[Cite as *State v. Clayton*, 2009-Ohio-7040.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22937
v.	:	T.C. NO. 2005 CR 0811
STEVEN L. CLAYTON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 30th day of December, 2009.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Steven L. Clayton appeals his conviction and sentence for two counts of engaging in a pattern of corrupt activity, in violation of R.C. § 2923.32(A)(1), a felony of the first degree, one count of aggravated theft (over $100,000.00),

in violation of R.C. § 2913.02(A)(2), a felony of the third degree, and sixteen counts of money laundering, in violation of R.C. § 1315.55(A)(1) and (3), a felony of the third degree.

{¶ 2} On March 24, 2005, Clayton was charged by indictment ("Indictment A") with one count of engaging in a pattern of corrupt activity, one count of aggravated theft, and ten counts of money laundering. The State filed a second indictment ("Indictment B") against Clayton on May 30, 2006, charging him with another count of engaging in a pattern of corrupt activity, as well as charging him with an additional thirteen counts of money laundering.

{¶ 3} On July 27, 2006, Clayton waived his right to a jury trial, and a bench trial was held before a visiting judge on June 6, 2007, and June 7, 2007. At the conclusion of the bench trial, the court ordered both parties to submit written closing arguments. On May 30, 2008, the trial court filed a written verdict in which it found Clayton guilty of two counts of engaging in a pattern of corrupt activity as charged in Indictments A and B. The trial court also found Clayton guilty of aggravated theft as charged in Indictment A. Lastly, the trial court found Clayton guilty of sixteen counts of money laundering as charged in counts III through XII of Indictment A (R.C. § 1315.55(A)(1)), and counts V, VII, XI, XII, XIII, and XIV in Indictment B (R.C. § 1315.55(A)(3).

{¶ 4} The trial court filed a termination entry on September 8, 2008, in which it merged both counts of engaging in a pattern of corrupt activity from each indictment and sentenced Clayton to six years in prison. The trial court sentenced Clayton to five years for the aggravated theft conviction. The trial court sentenced Clayton to one year in prison for

each of the sixteen counts of money laundering, but ordered that the sentences for money laundering be served concurrently to one another. The court then ordered that the six-year, five-year, and one-year sentences be served consecutively, for an aggregate sentence of twelve years imprisonment. The trial court also ordered Clayton to pay restitution in the amount of $7,070,183.76.

I

{¶ 5} Clayton was the president and owner of Equity Land Title Agency, Inc. (hereinafter "ELTA"), an Ohio corporation that acted as a real estate title agency as well as a title insurance agency. ELTA was headquartered in Vandalia, Ohio. ELTA had been in existence since 1986 when Clayton filed the company's articles of incorporation with the Ohio Secretary of State.[1]

{¶ 6} Upon its inception, ELTA contracted with underwriter, First American Title Insurance Company, for Clayton to be a title agent who wrote policies on First American's behalf. In addition to drafting title insurance policies, Clayton was also permitted to hold money in escrow accounts for clients who were awaiting closing dates on real estate purchases. Pursuant to R.C. § 3953.23(B), a title insurance agent can maintain escrow accounts in order to hold clients' funds for future real estate closings; however, the title agent must maintain the escrow accounts separate from the title agency's business operating account. In short, the escrow funds may not be commingled with funds held by the title agent for any other purpose.

[1]The Ohio Secretary of State canceled ELTA's articles of incorporation on February 20, 1999, for failure to pay its franchise tax.

{¶ 7} In March of 2002, Margarita Vandergoorbergh (Rita), an auditor employed by First American Title, conducted a review of ELTA's escrow accounts. During the course of the review, Rita discovered that ELTA's escrow accounts were short by a considerable amount of money. Further investigation resulted in the discovery that Clayton had written checks withdrawing money from the escrow accounts and then deposited said checks in ELTA's business operating account. By the end of her investigation, Rita was able to determine that Clayton had written over $6,000,000.00 in checks from the escrow accounts which were then deposited in ELTA's operating account. Clayton returned approximately $3,000,000.00 of the funds to the escrow accounts, but $3,100,000.00 was still missing. After being confronted with these findings, Clayton admitted that he had been transferring funds from his escrow accounts to his operating account since approximately 1990 or 1991 in order to keep his business running. Clayton was also unable to account for the additional funds which were still missing from the escrow accounts.

{¶ 8} As a result, First American Title terminated its business relationship with Clayton. First American Title also took over ELTA in order to wind down its business operations. All of ELTA's financial accounts were frozen, and the business was subsequently dissolved.

{¶ 9} After a bench trial, Clayton was convicted of engaging in a pattern of corrupt activity, aggravated theft, and money laundering, and sentenced accordingly. It is from this judgment that Clayton now appeals.

II

{¶ 10} Clayton's first assignment of error is as follows:

{¶ 11} "APPELLANT'S CONVICTION OF THEFT WAS BASED UPON INSUFFICIENT EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 12} In his first assignment, Clayton contends that his conviction for aggravated theft was not supported by sufficient evidence. Clayton also argues that his conviction for aggravated theft is against the manifest weight of the evidence. Specifically, Clayton asserts that the State failed to produce any evidence which established that he did not own the money in the ELTA escrow accounts. Clayton argues that since he was the owner of the funds in the escrow accounts, he, therefore, could not be found guilty of theft of money that belonged to him.

{¶ 13} Although both are raised by Clayton in a single assignment of error, "a challenge to the sufficiency of the evidence differs from a challenge to the manifest weight of the evidence." *State v. McKnight*, 107 Ohio St.3d 101,112, 2005-Ohio-6046. "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' (Internal citations omitted). A claim that a jury verdict is against the manifest weight of the evidence involves a different test. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in

which the evidence weighs heavily against the conviction.'" Id. (Internal citations omitted).

{¶ 14} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 15} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 16} R.C. § 2913.02(A)(2) describes the offense of aggravated theft as follows:

{¶ 17} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 18} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent."

{¶ 19} As he did during the trial, Clayton argues that since he owned the escrow accounts that the funds were withdrawn from, he cannot be found guilty of stealing money from himself. Clayton also asserts that even if he did not own the money in the escrow

accounts, the State failed to adduce any evidence which established whose money it was. Clayton also contends that the State failed to establish what, if any, conditions were placed upon the utilization of the funds in the escrow accounts.

{¶ 20} Initially, we note that the evidence adduced at trial clearly established that Clayton admitted on numerous occasions that he had transferred money from ELTA's escrow accounts into ELTA's business operating account in order to keep his title agency running. The statutory bar to the transfer of escrow funds to a title agency's operating account is found in R.C. § 3953.23(B), which states in pertinent part:

{¶ 21} "(B) A title insurance agent may engage in the business of handling escrows of real property transactions provided that the agent shall maintain a separate record of all receipts and disbursements of escrow funds and shall not commingle any such funds with the agent's own funds or with funds held by the agent in any other capacity; and if at any time, the superintendent of insurance determines that an agent has failed to comply with any of the provisions of this section, the superintendent may revoke the license of the agent pursuant to section 3905.14 of the Revised Code, subject to review as provided for in Chapter 119. of the Revised Code."

{¶ 22} Black's Dictionary defines an "escrow account" as "a bank account generally held in the name of the depositor and an escrow agent which is returnable to depositor or paid to third person on the fulfillment of escrow condition: e.g. funds for payment of real estate taxes are commonly paid into escrow account of bank-mortgagor by mortgagee." 5th. Ed., 1979.

{¶ 23} R.C. § 3953.23(B) permits an insurance title agent to maintain an escrow

account which contains funds that are to be ultimately put toward the closing costs for purchases of real property. R.C. § 3953.23(B) also clearly states that the title agent is to keep the funds in the escrow account separate from funds being held by the agent in any other capacity. In effect, the title agent is allowed to hold the funds in the escrow account in trust for the respective purchaser until the date of closing. The title agent has no possessory interest in the funds in the escrow account. He or she merely maintains the account in order to store the funds until the date the funds are needed to complete the sale of property. After the closing has been completed, the title agent may then claim a portion of the funds as money earned by the agent as fees or premiums.

{¶ 24} In the instant case, Clayton maintained escrow accounts in which to hold his clients' funds until the date of closing. The funds did not belong to Clayton. Clayton's only duty in regards to the funds held in the escrow account was merely to maintain the money in the accounts until said funds were necessary to complete the closing. Clayton, however, withdrew large amounts of money from the escrow accounts on numerous occasions prior to the closings and deposited the money in his title agency's business operating accounts. Clayton's actions in this regard were in clear contravention of R.C. § 3953.23(B). More importantly, though, Clayton only returned approximately half of the over six million dollars which he originally withdrew from the account to the escrow account. At the time of trial, the remaining funds totaling over $3.1 million dollars that Clayton withdrew from the escrow accounts were still missing. Clearly, the individual owners' interest in these funds were stolen from them without their knowledge or consent.

{¶ 25} The evidence presented at trial, in the form of testimony from Mike

Waiwood, Sam Halkias, and Rita established that Clayton admitted to transferring funds from the ELTA escrow accounts to ELTA's business operating account. The transferred funds did not represent earned premiums or fees due Clayton. Clayton merely took the funds from the escrow account for his business and personal use and did not pay a substantial portion of the money back. Thus, the State adduced sufficient evidence at trial to prove that Clayton both intended to deprive and deprived the actual owners of the funds in the escrow accounts when he transferred the funds into his operating account.

{¶ 26} Lastly, Clayton's conviction is also not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the trier of fact to resolve. Clayton presented no evidence on his own behalf. The court did not lose its way simply because it chose to believe the State's witnesses, namely Rita, Halkias, and Waiwood regarding Clayton's misuse and theft of the funds in ELTA's escrow accounts. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 27} Clayton's first assignment of error is overruled.

III

{¶ 28} Clayton's second assignment of error is as follows:

{¶ 29} "APPELLANT'S CONVICTIONS OF MONEY LAUNDERING WERE BASED UPON INSUFFICIENT EVIDENCE."

{¶ 30} In his second assignment, Clayton argues that the State failed to adduce sufficient evidence to convict him of any of the counts of money laundering.

{¶ 31} R.C. § 1315.55(A)(1) states in pertinent part:

{¶ 32} "(A)(1) No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity."

{¶ 33} As we held in our analysis of Clayton's first assignment, the State adduced sufficient evidence to find Clayton guilty beyond a reasonable doubt of the aggravated theft of the funds from ELTA's escrow accounts. The State also established that after he illegally withdrew funds from the escrow accounts, Clayton transferred the money into ELTA's business operating account and did not return a substantial portion of the money to the escrow accounts. The State also adduced evidence which established that the transfer of the funds from the escrow accounts to the operating account was in no way related to the collection of earned fees for services rendered by Clayton to his clients. Each act of depositing the individual checks withdrawn from the escrow accounts into the operating account for Clayton's own personal benefit was a clear violation of R.C. § 1315.55(A)(1).

{¶ 34} R.C. § 1315.55(A)(3) states in pertinent part:

{¶ 35} "(3) No person shall conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity."

{¶ 36} After a thorough review of the record, we find that the State presented sufficient evidence which established that Clayton deposited funds from the escrow accounts into his operating account. Moreover, these transactions were conducted with the purpose of facilitating a corrupt activity, namely Clayton's ongoing theft of funds from the escrow

account.

{¶ 37} Clayton's second assignment of error is overruled.

IV

{¶ 38} Clayton's third assignment of error is as follows:

{¶ 39} "APPELLANT'S CONVICTION OF ENGAGING IN A PATTERN OF CORRUPT ACTIVITY WAS BASED UPON INSUFFICIENT EVIDENCE."

{¶ 40} In his third assignment, Clayton contends that insufficient evidence was presented at trial to find him guilty of engaging in a pattern of corrupt activity under R.C. § 2923.32 because there was insufficient proof that an "enterprise" existed. It was undisputed at trial that Clayton was the president and owner of ELTA. Thus, Clayton argues that he cannot be guilty of forming an enterprise when he was merely associating with himself.

{¶ 41} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. McKnight*, 107 Ohio St.3d 101, 112, 837 N.E.2d 315, 2005-Ohio-6046 (Internal citations omitted).

{¶ 42} R.C. § 2923.32(A)(1)provides, "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity * * * ." "'Enterprise' includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. 'Enterprise' includes illicit as well as

licit enterprises." R.C. § 2923.31(C). "'Pattern of corrupt activity' means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." R.C. § 2923.31 (E).

{¶ 43} The court in *U.S. Demolition & Contracting, Inc. v. O'Rourke Constr. Co.* (1994), 94 Ohio App.3d 75, pointed out that "[the Ohio pattern of corrupt activity statutes] are patterned after the Racketeering Influenced and Corrupt Organizations Act ('RICO'), Section 1961 et seq., Title 18, U.S. Code.*** In applying [the Ohio pattern of corrupt activity statutes], Ohio courts look to federal case law applying RICO."

{¶ 44} In *Cedric Kushner Promotions, Ltd. v. King* (2001), 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198, the U.S. Supreme Court applied RICO and specifically addressed the argument presently advanced by Clayton. In *King*, the plaintiff alleged that the defendant violated RICO statutes by engaging in a pattern of corrupt activity in the conduct of his business. The defendant maintained that he could not be a "person" operating a separate "enterprise" because he was the president and sole shareholder of his closely held corporation. The U.S. Supreme Court held that the requisite distinctness between the defendant and his corporation was sufficient to establish that they were legally distinct entities, thus that the defendant, as the sole shareholder/officer/employee was the "person," and his corporation was the "enterprise."

{¶ 45} Similar to the defendant in *King*, Clayton was the president and owner of ELTA. In that role, Clayton was the separate and distinct "person," while the ELTA was

the "enterprise" that he acted through when he engaged in a pattern of corrupt activity, to wit; aggravated theft and money laundering. Thus, the State adduced sufficient evidence to convict Clayton of engaging in a pattern of corrupt activity.

{¶ 46} Clayton's third assignment of error is overruled.

V

{¶ 47} Clayton's fourth assignment of error is as follows:

{¶ 48} "THE TRIAL COURT ERRED IN ORDERING RESTITUTION IN THE AMOUNT OF $7,070,183.76."

{¶ 49} In his fourth assignment, Clayton argues that the amount of restitution ordered by the trial court at sentencing was not supported by the evidence adduced at trial. Specifically, Clayton asserts that the only loss that can be directly attributable to the offenses for which he was convicted was the sum of $3,100,170.04, which denotes the funds that he failed to return to the escrow account. Thus, Clayton asserts that the trial court erred when it ordered restitution in the amount of $7,070,183.76, which included not only the $3.1 million dollars owed to First American Title, but also the money owed to the additional persons and lending institutions who funded ELTA's escrow account.

{¶ 50} R.C. 2929.18(A)(1) authorizes a court that imposes a sentence on a felony offender to order a financial sanction in the form of restitution by the offender to the victim of his crime(s) "in an amount based on the victim's economic loss."

{¶ 51} That section further provides:

{¶ 52} "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

pre-sentence 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."

{¶ 53} We recently addressed the concept of court-ordered restitution in *State v. Bowman*, 181 Ohio App.3d 407, 2009-Ohio-1281, wherein we stated as follows:

{¶ 54} "'An order of restitution must be supported by competent, credible evidence in the record. *State v. Warner* (1990), 55 Ohio St.3d 31, 69. 'It is well settled that there must be a due process ascertainment that the amount of restitution bears a reasonable relationship to the loss suffered.' *State v. Williams* (1986), 34 Ohio App.3d 33, 34. 'A sentence of restitution must be limited to the actual economic loss caused by the illegal conduct for which the defendant was convicted.' *State v. Banks* (Aug. 19, 2005), Montgomery App. No. 20711, 2005-Ohio-4488. 'Implicit in this principle is that the amount claimed must be established to a reasonable degree of certainty before restitution can be ordered.' *State v. Golar* (October 31, 2003), Lake App. No.2002-L-092, 2003-Ohio-5861.

{¶ 55} "A trial court abuses its discretion in ordering restitution in an amount that was not determined to bear a reasonable relationship to the actual loss suffered. *State v. Williams,* 34 Ohio App.3d 33. Thus, we review the trial court's decision under an abuse of discretion standard. 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is

unreasonable, arbitrary or unconscionable.' *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, quoting *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 56} "Documentary and/or testimonial evidence must be introduced to demonstrate the victim's economic loss. *State v. Webb*, 173 Ohio App.3d 547, 2007-Ohio-5670; *State v. Marbury* (1995), 104 Ohio App.3d 179. Furthermore, because R.C. 2929.18(A)(1) states that the trial court's order of restitution shall not exceed the amount of economic loss suffered by the victim, and double recovery would amount to an impermissible economic windfall for the victim, the evidence introduced to demonstrate the actual economic loss suffered by the victim must take account of any offsets to the victim's economic loss and any mitigation of damages in the form of compensation received for the loss from, for example, insurance, the Ohio Title Defect Rescission Fund, or civil judgments against the defendant. *State v. Martin*, 140 Ohio App.3d 326, 2000-Ohio-1942; *State v. Christy*, Wyandot App. No. 16-06-01, 2006-Ohio-4319."

{¶ 57} Clayton argues that the only financial loss that can be directly attributable to his illegal conduct was the $3.1 million dollars that he withdrew from the escrow account and failed to return. Clayton, however, ignores the fact that as a result of his theft of the funds from the escrow account, some of his clients lost all of the money they gave to him and were unable to recoup their losses. During the sentencing phase of Clayton's trial, the State provided the trial court with its "Exhibit A" which contained a detailed list of all of the victims who suffered financial losses as a result of Clayton's crimes. Exhibit A also established the specific amount of financial loss suffered by each victim. Thus, the trial court did not abuse its

discretion when it relied on Exhibit A which established to a reasonable degree of certainty the actual net economic loss suffered by the victims as a direct and proximate result of Clayton's offenses. The trial court's restitution order of $7,070,183.76 is, therefore, affirmed.

{¶ 58} Clayton's fourth assignment of error is overruled.

VI

{¶ 59} Clayton's fifth assignment of error is as follows:

{¶ 60} "THE TRIAL COURT ERRED IN FAILING TO MERGE APPELLANT'S CONVICTIONS AND SENTENCES."

{¶ 61} In his fifth assignment, Clayton contends that the trial court erred as a matter of law when it failed to merge his convictions. Clayton asserts that his convictions for theft and money laundering should have been merged with his conviction for engaging in a pattern of corrupt activity because the offenses were allied offenses of similar import.

{¶ 62} This issue was not raised before the trial court. Thus, Clayton has waived all but plain error. *State v. Long* (1978), 53 Ohio St.2d 91, 95-96. An error that is waived by failure to object will not be noticed by a court of appeals unless it is plain error. Crim. R. 52(B). The court's power under Crim. R. 52(B) is discretionary. *United States v. Olano* (1992), 507 U.S. 725, 113 S.Ct. 1770, 1777-1778.

{¶ 63} The plain error doctrine represents an exception to the usual rule that errors must first be presented to the trial court before they can be raised on appeal and permits an appellate court to review an alleged error where necessary to

prevent a manifest "miscarriage of justice." *State v. Long* (1978), 52 Ohio St.2d at 96. To prevail under a plain error standard, then, an appellant must demonstrate both that there was an obvious error in the proceedings and that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Noling,* 98 Ohio St.3d 44, 2002-Ohio-7044.

{¶ 64} R.C. § 2941.25, Ohio's allied offense statute, protects against multiple punishments for the same criminal conduct, which could violate the Double Jeopardy Clauses of the United States and Ohio constitutions. It provides as follows:

{¶ 65} "(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.

{¶ 66} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where this 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 for all of them."

{¶ 67} The Supreme Court of Ohio held that the elements of alleged allied offenses are to be compared in the abstract. *State v. Rance* (1999), 85 Ohio St.3d 632, ¶ 1 of the syllabus. In *Rance*, supra, the Supreme Court set out a two-part test to determine when convictions may be obtained for two or more allied offenses of similar import. In the first step, the elements of the offenses at issue are

compared in the abstract to determine whether the elements correspond to such a degree that the commission of one offense will result in the commission of the other. *Id*. at 638. However, if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both of them pursuant to R.C. § 2941.25(B). *Id.*, *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14.

{¶ 68} Clayton was convicted of aggravated theft, in violation of R.C. § 2913.02(A)(2), which states in pertinent part:

{¶ 69} "(A) No person, with the purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 70} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent.

{¶ 71} "(B)(2) at a value of $100,000 and less than $500,000."

{¶ 72} The elements of money laundering, in violation of R.C. § 1315.55(A)(1) and (3), are as follows:

{¶ 73} "(A)(1) No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity.

{¶ 74} "(A)(3) No person shall conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity."

{¶ 75} Lastly, the elements of engaging in a pattern of corrupt activity, in

violation of R.C. § 2923.32(A)(1), are as follows:

{¶ 76} "(A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt."

{¶ 77} Initially, we note that aggravated theft and money laundering are not allied offenses of similar import. Comparing the elements of these offenses in the abstract, it is apparent that commission of one of them will not necessarily result in commission of another. Aggravated theft requires proof that an individual deprived an owner of property or services, in conjunction with obtaining or exerting control over the property beyond the express or implied consent of the owner. Neither of the money laundering statutes contains those elements.

{¶ 78} Moreover, the money laundering statutes Clayton was convicted under are not allied offenses. R.C. § 1315.55(A)(1) requires that an individual conduct a transaction knowing that the property involved are proceeds from some other unlawful activity. R.C. § 1315.55(A)(3) does not require that the transaction involve proceeds from an unlawful activity.

{¶ 79} Finally, we find that the trial court did not err when it refused to merge the aggravated theft and money laundering counts with the count of engaging in a pattern of corrupt activity. Commission of engaging in a pattern of corrupt activity will not necessarily result in the commission of an aggravated theft or money laundering. "This is so because a conviction for engaging in a pattern of corrupt activity may be based on two or more violations of numerous other criminal statutes. See R.C. 2923.31(I) (identifying a multitude of crimes that qualify as

'corrupt activity')." *State v. Musselman*, Montgomery App. No. 22210, 2009-Ohio-424. Because a defendant need not engage in theft or money laundering in order to commit the offense of engaging in a pattern of corrupt activity and vice versa, the crimes are not allied offenses of similar import. Thus, the trial court did not err by refusing to merge his convictions for theft and money laundering with his conviction for engaging in a pattern of corrupt activity.

{¶ 80} Clayton's fifth assignment of error is overruled.

VII

{¶ 81} Clayton's sixth assignment of error is as follows:

{¶ 82} "THE TRIAL COURT ERRED IN FAILING TO IMPOSE MINIMUM, CONCURRENT SENTENCES FOR OFFENSES COMMITTED PRIOR TO THE OHIO SUPREME COURT'S DECISION IN *STATE V. FOSTER*."

{¶ 83} In his sixth assignment, Clayton contends that the retroactive application of the remedial holding in *Foster* acts as an ex post facto law and is precluded by the Fifth Amendment's Due Process Clause. Specifically, Clayton argues that when he originally committed the offenses for which he was charged and convicted, statutory safeguards were in place regarding maximum and consecutive sentences. If the trial court inappropriately sentenced him by failing to make the necessary findings, he would have the ability to appeal. Clayton argues that if *Foster's* retroactive severance remedy is applied to him then he becomes subject to ex post facto substantive law changes. Clayton requests that we apply the sentencing laws as they were written at the time he committed his offenses. Clayton failed to object to the sentence he received during the sentencing hearing.

Thus, we review this assignment under a plain error analysis.

{¶ 84} Initially, it should be noted that this court is bound to follow the decision of the Ohio Supreme Court in *Foster*. *State v. Smith* (Aug. 25, 2006), Montgomery App. No. 21004, 2006-Ohio-4405. We "cannot overrule or modify *Foster*." *State v. Newman* (Aug. 9, 2006), Summit App. No. 23038, 2006-Ohio-4082. We do not have the jurisdiction to declare *Foster* unconstitutional. *State v. Durbin* (Sept. 29, 2006), Greene App. No. 2005-CA-134, 2006-Ohio-5125. "Moreover, even if we were not bound by the mandate in *Foster*, we do not believe that the Ohio Supreme Court's holding in that case operates as an ex post facto law." *Smith*, supra, 2006-Ohio-4405.

{¶ 85} The United States Constitution, Article I, Section 10, provides that no State shall pass an ex post facto law. *Id*. The United States Supreme Court stated that "[t]he Ex Post Facto Clause, by its own terms, does not apply to the courts." *Rogers v. Tennessee* (2001), 532 U.S. 451, 460, 121 S.Ct. 1693, 149 L.Ed.2d 697. Retroactive judicial decision-making is limited by the due process concept of fair warning, not by the ex post facto clause. *State v. Bruce* (2007),170 Ohio App.3d 92 , 2007-Ohio-175; see *Rogers v. Tennessee,* 532 U.S. at 459. "With respect to judicial decisions, fair warning is violated when the judicial interpretation is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id*.; see *Rogers v. Tennessee,* 532 U.S. at 461, 462; see also *Bouie v. Columbia* (1964), 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894.

{¶ 86} Additionally, we note that in *State v. Elmore*, 122 Ohio St.3d 472,

2009-Ohio-3478, the Ohio Supreme Court recently held that a defendant's re-sentencing under *Foster* for offenses that occurred prior to that decision did not violate the ex post facto clause. In light of the Supreme Court's holding in *Elmore*, Clayton's argument is without merit. Thus, the trial court did not err when it sentenced Clayton to non-minimum, consecutive sentences for his offenses.

{¶ 87} Clayton's sixth assignment of error is overruled.

VIII

{¶ 88} Clayton's seventh and final assignment of error is as follows:

{¶ 89} "APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 90} In his final assignment, Clayton asserts that if the we were to find that any of the previous assignments of error were waived because of his trial counsel's failure to properly preserve said errors for appeal, he argues that such waiver constitutes ineffective assistance of counsel.

{¶ 91} "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

{¶ 92} The above standard contains essentially the same requirements as

the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, supra, at 687-688. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. Thus, counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Id*.

{¶ 93} For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694.

{¶ 94} In the instant case, Clayton argues that if any of the assigned errors were waived by trial counsel, said waiver constitutes ineffective assistance. As is clear from the foregoing analysis, we find no error in the trial court's disposition of this case. Thus, defense counsel's failure to object cannot be deemed ineffective assistance.

{¶ 95} Clayton's final assignment of error is overruled.

IX

{¶ 96} All of Clayton's assignments of error having been overruled, the judgment of the trial court is affirmed in all respects.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

R. Lynn Nothstine
Richard Hempfling
Hon. William McCracken,
Visiting Judge