naumovski was re-called and shown the photograph specifically to rebut Haddix's testimony that he was at the fourth location on the morning following the robbery and theft. Until Haddix so testified, the state had no reason to show Deputy Naumovski a photograph of Wanda Burden's home or question Deputy Naumovski extensively on the timing of the investigation as it related to Haddix's claims that he was at the house during and after the theft and robbery.

{¶ 40} We also find that foreknowledge of the photograph or Deputy Naumovski's statements would not have benefited Haddix and did not otherwise prejudice him. The

photograph offered on rebuttal merely allowed Deputy Naumovski to verify that he did go to that location, which he recognized by sight rather than having memorized the address. Even absent the photograph, Deputy Naumovski testified that he and other officers went to multiple residences, including that of Wanda Burden, on the morning after the theft and robbery, and did not locate Haddix at any of the locations.

{¶ 41} Moreover, there is no indication from the record that Haddix requested a continuance in order to respond to the photograph or Deputy Naumovski's rebuttal testimony. *See State v. Wiles*, 59 Ohio St.3d 71, 80 (1991) (finding that "no prejudice to a criminal defendant results where an objection is made at trial to the admission of nondisclosed discoverable evidence on the basis of surprise but no motion for a continuance is advanced at that time"). In fact, Haddix immediately cross-examined Deputy Naumovski regarding his failure to include the pertinent addresses in his investigation report, and the jury was free to question Deputy Naumovski's credibility and ability to recall details of the investigation based on his failure to include the addresses in his report.

{¶ 42} Having found that the trial court did not abuse its discretion in admitting the evidence, Haddix's third assignment of error is overruled.

{¶ 43} Assignment of Error No. 4:

{¶ 44} THE TRIAL COURT ERRED IN CONVICTING THE DEFENDANT.

{¶ 45} Haddix argues in his fourth assignment of error that the trial court erred in convicting him. In doing so, Haddix reiterates that the state made reference to his pre-arrest silence, an issue that we have already addressed in the second assignment of error. Haddix also argues that the state made improper references in its closing argument to his silence and failure to claim innocence prior to turning himself in. As discussed above, Haddix testified in his own defense regarding his reasoning for not turning himself in to police, and the state properly cross-examined him on his pre-arrest silence. Therefore, the state was

free to comment on Haddix's own testimony, as well as the testimony elicited on cross-examination, during its closing argument. *State v. Freeman*, 138 Ohio App.3d 408, 419 (1st Dist.2000).

{¶ 46} Haddix next argues that the trial court erred by permitting the state to insinuate during closing arguments that he was guilty of the charges because he had previously been convicted of burglary. During the state's closing argument, the prosecutor stated, "he's a prior convict. Prior burglary, go figure. Doesn't that sound familiar?" Haddix asserts that this statement improperly suggested to the jury that he must have committed burglary in the current case because he had committed burglary in the past.

{¶ 47} While Haddix does not specifically assert prosecutorial misconduct, we nonetheless analyze the prosecutor's statement to determine "whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940 (1982). An appellate court should not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 12.

{¶ 48} At trial, Haddix's counsel failed to object to the prosecutor's comments regarding Haddix's criminal history. A failure to object to alleged prosecutorial misconduct waives all but plain error. *Id.* at ¶ 126. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Stojetz*, 84 Ohio St.3d 452, 455, 1999-Ohio-464. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. D'Ambrosio*, 73 Ohio St.3d 141, 144, 1995-Ohio-129.

{¶ 49} A prosecutor is afforded wide latitude in closing arguments. *State v. Jacks*, 63 Ohio App.3d 200, 210 (8th Dist.1989). The Ohio Supreme Court has also stated that a closing argument must be reviewed in its entirety to determine whether the prosecutor's remarks were prejudicial. *State v. Loza*, 71 Ohio St.3d 61, 79 (1994), citing *State v. Moritz*, 63 Ohio St.2d 150, 157 (1980).

{¶ 50} After reviewing the record, the statement quoted by Haddix was taken out of context. Instead of insinuating that Haddix was guilty because he was acting in conformance with a prior bad act, the prosecutor was arguing that Haddix lacked credibility. "It is well-established that 'the prosecutor is permitted to make a fair comment on the credibility of witnesses based upon their testimony in open court.'" *State v. Brown,* 12th Dist. No. CA2002-03-026, 2002-Ohio-5455, ¶ 22, quoting *State v. Mundy*, 99 Ohio App.3d 275, 304 (2nd Dist.1994).

{¶ 51} Immediately prior to making the statement about Haddix's prior burglary, the state asked the jury, "why do you give him any credence or credibility? He's a prior convict. Prior burglary, go figure. Doesn't that sound familiar?" The prosecutor then continued to argue Haddix's lack of credibility by reiterating Haddix's admitted drug problems, as well as comparing Haddix's testimony against the evidence collected against him, such as his personal items left at Bray's home and the fingerprints on the broom.

{¶ 52} Haddix opened the door to the statements regarding his prior criminal history during his direct testimony. In addition to admitting that he was on probation and had violated such by operating his grandmother's car while under the influence of narcotics, Haddix discussed his prior conviction for burglary and chose to explain the circumstances of his past conviction to the jury. The prosecutor's reference to Haddix's past conviction, while perhaps inartfully stated, was merely an argument that Haddix lacked credibility based on the evidence adduced at trial. As the jury was clearly aware that Haddix had a criminal history,

we cannot say that such statements constituted plain error because the outcome of the trial clearly would not have been otherwise absent the prosecutor's statements.

{¶ 53} Haddix concludes his fourth assignment of error by arguing that the cumulative effects of the prosecutor's statements regarding his pre-arrest silence, as well as the prosecutor's reference to his criminal history, denied him a fair trial. However, we have not found that the state committed error on either account. Therefore, the cumulative error doctrine is inapplicable. Haddix's fourth assignment of error is overruled.

{¶ 54} Assignment of Error No. 5:

{¶ 55} THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT.

{¶ 56} Haddix challenges his sentence in his fifth assignment of error, and argues that (1) the trial court erred by failing to merge the aggravated robbery and burglary charges into a single conviction because the charges are allied offenses of similar import; (2) the trial court erred by sentencing him to consecutive sentences; and (3) the consecutive sentence was unjust.

{¶ 57} The Ohio Supreme Court has set forth a two-part test to determine if offenses are allied offenses of similar import pursuant to R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 48.

> 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. *** 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.

(Emphasis in original.) The court went on to state,

> if the multiple 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." If the answer to both questions is

> yes, then the offenses are allied offenses of similar import and will be merged. 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.

Id. at ¶ 49-51. (Emphasis in original.)

{¶ 58} Applying the *Johnson* analysis to the case at bar, we must first determine if it is possible for aggravated burglary and robbery to be committed with the same conduct. According to R.C. 2911.02(A)(2), "no person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: inflict, attempt to inflict, or threaten to inflict physical harm on another * * *." Ohio's aggravated burglary statute, R.C. 2911.11(A)(1), states that,

> No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply: the offender inflicts, or attempts or threatens to inflict physical harm on another * * *.

{¶ 59} It is theoretically possible to commit both robbery and burglary with the same conduct because one could enter an occupied structure in order to facilitate a theft offense. However, Haddix did not commit the robbery and aggravated burglary with the same conduct in this case. The aggravated burglary occurred when Haddix entered Bray's garage by force or stealth and placed a pillowcase over Bray's head. The struggle ensued, and Bray was injured by Haddix dragging him to the floor of the garage, thus inflicting physical harm. At that point, the aggravated burglary had occurred. The robbery, however, did not occur until Haddix dragged Bray into the kitchen and then proceeded to steal the pills from Bray's cabinets and the money from his person.

{¶ 60} Once Haddix's separate theft act was completed, the robbery had occurred,

and the two counts are not allied offenses of similar import. *See State v. Jackson*, 2nd Dist. No. 24430, 2012-Ohio-2335, ¶ 137 (finding that robbery and burglary are often "not allied offenses of similar import, and therefore do not merge for sentencing, because the a (sic) burglary is complete upon entry into the victim's home, and a robbery subsequently committed inside the home constitutes a new, separate offense").

{¶ 61} Haddix next argues that the trial court erred in imposing consecutive sentences without first making required findings pursuant to previous versions of Ohio's sentencing statutes. Similar arguments have been made to this court in wake of the United States Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711 (2009), which held that the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, finding of facts necessary to impose consecutive, rather than concurrent, sentences for multiple offenses.

{¶ 62} Haddix argues that the trial court should have been required to make judicial findings as was required by statute before the Ohio Supreme Court decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster,* the Ohio Supreme Court found statutes requiring judicial findings prior to imposition of maximum, non-minimum, or consecutive sentences unconstitutional because doing so violated the Sixth Amendment right to jury trial. Since *Ice*, the Ohio Supreme Court has considered whether the pre-*Foster* statutes were revived by *Ice*, and held that they were not. *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320.

{¶ 63} The court in *Hodge* stated that while *Ice* negated the idea that judicial fact finding was a violation of the Sixth Amendment, such a finding did not serve to revive the pre-*Foster* statute. Therefore, the court stated that the General Assembly was no longer constrained by *Foster*'s holdings and could, if it chose to do so, respond with enactment of a statutory provision in light of *Ice*'s holding. The General Assembly recently amended former

R .C. 2929.14(E)(4), renumbered R.C. 2929.14(C)(4), and enacted new language requiring fact-finding for consecutive sentences. Am.Sub.H.B. No. 86. This legislation, which had an effective date of September 30, 2011, was not applicable to Haddix, who was sentenced in June 2011.

{¶ 64} Haddix next argues that the trial court erred in sentencing him to consecutive sentences. Although Haddix asks this court to review his sentence for "necessity and proportionality," the Ohio Supreme Court has set forth a two-part test for appellate courts to use when reviewing an appellant's sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4. First, an appellate court is to review the sentence to "determine whether the sentence is clearly and convincingly contrary to law." *Id.* Should the sentence satisfy the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 181.

{¶ 65} "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *State v. Elliott*, 12th Dist. No. CA2009-03-020, 2009-Ohio-5926, ¶ 10, citing *Kalish* at ¶ 18.

{¶ 66} The trial court sentenced Haddix to three years on the aggravated burglary charge, a first-degree felony, and two years on the robbery charge, a felony of the second degree. Both sentences fell within the applicable statutory range according to R.C. 2929.14, being the minimum term of incarceration. Moreover, the trial court's judgment entry of sentence and the sentencing transcript clearly indicate that the court considered the purposes and principles of sentencing pursuant to R.C. 2929.11 and R.C. 2929.12. The trial

court also advised Haddix of the applicable postrelease control issues. Therefore, the sentence was not contrary to law.

{¶ 67} Nor is the sentence an abuse of discretion. Haddix was found guilty of the crimes by a jury after the state presented evidence that Haddix broke into Bray's home, placed a pillowcase over his head, and took him to the ground. Haddix then dragged Bray into his home and stole money and prescription pills from him. Bray, an elderly man who had several health problems, was badly injured as a result of Haddix's actions. The trial court also considered that Haddix had a previous conviction for burglary and had violated his probation by operating a vehicle under the influence of narcotics.

{¶ 68} After reviewing the record, we cannot say that the trial court abused its discretion in sentencing Haddix as it did. As such, Haddix's final assignment of error is overruled.

{¶ 69} Judgment affirmed.

POWELL, P.J., and RINGLAND, J., concur.