[Cite as *State v. Hubbard*, 2015-Ohio-646.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-03-063
	:	O P I N I O N
- vs -		2/23/2015
	:	
CHRISTOPHER JAMES HUBBARD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2011-03-0334

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HENDRICKSON, J.

{¶ 1} Defendant-appellant, Christopher James Hubbard, appeals from his conviction and sentence in the Butler County Court of Common Pleas for burglary and petty theft. For the reasons discussed below, we affirm.

I. FACTS

{¶ 2} On November 8, 2009, the home of John Keller was broken into and a 32" LCD flat screen television was stolen. The burglar left DNA evidence behind at the scene. On

June 15, 2010, the Fairfield Township Police Department obtained a search warrant to take a saliva sample from Hubbard at the Butler County Jail. The affidavit for the search warrant was completed by Detective John Vanderyt. In the affidavit, Vanderyt attested that on May 21, 2010, Miami Valley Regional Crime Laboratory advised law enforcement by letter that it had processed the DNA evidence left behind at Keller's residence, entered the information into the National DNA index system database, and found a match in the DNA database identifying Hubbard. Vanderyt further stated in his affidavit the following:

> The status of Christopher Hubbard is that he is currently incarcerated at the Butler County Jail. This information was verified by Detective John Vanderyt on 06/15/10 by Checking Butler County Jail Inmate Roster and calling Noble Correctional Institution, records department.

{¶ 3} Vanderyt successfully obtained a saliva sample from Hubbard on June 15, 2010 at the Butler County Jail. Hubbard, who was incarcerated and serving an 81-month prison term for an unrelated burglary conviction, had been transferred to the Butler County Jail in order to be resentenced in the unrelated case. Approximately three to five days after providing the saliva sample, Hubbard was returned to prison.[1] Months later, Miami Valley notified the Fairfield Township Police Department that it had processed Hubbard's saliva sample and, "to a reasonable degree of scientific certainty," Hubbard was the source of the DNA found at the crime scene.

{¶ 4} Subsequently, on March 16, 2011, Hubbard was indicted on one count of burglary in violation of R.C. 2911.12(A)(2), a felony of the second degree, and one count of

1. At the time Hubbard was incarcerated on the unrelated burglary charge, he was serving his prison term at either the Noble Correctional Institution or the Warren Correctional Institution of the Ohio Department of Rehabilitation and Correction (ODRC). Although the affidavit for the search warrant and an arrest warrant later issued in this case indicate Hubbard was incarcerated at the Noble Correctional Institution, it is unclear whether he actually spent time incarcerated in this facility. While Hubbard testified at a September 23, 2013 hearing that he was currently incarcerated at the Warren Correctional Institution, he did not clarify whether or not he ever spent time at the Noble Correctional Institution. As discussed in the body of our decision, an arrest warrant for Hubbard was issued on March 16, 2011, at the address for the Noble Correctional Institution. The warrant was not served, however, until June 6, 2013, at which time Hubbard had been transported from the Warren Correctional Institution to the Butler County Jail.

petty theft in violation of R.C. 2913.02(A)(1), a misdemeanor of the first degree. An arrest warrant accompanying the indictment listed Hubbard's address as 15708 McConnellsville Road, Caldwell, Ohio 43724, which is the address for the Noble Correctional Institution. The arrest warrant was not served, however, until June 6, 2013. At this time, Hubbard was transported from the Warren Correctional Institution to the Butler County Jail. Hubbard was arraigned on June 10, 2013, and he entered a not guilty plea to the charges.

{¶ 5} On August 14, 2013, Hubbard filed a motion to dismiss the indictment for pre-indictment and post-indictment delay, arguing that the state's delay in prosecuting the case violated his "Federal and State Constitutional Due Process rights and his right to a speedy trial." A hearing on Hubbard's motion to dismiss was held on September 23, 2013. At this time, the state admitted it had no explanation for the nearly 27-month delay between the indictment date and Hubbard's arraignment date, but argued that the delay was not prejudicial to Hubbard. Conversely, Hubbard argued he was prejudiced "on many fronts," including being "prejudiced for a fast and speedy trial," having difficulty in locating alibi witnesses, and having the charges hanging over his head since he gave a saliva sample in June 2010. Hubbard took the stand to testify about the prejudice he faced, stating that he first became aware he was a suspect for the break-in and theft of Keller's TV when a DNA sample was taken from him at the Butler County Jail in June 2010. Hubbard testified that at the time the saliva sample was taken, he had been told the following:

> [HUBBARD]: [The officer] told me, he said, "Okay, Well, we'll just hold you here. Anything past three weeks, man, we're going to ride you on back because you're not a - - it wouldn't be a match to you," which made me fully believe, fully believe when that man told me, I believed him.

Hubbard further testified that, although he believed charges were not going to be brought against him because he had been returned to prison three to five days after the sample was taken, "this has been on my mind a lot of this time." Hubbard stated that although he had

been worried about the matter, he had no knowledge of the March 2011 indictment until he was served in June 2013. Hubbard then discussed the difficulty he would face in locating his alibi witnesses, stating that at the time of the break-in and theft, he had been staying with a guy named "Rick" at Rick's mother's apartment in Bond Hill. Hubbard had worked with Rick at a video game store in West Chester, Ohio. Hubbard did not know Rick's last name or Rick's mother's name, and could not recall exactly where the two resided. Hubbard believed they had resided at either 1311 or 1131 Franklin Street in Bond Hill, but was unsure if Rick and his mother were still living at that residence given the time that had passed.

{¶ 6} On September 26, 2013, the trial court, without findings, overruled Hubbard's motion to dismiss. Thereafter, on February 14, 2014, Hubbard pleaded no contest to the charges, waived a presentence investigation report, and was sentenced. The trial court imposed a 180-day jail term on the petty theft count, which was run concurrently to a two-year prison sentence imposed on the burglary count. Hubbard's two-year sentence was ordered to be served consecutively to prison sentences previously imposed in the Butler County Court of Common Pleas Case No. CR2009-11-1946 and the Pickaway County Court of Common Pleas Case No. 2011CR303.

{¶ 7} Hubbard timely appealed his conviction and sentence, raising four assignments of error.

II. MOTION TO DISMISS

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING HIS MOTION TO DISMISS THE INDICTMENT.

{¶ 10} In his first assignment of error, Hubbard contends the trial court erred in denying his motion to dismiss for two reasons. First, Hubbard contends that his federal and state constitutional rights to a speedy trial were violated by the state's 27-month post-

indictment delay in prosecuting the case. Second, Hubbard argues that his motion should have been dismissed as the state violated his statutory speedy-trial rights under R.C. 2941.401. We begin by addressing Hubbard's constitutional argument.

A. Constitutional Speedy-Trial Challenge

{¶ 11} Appellate review of speedy-trial issues involves a mixed question of law and fact. *State v. Messer*, 12th Dist. Clermont No. CA2006-10-084, 2007-Ohio-5899, ¶ 7. A reviewing court must give deference to the trial court's findings of fact if they are supported by competent credible evidence, but will independently review whether the trial court correctly applied the law to the facts of the case. *Id.*

{¶ 12} The Sixth Amendment to the United States Constitution guarantees an accused in a criminal prosecution the right to a speedy trial. The Due Process Clause of the Fourteenth Amendment makes this provision applicable to the states. *Klopfer v. North Carolina*, 386 U.S. 213, 222-223, 87 S.Ct. 988 (1967). Furthermore, Section 10, Article I of the Ohio Constitution guarantees a criminal defendant the right to a speedy trial.

{¶ 13} In regard to the Sixth Amendment right to a speedy trial, the United States Supreme Court has stated:

> The Sixth Amendment right to a speedy trial is * * * not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.

United States v. MacDonald, 456 U.S. 1, 8, 102 S.Ct. 1497 (1982). *See also State v. Triplett*, 78 Ohio St.3d 566, 568 (1997).

{¶ 14} To determine whether an accused has been denied his constitutional right to a speedy trial, a court must consider the following four factors: (1) the length of the delay, (2)

the reason for the delay, (3) the accused's assertion of his right to a speedy trial, and (4) the prejudice to the accused as a result of the delay. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182 (1972); *Triplett* at 568. None of these four factors are determinative of whether an accused suffered a violation of his constitutional right to a speedy trial; rather, the court must consider the four factors collectively. *Barker* at 533

{¶ 15} "The first factor, the length of the delay, is a 'triggering mechanism,' determining the necessity of inquiry into the other factors." *Triplett* at 569. Unless there is some delay which is "presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker* at 530. Post-accusation delay approaching one year is generally found to be presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 652, fn. 1, 112 S.Ct. 2686 (1992). "Once the Barker analysis is triggered, length of delay, beyond the initial threshold showing, is again considered and balanced against the other relevant factors." *State v. Boyd*, 4th Dist. Ross No. 04CA2790, 2005-Ohio-1228, ¶ 11, citing *Doggett* at 652.

{¶ 16} In this case, we find the 27-month delay between Hubbard's indictment and arraignment was presumptively prejudicial, thus triggering the *Barker* analysis. We therefore turn to an analysis of each factor.

1. Length of the Delay

{¶ 17} Although the length of delay in this case was nearly 27 months, the first *Baker* factor carries little weight for Hubbard. In *State v. Triplett*, 78 Ohio St.3d at 569-571, the Ohio Supreme Court found that a 54-month delay, while significant, did not violate the defendant's constitutional right to a speedy trial. There, the court analyzed the length of the delay and found:

> [T]he delay in this case, while significant, did not result in any infringement on Triplett's liberty. In fact, according to her own testimony, she was completely ignorant of any charges against

> her. The interests which the Sixth Amendment was designed to protect—freedom from extended pretrial incarceration and from the disruption caused by unresolved charges—were not issues in this case. Therefore, while the first factor does technically weigh in Triplett's favor, its weight is negligible.

Id. at 569.

{¶ 18} We find the reasoning in *Triplett* applicable to the case at hand. At the time the indictment was filed against Hubbard, he was serving a prison term imposed in another case on unrelated charges. During the ensuring period of delay, Hubbard admittedly had no knowledge of the March 16, 2011 indictment filed against him. He specifically testified at the motion to dismiss hearing that he was unaware of the pending charges against him. Further, there is nothing to indicate that his life was disrupted by the unresolved charges against him. We therefore find that the length of the delay weighs only slightly in favor of Hubbard. *See, e.g., State v. Owens*, 2d Dist. Montgomery No. 23623, 2010-Ohio-3353, ¶ 9-10 (finding that a delay over 12 months weighed only slightly in favor of the defendant on his constitutional speedy-trial challenge as he had no knowledge of the charges pending against him and was incarcerated on unrelated charges); *State v. Smith*, 8th Dist. Cuyahoga No. 81808, 2003-Ohio-3524, ¶ 12 (finding that a 16-month delay weighed only negligibly in favor of the defendant on his constitutional speedy-trial challenge as he was unaware of the indictment and incarcerated on unrelated charges).

2. Reason for the Delay

{¶ 19} When determining if the reason for the delay should weigh in favor of the accused or the state, we note that if an accused caused or contributed to the delay, this factor would weigh heavily against him. *See Triplett*, 78 Ohio St.3d at 569-570; *Smith* at ¶ 14. Where the state purposefully causes a delay, hoping to gain some impermissible advantage at trial, this factor would weigh heavily against the state and in favor of dismissal. *Doggett*, 505 U.S. at 656. "Between diligent prosecution and bad-faith delay, official

negligence in bringing an accused to trial occupies the middle ground." *Id.* at 656-657. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* at 657. The weight assigned to official negligence compounds over time as the presumption of evidentiary prejudice grows. *Id.*

{¶ 20} In this case, there is nothing in the record to suggest the state intentionally delayed service of the indictment and arrest warrant on Hubbard. Although Hubbard was incarcerated on unrelated charges at the time he was indicted, the record demonstrates that there was some confusion as to where exactly he was incarcerated. Even though Hubbard claims he was confined at the Warren Correctional Institution, both the June 15, 2010 search warrant and the March 26, 2011 arrest warrant indicated Hubbard was incarcerated at the Noble Correctional Institution. The state's failure to locate Hubbard and serve him with the indictment and arrest warrant is nothing more than prosecutorial negligence. *See Owens*, 2010-Ohio-3353, ¶ 12-13; *Smith*, 2003-Ohio-3524 at ¶ 16. Accordingly, pursuant to *Doggett*, the state's negligence weighs somewhat in favor of Hubbard.

3. Accused's Assertion of his Right

{¶ 21} An accused's assertion of, or failure to assert, his speedy-trial right is a factor to be considered in determining whether an accused's constitutional rights were violated. *Barker*, 407 U.S. at 528; *Triplett*, 78 Ohio St.3d at 570. Although indicted in March 2011, Hubbard did not assert his speedy-trial right until August 14, 2013. Hubbard provided uncontroverted testimony, however, that he was unaware of the charges against him until he was served with the arrest warrant on June 6, 2013. As a result, his failure to raise a speedy-trial issue during this time period cannot be held against him. *See Owens* at ¶ 14; *Boyd*, 2005-Ohio-1228 at ¶ 16. Yet, even after he was served with the arrest warrant, was

arraigned, and was appointed counsel, Hubbard still waited two months to file his motion to dismiss and assert his speedy-trial right. This two-month delay must be weighed, at least to some extent, against Hubbard's claim of a serious deprivation of his right to a speedy trial. *See State v. Walker*, 10th Dist. Franklin No. 06AP-810, 2007-Ohio-4666, ¶ 31, citing *Barker*, 407 U.S. at 528; *Triplett* at 570. Consequently, Hubbard's assertion of his right to a speedy trial weighs only moderately in his favor.

4. Prejudice to the Accused

{¶ 22} The final factor we must consider is the prejudice to the accused. In *Barker*, the United States Supreme Court identified three interests that the speedy-trial right is designed to protect: (1) oppressive pretrial incarceration, (2) the anxiety and concern of the accused, and (3) the possibility that the accused's defense will be impaired. *Barker* at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.* A defendant is prejudiced if a witness dies, disappears, or is unable to recall accurately events of the distant past. *Id.*

{¶ 23} The first type of prejudice identified by the Supreme Court, oppressive pretrial incarceration, is not implicated in Hubbard's case as he was already incarcerated on unrelated charges. With respect to the second type of prejudice, the anxiety and concern an accused faces, Hubbard made contradictory assertions. On one hand, Hubbard claimed to have been unaware that charges were pending against him, stating that he relied on his return to prison three to five days after providing police with a salvia sample in June 2010 as confirmation that he was no longer a suspect in the theft of Keller's television. Then, on the other hand, Hubbard claimed that he had been concerned that he could face charges for the theft, stating that, "this has been on my mind a lot of the time." In any event, Hubbard's blanket statement, without more, that he suffered anxiety caused by delay is insufficient to show the type of prejudice required for a violation of constitutional speedy-trial rights. *State*

v. Glass, 10th Dist. Franklin No. 10AP-558, 2011-Ohio-6287, ¶ 26; *State v. Eicher*, 8th Dist. Cuyahoga No. 89161, 2007-Ohio-6813, ¶ 33.

{¶ 24} As for the third type of prejudice, the possible impairment of an accused's defense, Hubbard testified that he believed he would have difficulty locating his alibi witnesses given the delay in proceedings. However, prior to the motion to dismiss hearing, Hubbard had not filed a notice of alibi in accordance with Crim.R. 12, indicating his intention to claim an alibi. Moreover, Hubbard had not taken steps to fully identify or to try and locate his alleged alibi witnesses. During cross-examination, Hubbard admitted he did not know "either way" whether Rick and Rick's mother lived at the same apartment in Bond Hill. Hubbard merely speculated that the two may have moved. Such speculation is not sufficient to show prejudice. There must be some evidence that Rick and Rick's mother were unavailable because of the delay in the proceedings, either due to death or the fact that they had disappeared and could not be located. *See State v. Watson*, 10th Dist. Franklin No. 13AP-148, 2013-Ohio-5603, ¶ 33; *Glass*, 2011-Ohio-6287 at ¶ 25; *State v. Mercer*, 3d Dist. Logan No. 8-07-09, 2008-Ohio-160, ¶ 16.

{¶ 25} Hubbard asserts that even if he cannot specifically identify how he was prejudiced or show affirmative proof of prejudice, dismissal of the charges is warranted as the excessive delay presumptively compromised the proceedings. In *Doggett v. United States*, the United States Supreme Court recognized that "consideration of prejudice is not limited to the specifically demonstrable, and * * * affirmative proof of particularized prejudice is not essential to every speedy trial claim." 505 U.S. at 655. "When considered as 'part of the mix of relevant facts,' the presumptive prejudice that arises from a lengthy delay may be sufficient to support a finding of a speedy trial violation." *State v. Bailey*, 2d Dist. Montgomery No. 20764, 2005-Ohio-5506, ¶ 19, quoting *Doggett* at 655. However, "where delay attributable to the negligence of the State is more than one year (i.e., 'presumptively

prejudicial' under the first *Barker* factor) but not exceedingly long like the eight-and-one-half years at issue in *Doggett*, courts sometimes decline to find a speedy trial violation absent actual prejudice to the defendant." *Id. See also Owens*, 2010-Ohio-3353 at ¶ 16. The record supports such a conclusion in Hubbard's case.

{¶ 26} The disputed period of delay in Hubbard's case is significantly shorter than the eight and one-half years at issue in *Doggett*. While the 27-month delay weighs in Hubbard's favor, that weight, as explained above, is negligible as the interests the Sixth Amendment protects against were not implicated in this case. *See, e.g., Triplett*, 76 Ohio St.3d at 569. The record also does not suggest that the delay was due to anything other than prosecutorial negligence. Finally, although Hubbard asserted his speedy-trial right in a fairly timely manner, the record contains no evidence of any actual prejudice as a result of the challenged delay. Hubbard's testimony from the motion to dismiss hearing indicates that there is an absence of prejudice in this case. Accordingly, our review of the *Barker* factors leads us to the conclusion that Hubbard's Sixth Amendment speedy-trial right was not violated. The trial court, therefore, did not err in denying Hubbard's motion to dismiss based on his constitutional speedy-trial challenge.

B. Statutory Speedy-Trial Challenge

{¶ 27} Hubbard also challenges the denial of his motion to dismiss on statutory grounds. He contends that, pursuant to R.C. 2941.401, the state's failure to bring him to trial within 180 days of his indictment meant that the indictment was void, that the court lacked jurisdiction over the case, and that the case should have been dismissed with prejudice. The state, however, contends that Hubbard's statutory argument has been waived as he failed to raise the issue at the trial court level. The state asserts Hubbard's failure to cite to R.C. 2941.401 within his motion to dismiss or to reference the statute at the hearing on the motion to dismiss meant that he was only raising his constitutional right to a speedy trial. Hubbard

disagrees, arguing that he raised a statutory speedy-trial challenge within his motion to dismiss and at the motion to dismiss hearing. He further contends that even if he did not raise an R.C. 2941.401 challenge below, the argument is not waived on appeal as "compliance with the time limits within R.C. 2941.401 is jurisdictional * * * [and] involves subject matter jurisdiction, which can never be waived."

{¶ 28} After reviewing the record, we find that Hubbard failed to raise the issue of his statutory speedy-trial right under R.C. 2941.401 below. *See* Crim.R. 47. However, we will review the merits of Hubbard's argument as R.C. 2941.401 is jurisdictional in nature. *See State v. Bellman*, 86 Ohio St.3d 208, 210-211 (1999).[2]

{¶ 29} R.C. 2941.401 provides, in relevant part, the following:

> When a person has entered upon a term of imprisonment in a correctional institution of this state, and when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, *he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for a final disposition to be made of the matter*, except that for good cause shown in open court, with the prisoner or his counsel present, the court may grant any necessary or reasonable continuance. * * *
>
> The written notice and request for final disposition shall be given or sent by the prisoner to the warden or superintendent having custody of him, who shall promptly forward it with the certificate to the appropriate prosecuting attorney and court by registered or certified mail, return receipt requested.

2. In *State v. Bellman*, 86 Ohio St.3d 208, 210 (1999), the Ohio Supreme Court recognized:

> [I]t is * * * where a statutory time requirement evinces an object or purpose to limit a court's authority that the requirement will be considered jurisdictional. For example, R.C. 2941.401 involving speedy trial rights for untried indictments provides that if the action is not brought within the required time, "no court any longer has jurisdiction thereof, the indictment * * * is void, and the court shall enter an order dismissing the action with prejudice."

R.C. 2941.401 is, therefore, clearly jurisdictional in nature.

> *The warden or superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof*.
>
> * * *
>
> *If the action is not brought to trial within the time provided*, subject to continuance allowed pursuant to this section, *no court any longer has jurisdiction thereof, the indictment, information, or complaint is void, and the court shall enter an order dismissing the action with prejudice*. (Emphasis added.)

{¶ 30} It is uncontroverted that Hubbard did not file with the trial court or the prosecuting attorney a request for final disposition of the charges pending against him in this case. However, Hubbard argues that prior to June 6, 2013, he was unaware of the charges filed against him and, therefore, could not have requested a final disposition in this matter. Hubbard contends that because the state had knowledge that he was incarcerated yet failed to inform the warden of the institution he was incarcerated within of the pending indictment, the 180-day limitation set forth in R.C. 2941.401 was triggered at the time the indictment was filed. Hubbard argues that "the state is required to exercise reasonable diligence in providing notice of pending charges where the state has knowledge of an incarcerated defendant's whereabouts." *See State v. Dillon*, 114 Ohio St.3d 154, 2007-Ohio-3617; *State v. Williams*, 4th Dist. Highland No. 12CA12, 2013-Ohio-950; and *Cleveland Metroparks v. Signorelli*, 8th Dist. Cuyahoga No. 90157, 2008-Ohio-3675.

{¶ 31} The Ohio Supreme Court has had the opportunity to consider the requirements of R.C. 2941.401 on two occasions. First, in *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, the court was asked to determine whether R.C. 2941.401 places a duty of reasonable diligence on the state to discover the whereabouts of an incarcerated defendant against whom charges are pending. *Id.* at ¶ 1. Hairston had been indicted in October 2000 on aggravated robbery, kidnapping, and robbery charges. *Id.* at ¶ 6. A summons was sent

to Hairston's home address, but he was in the county jail waiting to be transferred to the ODRC after having his parole revoked and he did not receive the summons. *Id*. at ¶ 7. When Hairston did not appear at his arraignment, a capias for his arrest was issued in November 2000. *Id.* Finally, in June 2001, a detainer was served on Hairston, advising him of the charges from the October 2000 indictment. *Id.* at ¶ 8. Hairston sought dismissal of the charges pursuant to R.C. 2941.401, arguing the state failed to exercise reasonable diligence to discover his whereabouts. *Id.* The trial court denied his motion, but the Tenth District Court of Appeals reversed the trial court's decision and ordered that the charges against Hairston be dismissed with prejudice. *Id.* at ¶ 9.

{¶ 32} In examining the Tenth District's decision, the Supreme Court found that the language of R.C. 2941.401 was unambiguous, and "places the initial duty on the defendant to cause written notice to be delivered to the prosecuting attorney and the appropriate court advising of the place of his imprisonment and requesting final disposition." *Id.* at ¶ 20. The court further stated that "the statute imposes no duty on the state *until such time as the incarcerated defendant provides the statutory notice*." (Emphasis added.) *Id.* The court, therefore, found that the state did not have a duty of "reasonable diligence" under the express language of R.C. 2941.401 to discover Hairston's whereabouts. *Id.* at ¶ 22. In reaching this determination, the court noted that R.C. 2941.401 "does not * * * allow a defendant to avoid prosecution simply because the state failed to locate him." *Id.* at ¶ 25. Accordingly, the Supreme Court reversed the Tenth District's decision, finding that because Hairston never caused the requisite notice of imprisonment and request for disposition to be delivered to either the prosecuting attorney or the court, he never triggered the process to cause him to be brought to trial within 180 days of his notice and request. *Id.* at ¶ 21. In reversing the appellate court's decision, the Supreme Court also noted that under the facts in

Hairston, it was apparent that the warden had no knowledge of any of the charges pending against the inmate. *Id.* at ¶ 21.

{¶ 33} In *State v. Dillon*, *supra*, the Supreme Court was asked to determine what impact an inmate's awareness of an unserved indictment had on the inmate's right to request a speedy trial pursuant to R.C. 2941.401 where the warden had knowledge of the indictment but failed to notify the prisoner in writing of the indictment and his right to request a final disposition of the charges. *Dillon*, 2007-Ohio-3617 at ¶ 1. Dillon had been indicted by the Delaware County Grand Jury on November 21, 2003 on charges of robbery, burglary, and breaking and entering. *Id.* at ¶ 2. On January 28, 2004, Dillon met with Delaware County law enforcement and a Delaware County assistant prosecutor while he was incarcerated in the Franklin County Jail on unrelated charges. *Id.* at ¶ 3-4. The indictment was not served on him at this meeting. *Id.* Eventually, near the end of January 2004, Dillon was transferred from the Franklin County Jail to the Ohio Corrections Reception Center (CRC) in Orient, Ohio. *Id.* at ¶ 5. A copy of the warrant on indictment was sent to CRC on January 29, 2004. *Id.* A copy of the warrant and indictment was then subsequently faxed to CRC on February 4, 2004, with the request that such documents be served on Dillon. *Id.* Additional phone calls were made to CRC to make sure Dillon was served with the indictment. *Id.* However, despite these efforts, Dillon was never personally served with the Delaware County indictment while at CRC. *Id.* In late February or early March 2004, Dillon was transferred to the Pickaway Correctional Institution. He was not served with the Delaware indictment while there, although he did sign a "wanted detainer" acknowledging that he was wanted by the Franklin County Sheriff and Delaware County Sheriff. *Id.* at ¶ 6. In April 2004, Dillon was returned to the Franklin County Jail, but was not served with the Delaware Indictment. *Id.* at ¶ 7. Finally, on August 13, 2004, Dillon was transported to Delaware County where he was served with a copy of the warrant and indictment. Later that month, Dillon filed a motion to

dismiss due to a speedy-trial violation. *Id.* at ¶ 8. His motion was denied by the trial court. *Id.* The Fifth District reversed the trial court, finding Dillon's speedy trial rights had been violated, and the state appealed. *Id.* at ¶ 11.

{¶ 34} The Ohio Supreme Court again found the language of R.C. 2941.401 to be unambiguous. *Id.* at ¶ 18. The court noted that under R.C. 2941.401, the warden or prison superintendent has a duty to promptly inform a prisoner "in writing of the source and contents of any untried indictment * * * against him, concerning which the warden or superintendent has knowledge, and of his right to make a request for final disposition thereof." *Id.*, citing R.C. 2941.401. Once the indictment was served on CRC on January 29 and February 4, 2004, "the statute affirmatively required the warden or superintendent to promptly inform Dillon in writing of the indictment." *Id.* "Permitting a warden or superintendent to avoid complying with the duty imposed by R.C. 2941.401 would circumvent the purpose of the statute and relieve the state of its legal burden to try cases within the time constraints imposed by law." *Id.* at ¶ 23. The Supreme Court therefore concluded that the speedy-trial calculation commenced when the warden was requested to serve the indictment on Dillon, which occurred at the latest on February 4, 2004, and that the court no longer had jurisdiction over the matter because a speedy-trial violation had occurred. *Id.*

{¶ 35} In dismissing the case against Dillon for a speedy-trial violation, the Supreme Court specifically found its holding in *Hairston* inapplicable, stating:

> Unlike the warden in *Hairston*, the warden at the CRC knew about the pending Delaware County indictment because [Delaware County law enforcement] had delivered it to him. For unknown reasons, the warden at the CRC failed to deliver these documents to Dillon. The warden's failure to provide written notification of the indictment to Dillon, as R.C. 2941.401 requires, makes *Hairston* inapplicable to this case.

Id. at ¶ 22.

{¶ 36} We find, contrary to Hubbard's assertions, that *Dillon* is inapplicable to the

present case and that the Supreme Court's ruling in *Hairston* controls. Unlike in *Dillon*, there was no evidence presented at the motion to dismiss hearing that the warden of the facility in which Hubbard was incarcerated had any knowledge of the untried indictment pending against him. The warden's "failure" to serve the untried indictment, therefore, could not have triggered the 180-day jurisdictional limit set forth in R.C. 2941.401. Rather, to invoke the jurisdictional limit set forth in R.C. 29401, Hubbard had to "cause written notice to be delivered to the prosecuting attorney and the appropriate court advising of the place of his imprisonment and requesting final disposition." *Hairston*, 2004-Ohio-969 at ¶ 20. Regardless of the reason, Hubbard simply did not do this. The state, therefore, was under no duty to act and the 180-day jurisdictional limitation set forth in R.C. 2941.401 was not triggered. *See Hairston* at ¶ 20. Further, although the state had knowledge that Hubbard was incarcerated, the record demonstrates that there was some confusion as to where Hubbard was incarcerated—either the Noble Correctional Institution or the Warren Correctional Institution. The state did not have a duty of reasonable diligence under the express language of R.C. 2941.401 to discover Hubbard's whereabouts. *See id.* at ¶ 22.

{¶ 37} We further find no merit to Hubbard's contention that *Dillon* stands for the proposition that commencement of speedy-trial time begins when the state is aware of an incarcerated defendant's whereabouts and fails to serve notice of a complaint or indictment. In *Dillon*, the Supreme Court specifically found that the speedy-trial time did not commence until February 4, 2008, the date the warden failed to comply with the state's request that he serve the indictment on Dillon. *Dillon*, 2007-Ohio-3617 at ¶ 23. The court did not commence the speedy-trial time as of the date the state knew of Dillon's whereabouts, yet failed to serve him with the indictment. Had the Supreme Court intended to penalize the state for knowing where Dillon was located and failing to serve him with the indictment, the court would have used January 28, 2004 as the beginning date, as the prosecutor met with an incarcerated

Dillon at a county jail to discuss a possible plea bargain to the charges on this date. The court did not, however, commence its speedy-trial calculation as of this date, but rather used the date the warden failed to comply with his statutorily mandated duty to serve the indictment. *Dillon*, therefore, does not stand for the proposition that the calculation of speedy-trial time begins when the state is aware of an incarcerated defendant's whereabouts but fails to serve notice of a complaint or indictment.

{¶ 38} Additionally, we find that the other cases relied on by Hubbard in support of his statutory speedy-trial challenge are factually distinguishable. *See Sate v. Williams*, 2013-Ohio-950; *Cleveland Metroparks v. Signorelli*, 2008-Ohio-3675. In both *Williams* and *Signorelli*, the Fourth and Eighth Districts, respectively, found that an incarcerated defendant's speedy-trial rights had been violated. *Williams* at ¶ 21; *Signorelli* at ¶ 25. However, in both of those cases, the inmates-defendants had substantially complied with the requirements of R.C. 2941.401 by notifying the prosecutor and the trial court of their incarceration. In *Williams*, the defendant sent a notice of incarceration and a request for disposition to the prosecutor prior to an indictment being filed against him. *Williams* at ¶ 3, 20. In *Signorelli*, the defendant, who was imprisoned due to a conviction in an unrelated case, had his attorney appear before the trial court and inform the court and the prosecutor of his incarceration. *Signorelli* at ¶ 5, 22. Additionally, the defendant in *Signorelli* filed "a time-stamped R.C. 2941.401 notice of availability motion with the Euclid Municipal Court, Clerk of Court, informing the court that he was currently in the Lake County Jail." *Id.* at ¶ 22. Unlike the defendants in *Williams* and *Signorelli*, Hubbard did not act or seek to comply with the requirements of R.C. 2941.401 as he did not inform either the trial court or the prosecutor of his incarceration. The 180-day jurisdictional limitation was, therefore, not triggered in the present case.

{¶ 39} In conclusion, we find that the 180-day jurisdictional limit set forth in R.C.

2941.401 is not self-executing. Before the jurisdiction of the trial court is limited for untimeliness, an inmate must act to trigger the jurisdictional timeframe, or, alternatively, a warden with knowledge of the source and contents of an untried indictment, information or complaint must have failed to inform the inmate in writing of such indictment, information, or complaint, thereby triggering the jurisdictional limitation. *See, e.g., Hairston*, 2004-Ohio-969; *Dillon*, 2007-Ohio-3617; *State v. Savage*, 12th Dist. Madison Nos. CA2014-02-002, CA2014-02-003, CA2014-03-006, and CA2014-03-007, 2015-Ohio-574, ¶ 29. As there was no evidence that the warden of the institution in which Hubbard was incarcerated had knowledge of the indictment charging Hubbard with petty theft and burglary and there was no evidence that Hubbard ever caused to be delivered to the prosecuting attorney or the common pleas court a written notice of the place of his imprisonment and a request for final disposition of the charges, we find that the 180-day jurisdictional limitation set forth in R.C. 2941.401 was never triggered. We therefore find that the trial court retained jurisdiction over the indictment and that dismissal of the indictment is unwarranted.

{¶ 40} Having found no merit to Hubbard's constitutional and statutory speedy-trial challenges, his first assignment of error is overruled.

III. ALLIED OFFENSES

{¶ 41} Assignment of Error No. 2:

{¶ 42} THE TRIAL COURT COMMITTED PLAIN ERROR TO THE PREJUDICE OF APPELLANT IN IMPOSING MULTIPLE SENTENCES FOR ALLIED OFFENSES.

{¶ 43} In his second assignment of error, Hubbard argues his convictions for burglary and petty theft should have been merged as allied offenses at sentencing. Hubbard contends that the two offenses "involved the same conduct and were not committed with a separate animus."

{¶ 44} At the outset, we note that Hubbard never raised the issue of merger before the

trial court. As a result, we review his allied offenses argument for plain error. *State v. Chamberlain*, 12th Dist. Brown No. CA2013-04-004, 2014-Ohio-4619, ¶ 67. Under Crim.R. 52(B), plain error exists only where there is an obvious deviation from a legal rule that affected the outcome of the proceeding. *State v. Blanda*, 12th Dist. Butler No. CA2010-03-050, 2011-Ohio-411, ¶ 20, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). The imposition of multiple sentences for allied offenses of similar import amounts to plain error. *State v. Clay*, 196 Ohio App.3d 305, 2011-Ohio-5086, ¶ 25 (12th Dist.); *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31-33.

{¶ 45} Pursuant to R.C. 2941.25, Ohio's multiple-count statute, the imposition of multiple punishments for the same criminal conduct is prohibited. *State v. Brown*, 186 Ohio App.3d 437, 2010-Ohio-324, ¶ 7 (12th Dist.). Specifically, R.C. 2941.25 provides:

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

{¶ 46} The Ohio Supreme Court has set forth a two-part test to determine whether offenses are allied offenses of similar import under R.C. 2941.25. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314. Pursuant to the *Johnson* test, the court must first determine "'whether it is possible to commit one offense *and* commit the other with the same conduct.'" (Emphasis sic.) *State v. Lane*, 12th Dist. Butler No. CA2013-05-074, 2014-Ohio-562, ¶ 10, quoting *Johnson* at ¶ 48. It is not necessary that the commission of one offense will always result in the commission of the other. *Id.* Rather, the question is simply whether it is possible for both offenses to be committed by the same conduct. *Id.* "'If the offenses

correspond to such a degree that the conduct of the defendant constituting one offense constitutes the commission of the other, then the offenses are of similar import.'" *State v. Snyder*, 12th Dist. Butler No. CA2011-02-018, 2011-Ohio-6346, ¶ 15, quoting *Johnson* at ¶ 48.

{¶ 47} If it is possible to commit both offenses with the same conduct, the court must next determine whether the offenses were in fact committed by the same conduct, that is, by a single act, performed with a single state of mind. *Lane* at ¶ 11, citing *Johnson* at ¶ 49. If so, the offenses are allied offenses of similar import and must be merged. *Lane* at ¶ 11, citing *Johnson* at ¶ 50. On the other hand, if the offenses are committed separately or with a separate animus, the offenses will not merge. *Lane* at ¶ 11, citing *Johnson* at ¶ 51.

{¶ 48} In the present case, Hubbard was convicted of burglary in violation of R.C. 2911.12(A)(2), which states that:

> [n]o person, by force, stealth, or deception, shall * * * [t]resspass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with the purpose to commit in the habitation any criminal offense.

Hubbard was also convicted of petty theft in violation of R.C. 2913.02(A)(1), which states that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent." With respect to these two offenses, Hubbard entered a no contest plea following the state's recitation of the following facts:

> [THE STATE]: Your Honor, Counts I and II occurred on November 7th [2009] at 10:00 p.m. through November 8th [2009] at 5728 Mill Crest Court, City of Hamilton, Butler County, Ohio. It's actually Fairfield Township, Butler County, Ohio.
>
> Count I, Christopher Hubbard did by force, stealth or deception trespass as is defined in Revised Code Section 2911.12 in that occupied structure that's the permanent or temporary habitation

> of John Keller and his daughter Lindsey Keller, who was present, with the purpose to commit in the habitation a theft of a Dynex 32-inch flat screen television, that offense is burglary in violation of Revised Code Section R.C. 2911.12(A)(2)
>
> Count II, Christopher Hubbard did, with a purpose to defraud John Keller of a 32-inch LCD flat screen television knowingly obtained or exerted control over that property without the consent of Mr. Keller or any other person authorized to give consent. That offense petty theft first degree misdemeanor in violation of Revised Code Section 2913.02(A)(1).

{¶ 49} Applying *Johnson* to the facts of this case, we find that Hubbard's burglary and petty theft convictions are not allied offenses of similar import as the offenses were committed separately and with a separate animus. In order to commit burglary, Hubbard had to, by force, stealth, or deception, trespass in an occupied structure with the purpose to commit any criminal offense. Therefore, once inside the residence, with the requisite intent, the burglary was complete. The theft did not occur until later, when Hubbard physically removed the television from the residence. At this time, the petty theft offense was complete. "Consequently, 'because one offense was completed before the other offense occurred, the two offenses were committed separately for purposes of R.C. 2941.25(B) notwithstanding their proximity in time and that one was committed in order to commit the other.'" *Lane*, 2014-Ohio-562 at ¶ 16, quoting *State v. DeWitt*, 2d Dist. Montgomery No. 24437, 2012-Ohio-635, ¶ 33.

{¶ 50} Further, in determining that the offenses are not allied, we are guided by our decision in *State v. Crosby*, 12th Dist. Clermont Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, wherein we found that the offenses of burglary, safecracking, and grand theft were not allied offenses. With respect to the burglary and grand theft offenses, we stated the following:

> Crosby committed burglary with different conduct and a separate animus from * * * grand theft because in order to violate R.C. 2911.12(A)(1) [burglary], Crosby had to, by force, stealth, or

> deception, trespass in an occupied structure with the purpose to commit any criminal offense. While Crosby chose to carry out the theft offense, he could have entered the residence with any criminal purpose and abandoned it before actually completing the criminal act. For example Crosby could have entered the Alvarado home with the purpose to steal something, but then fled when he saw that Alvarado and her children were present. Obviously, once Crosby was inside the home, he had an opportunity to commit various criminal offenses.

Id. at ¶ 22. Similarly, in the present case, Hubbard could have entered the residence with any criminal purpose and abandoned it before actually completing the criminal act. Hubbard could have entered the Keller residence with the purpose to steal something, but then fled when he saw that John and Lindsey Keller were present. Hubbard did not abandon his criminal purpose, but rather committed petty theft by removing the television from the residence without John Keller's consent.

{¶ 51} Accordingly, for the reasons expressed above, we find that offenses of burglary and petty theft are not allied offenses of similar import. Hubbard's second assignment of error is, therefore, overruled.

IV. CONSECUTIVE SENTENCES

{¶ 52} Assignment of Error No. 3:

{¶ 53} THE TRIAL COURT ABUSED ITS DISCRETION IN IMPOSING CONSECUTIVE SENTENCES.

{¶ 54} In his third assignment of error, Hubbard asserts that the trial court abused its discretion in ordering that his two-year prison term for burglary be served consecutively to prison terms previously imposed in Butler County Court of Common Pleas Case No. CR2009-11-1946 and Pickaway County Court of Common Peas Case No. 2011CR0303. Although Hubbard concedes that the trial court made the required statutory findings under R.C. 2929.14(C), he contends the record does not support the finding that "consecutive sentences are necessary to protect the public from future crime by the offender."

{¶ 55} We review the imposed sentence under the standard of review set forth in R.C. 2953.08(G)(2), which governs all felony sentences. *State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. "When considering an appeal of a trial court's felony sentencing decision under R.C. 2953.08(G)(2), '[t]he appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing.'" *Id*. at ¶ 7, quoting R.C. 2953.08(G)(2). However, an appellate court's review of an imposed sentence is not whether the sentencing court abused its discretion. *Id*.; *State v. Moore*, 12th Dist. Clermont No. CA2014-02-016, 2014-Ohio-5191, ¶ 6. Rather, an appellate court may take any action authorized by R.C. 2953.08(G)(2) only if the court "clearly and convincingly finds" that either (1) "the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;" or (2) "[t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a)-(b). An appellate court will not find a sentence clearly and convincingly contrary to law where the trial court considers the principles and purposes of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly imposes postrelease control, and sentences appellant within the permissible statutory range. *Moore* at ¶ 6; *State v. Setty*, 12th Dist. Clermont Nos. CA2013-06-049 and CA2013-06-050, 2014-Ohio-2340, ¶ 107. However, where a trial court fails to make the consecutive sentencing findings required by R.C. 2929.14(C)(4), an appellate court will find a consecutive sentence contrary to law. *State v. Marshall*, 12th Dist. Warren Nos. CA2013-05-042 and CA2013-05-042, 2013-Ohio-5092, ¶ 8.

{¶ 56} Pursuant to R.C. 2929.14(C)(4), a trial court must engage in a three-step analysis and make certain findings before imposing consecutive sentences. *State v. Dillon*, 12th Dist. Madison No. CA2012-06-012, 2013-Ohio-335, ¶ 9; *see also State v. Bonnell*, 140

Ohio St.3d 209, 2014-Ohio-3177, syllabus. First, the trial court must find that the consecutive sentence is necessary to protect the public from future crime or to punish the offender. R.C. 2929.14(C)(4). Second, the trial court must find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. *Id.* Third, the trial court must find that one of the following applies:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4)(a)-(c).

{¶ 57} "A trial court satisfies the statutory requirement of making the required findings when the record reflects that the court engaged in the required analysis and selected the appropriate statutory criteria." *Setty*, 2014-Ohio-2340 at ¶ 113. In imposing consecutive sentences, the trial court is not required to provide a word-for-word recitation of the language of the statute or articulate reasons supporting its findings. *Bonnell*, 2014-Ohio-3177 at ¶ 27-29; *Setty* at ¶ 113. Nevertheless, the record must reflect that the trial court engaged in the required sentencing analysis and made the requisite findings. *Id.* The court's findings must thereafter be incorporated into its sentencing entry. *Bonnell* at ¶ 37.

{¶ 58} Here, the record reflects that the trial court made the findings required by R.C. 2929.14(C)(4) before ordering Hubbard's sentence be served consecutively. Specifically, the

trial court made the following findings at the sentencing hearing:

> THE COURT: The Court is thinking of finding the consecutive sentences necessary to protect the public from future crimes. Consecutive sentence is necessary to punish the offender. Consecutive sentences are not [dis]proportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public.
>
> * * *
>
> His criminal history and conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

The trial court later memorialized these findings within its sentencing entry.

{¶ 59} From the trial court's statements at the sentencing hearing and the language utilized in the sentencing entry, it is clear that the trial court complied with the dictates of R.C. 2929.14(C)(4). *See Bonnell* at ¶ 37; *Crawford*, 2013-Ohio-3315 at ¶ 17. Although Hubbard waived his right to a presentence investigation report (PSI) and the trial court proceeded with sentencing without the benefit of the PSI, the record demonstrates that the trial court had knowledge of Hubbard's criminal history. Both Hubbard and his defense counsel addressed the trial court about the prison term Hubbard was serving for his convictions in Butler Case No. CR2009-11-1946 and Pickaway Case No. 2011CR0303. Further, the state discussed Hubbard's prior convictions, stating: "Judge, it would be the State's position that he has been incarcerated from day one when he was indicted in this case on the burglary case out of Butler County as well as the possession of a deadly weapon while under detention out of Pickaway County Common Pleas Court." Based on the statements and representations made by the parties at the sentencing hearing, we find that the trial court had before it sufficient information to conclude that Hubbard's history of criminal conduct demonstrated consecutive sentences were necessary to protect the public from future crime by the offender.

{¶ 60} Accordingly, we find that the record supports the trial courts findings under R.C. 2929.14(C)(4) and that the imposition of a consecutive sentence in this case was not clearly and convincingly contrary to law. Hubbard's third assignment of error is, therefore, overruled.

V. RESTITUTION

{¶ 61} Assignment of Error No. 4:

{¶ 62} THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN ORDERING PAYMENT OF RESTITUTION AT SENTENCING.

{¶ 63} In his fourth assignment of error, Hubbard challenges the trial court's restitution award, arguing that the $600 award to John Keller "is not supported, to a reasonable degree of certainty, by competent evidence in the record." Hubbard also argues the trial court erred by ordering him to pay the restitution award without considering his present and future ability to pay the financial sanction.

A. Restitution Amount

{¶ 64} Hubbard did not object to the trial court's restitution award at the sentencing hearing, and he has, therefore, waived the issue on appeal except for plain error. *State v. Sesic*, 12th Dist. Madison No. CA2012-08-020, 2013-Ohio-2864, ¶ 6. Pursuant to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." However, "[a]n alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been otherwise. * * * Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Baldev*, 12th Dist. Butler No. CA2004-05-106, 2005-Ohio-2369, ¶ 12.

{¶ 65} R.C. 2929.18(A)(1) grants a trial court the authority to order restitution by an offender to a victim in an amount commensurate with the victim's economic loss. Pursuant to the statute,

> If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense.

R.C. 2929.18(A)(1). "For the court to ascertain the amount of restitution to a reasonable degree of certainty, the record must contain sufficient evidence, and the amount of restitution must bear a reasonable relationship to the loss suffered." *Sesic* at ¶ 8, citing *State v. Creech*, 12th Dist. Butler No. CA2005-11-488, 2006-Ohio-3896, ¶ 9. *See also State v. Lyons*, 12th Dist. Warren CA2013-08-074, 2014-Ohio-2239, ¶ 13.

{¶ 66} The record contains sufficient evidence indicating that Keller suffered $600 in economic loss and the amount ordered by the trial court bore a reasonable relationship to the loss suffered. Although there was no PSI prepared in the present case due to Hubbard's waiver of the report, there was information presented regarding Keller's economic loss. Specifically, at the sentencing hearing, the state cited to reports indicating the value of the stolen television was $600.[3] Hubbard did not object to the reports as being incorrect or seek other documentation or evidence to verify the amount. Given the information presented to the trial court, especially in light of Hubbard's failure to object to or otherwise dispute the amount, we find no error, plain or otherwise, in the trial court's order of restitution.

B. Present and Future Ability to Pay

{¶ 67} Hubbard also argues the trial court erred in imposing restitution without considering his present and future ability to pay the financial sanction under R.C.

3. After informing the trial court that the reports indicated the value of the stolen television was $600, the prosecuting attorney then stated, "Wait, let me confirm that before I finalize that." No further discussion about the amount of restitution was held, and the trial court ultimately held restitution in the amount of $600 was appropriate. The trial court was entitled to rely on the state's representation of what the reports' detailed, absent an objection by Hubbard. *See Sesic*, 2013-Ohio-2864 at ¶ 11; *State v. Wilkins*, 3d Dist. Shelby No. 17-13-13, 2014-Ohio-983, ¶ 12.

2929.19(B)(5).

{¶ 68} Before imposing a financial sanction, such as restitution, R.C. 2929.19(B)(5) requires a trial court "consider the offender's present and future ability to pay the amount of the sanction." Although "[t]here are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record * * * [t]here must be some evidence in the record * * * to show that the trial court acted in accordance with the legislative mandate." *State v. Humes*, 12th Dist. Clermont No. CA2009-10-057, 2010-Ohio-2173, ¶ 26, citing *State v. Martin*, 140 Ohio App.3d 326, 338 (4th Dist.2000) and *State v. Adkins*, 144 Ohio App.3d 633, 647 (12th Dist.2001).

{¶ 69} While we have consistently held that compliance with R.C. 2929.19(B)(5) can be shown through the trial court's use of a PSI, "reference to a PSI is not the only means by which a trial court may comply with [the statutory requirement]." *Humes* at ¶ 27; *State v. Simms*, 12th Dist. Clermont No. CA2009-02-005, 2009-Ohio-5440, ¶ 9. A trial court may consider relevant information introduced at a plea hearing and sentencing hearing regarding an offender's age, education, health, employment history, and earning ability. *See id.* at ¶ 9-13; *State v. Culver*, 160 Ohio App.3d 172, 2005-Ohio-1359, ¶ 59 (2d Dist.); *State v. Sillett*, 12th Dist. Butler No. CA2000-10-205, 2002-Ohio-2596, ¶ 34.

{¶ 70} In the present case, the record demonstrates that the trial court had before it evidence relevant to Hubbard's present and future ability to pay the restitution award. Specifically, the court had before it information about Hubbard's ability to work, his age, and his education level. Hubbard informed the court that he was 29 years old, had obtained his GED, and was currently working in the property room at the prison in which he was incarcerated. Hubbard also made the following statements to the court relevant to his future earning ability:

[HUBBARD]: And I have employment waiting me, a couple

> different things; a place to go, a place to live where I will be - - I have a support group waiting on me and the sooner I get there the, the better. I'm 29 years old; I'm done with this life.
>
> I do hold a position of trust and honor at the prison; work in the property room. * * *
>
> I've completed programs, personal achievement, career reentry programs and I've got the certificates.

This information, combined with the trial court's statement in its sentencing entry that it "ha[d] considered the defendant's present and future ability to pay the amount of any sanction, fine, or attorney's fees," sufficiently demonstrates that the trial court complied with R.C. 2929.19(B)(5) before imposing restitution.

{¶ 71} Accordingly, we find no error by the trial court in its imposition of the restitution award. Hubbard's fourth assignment of error is, therefore, overruled.

VI. CONCLUSION

{¶ 72} For the reasons set forth above, we overrule Hubbard's assigned errors and affirm his conviction and sentence.

{¶ 73} Judgment affirmed.

M. POWELL, J., concurs.

RINGLAND, P.J., concurs in part and dissents in part.

RINGLAND, P.J., concurring in part and dissenting in part.

{¶ 74} I concur in the majority's opinion in all respects except for its resolution of Hubbard's second assignment of error. With respect to Hubbard's allied offenses argument, I respectfully dissent. I find that the petty theft offense and the burglary offense should be merged as they constitute allied offenses of similar import. Under the facts of this case, I find that the petty theft and burglary offenses were committed by the same conduct and with a

single state of mind. *See State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 50. The burglary and petty theft charges stem from Hubbard's conduct of entering Keller's residence to steal the television therein. *See, e.g., State v. James*, 5th Dist. Delaware No. 11CAA050045, 2012-Ohio-966, ¶ 39-40 (finding that the trial court erred in not merging a defendant's burglary and theft convictions where it was apparent that the defendant's conduct in entering the victim's garage was to steal the items therein); *State v. Blackburn*, 4th Dist. Pickaway No. 10CA46, 2011-Ohio-4624, ¶ 15-18 (finding that the offenses of burglary, theft, and receiving stolen property were allied offenses of similar import where the defendant acted with the same conduct in trespassing inside a home to steal a television, stealing the television, and then retaining it).

{¶ 75} In finding that the offenses are allied, I reject the majority's application of *State v. Lane*, 12th Dist. Butler No. CA2013-05-074, 2014-Ohio-562, to the facts of the present case. In *Lane*, this court was asked to determine whether two separate offenses—aggravated burglary and felonious assault—were allied offenses of similar import. *Id.* at ¶ 8-16. As the offenses involved in *Lane* were separate and distinct from the offenses involved in the present case, I find *Lane* inapplicable. Further, I disagree with this court's holding in *State v. Crosby*, 12th Dist. Clermont Nos. CA2010-10-081 and CA2011-02-013, 2011-Ohio-4907, that the offense of burglary is not allied with the offense of grand theft. I find the holdings in *James* and *Blackburn* more persuasive. Where a defendant is convicted of multiple offenses arising out of a single course of conduct and a single state of mind, the offenses constitute allied offenses that must be merged for purposes of sentencing.

{¶ 76} Accordingly, I find that the trial court erred in not merging the petty theft and burglary offenses. I would sustain Hubbard's second assignment of error, reverse his sentence, and remand the matter back to the trial court for resentencing. On remand, the state would be entitled to elect which allied offense to pursue. *See State v. Whitefield*, 124

Ohio St.3d 319, 2010-Ohio-2, ¶ 20, 24.