[Cite as *State v. Tubbs*, 2009-Ohio-3263.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-0108
BOBBI LAVONNE TUBBS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2008-CR-286D
JUDGMENT:	Affirmed in part; Vacated in part
DATE OF JUDGMENT ENTRY:	June 29, 2009
APPEARANCES:	
For Plaintiff-Appellant	For Defendant-Appellee
JAMES J. MAYER, JR. Richland County Prosecutor 38 S. Park Mansfield, OH 44902	PATRICIA O'DONNELL KITZLER 3 N. Main Street, Suite 703 Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant-appellant Bobbi L. Tubbs appeals from her convictions and sentences in the Richland County Court of Common Pleas on one count of aiding and abetting theft with the value of property in excess of $500.00, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1), one count of receiving stolen property, a misdemeanor of the first degree, in violation of R.C. 2913.51(A), and one count of obstructing justice, a felony of the fifth degree, in violation of R.C. 2921.32(A)(2). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} At 12:45 a.m. on December 25, 2007, appellant, her estranged husband Robert, her daughter Whitney, and cousin Ryan Reed went to the Duke and Duchess (Hereinafter referred to as "D&D") store of the South Main Street BP station in Mansfield. While Whitney remained in the Jeep, the three adults entered the D&D to purchase cigarettes and prepay for gasoline.

{¶3} Appellant engaged the clerk in a protracted conversation regarding a deli sandwich, diverting his attention while Ryan snuck into the back storeroom and removed cartons of cigarettes. Specifically, she wanted to know if the sandwiches contained an ingredient called erythorbate. She handed him several different sandwiches and asked him to read the ingredients. The clerk, Russell Townsend, thought her questions were odd; however, he humored her because he thought that she could not read. Mr. Townsend testified that in the time he worked at the convenience store, this was the longest conversation he had ever had about the deli sandwiches.

{¶4} The store's security video showed that while appellant was distracting Mr. Townsend at the counter, Ryan Reed was moving cigarette cartons out the back door. After four trips and four and a half minutes, two other people entered the convenience store. The first person that entered the store was a friend of Mr. Townsend who was picking up a CD that Mr. Townsend was letting him borrow. The second person, a woman, entered the store and asked where the Jones' potato chips were located. Mr. Townsend directed her to the area by the cooler, and returned his focus to appellant and Mr. Tubbs. At the time, he was suspicious about all of the questions they were asking, and was worried that they were trying to steal sandwiches.

{¶5} While Mr. Townsend was busy waiting on the female customer, he noticed Ryan Reed throwing his coat off in the parking lot, and he thought there was going to be a fight. At that point, appellant left the store went back to her vehicle, and she pumped five dollars worth of gas. As she was pumping gas, Ryan Reed made two more trips from the storage room to the vehicle, and loaded the cartons of cigarettes into the Jeep. Mr. Tubbs, who was still inside the store, paid for the gas and bought a pack of cigarettes. He then left the store and joined appellant, Ryan Reed, and appellant's teenage daughter, Whitney Myers, in the Jeep.

{¶6} The female customer was also suspicious of appellant and Mr. Tubbs' behavior. When she exited the store, she saw Ryan Reed taking cigarette cartons out of the side door and loading them into a blue Jeep while appellant pumped gas. As soon as she drove away, the woman called 9-1-1 from her cell phone to report that the D&D store was being robbed. She described the suspects as a black male, a white male, and

a white female. She indicated that the white male was loading cigarettes into a blue Jeep while the white female pumped gas.

{¶7} Police apprehended the described vehicle within minutes of the call, finding appellant behind the wheel. After all of the suspects were removed, a search of the vehicle revealed twenty-eight cartons of Newport Kings cigarettes valued at $46.99 each, and nine cartons of Marlboro cigarettes valued at $49.99 each spread throughout the interior of the Jeep. The cartons were piled in the rear cargo area, on the back seat floorboards, and on the front drivers' and passenger side floorboards. An unopened case of beer was also located in the back seat of the car. Officer Stacie Bailey photographed the location of these items within the vehicle, and they were returned to the convenience store. The total value of the stolen property was over $1,700.

{¶8} Mansfield police officer David Minard arrived at the scene after the occupants had been removed from the vehicle. He spoke to appellant, who claimed that she had pumped gas at the D&D and that her ex-husband Robert Tubbs had bought her a pack of cigarettes. She stated that she did not know that the stolen cartons of cigarettes were in her vehicle and had no idea how they had gotten there. However, appellant admitted to Officer Minard that she had been inside the D&D, and had seen Ryan Reed enter the storage area of the store. Appellant's daughter, Whitney Myers, also told Officer Minard that her mother did not have anything to do with the theft of the cigarettes. Like her mother, Miss Myers also denied any knowledge that the stolen cartons of cigarettes were in the Jeep.

{¶9} After hearing all of the evidence, the jury found appellant guilty of all three counts in the indictment. Appellant appeared before the trial court for sentencing on

October 6, 2008. At that time, defense counsel argued that Counts One and Two, aiding and abetting theft and receiving stolen property, were allied offenses of similar import and should be merged for sentencing purposes. The trial court did not expressly rule on this issue; however, it sentenced appellant to eleven months consecutive on Counts One and Three, the two fifth degree felonies, and five months concurrent on Count Two, the first-degree misdemeanor.

{¶10} It is from these convictions and sentences appellant appeals, raising the following two assignments of error:

{¶11} "I. APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS AS GUARANTEED BY THE OHIO AND U.S. CONSTITUTIONS BY THE STATE'S MISLEADING BILL OF PARTICULARS REGARDING COUNT II, THE FAILURE OF COUNSEL TO OBJECT TO WHICH CONSTITUTES INEFFECTIVE ASSISTANCE, OR IN THE ALTERNATIVE CONSTITUTES PLAIN ERROR.

{¶12} "II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT IN THAT COUNTS II AND III OF THE INDICTMENT MERGE WITH COUNT I AS ALLIED OFFENSES OF SIMILAR IMPORT UNDER R.C. 2931.25; SENTENCING APPELLANT ON COUNT III ALSO CONSTITUTES DOUBLE JEOPARDY ON OTHER GROUNDS, IN DEROGATION OF APPELLANT'S RIGHTS CONFERRED UNDER SECTION 10, ARTICLE 1 OF THE OHIO CONSTITUTION AND THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION."

I.

{¶13} Appellant's first assignment of error relates to the sufficiency of the bill of particulars filed in this case. Subsumed within this generalized objection are three

challenges. Specifically, appellant contends that: (1) the bill of particulars herein does not specify the conduct constituting each offense; (2) ineffective assistance of counsel due to trial counsel's failure to pursue discovery of what the state's theory would be at trial, and/or to object to an inadequate bill of particulars; and (3) it was plain error for the trial court to admit evidence pertaining to Counts Two and Three not specified in the bill of particulars.

{¶14} Initially, we note that appellant never challenged the sufficiency of the indictment at any time before or during her trial as required by Crim.R. 12(B) (2). Accordingly, appellant has waived all but plain error. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391 at ¶ 26, 819 N.E.2d 215; *State v. Frazier* (1995), 73 Ohio St.3d 323, 332, 652 N.E.2d 1000; *State v. Biros* (1997), 78 Ohio St.3d 426, 436, 678 N.E.2d 891, 901-902, citing *State v. Joseph* (1995), 73 Ohio St.3d 450, 455, 653 N.E.2d 285, 290-291; and *State v. Mills* (1992), 62 Ohio St.3d 357, 363, 582 N.E.2d 972, 980 (Under Crim. R. 12(B) and 12(G), alleged defects in an indictment must be asserted before trial or they are waived").

{¶15} Accordingly, our review of the alleged error must proceed under the plain error rule of Crim. R. 52(B). *State v. Joseph* (1995), 73 Ohio St.3d 450, 455, 653 N.E.2d 285, 291. Crim.R. 52(B) provides that, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order to find plain

error under Crim.R. 52(B), it must be determined, but for the error, the outcome of the trial clearly would have been otherwise. Id. at paragraph two of the syllabus.

{¶16} In *U.S. v. Dominguez Benitez* (2004), 542 U.S. 74, 124 S.Ct. 2333, the Court defined the prejudice prong of the plain error analysis. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding. See *Arizona v. Fulminante*, 499 U. S. 279, 309–310 (1991) (giving examples).

{¶17} "Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as 'error that affects substantial rights,' used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States*, 328 U. S. 750 (1946). To affect "substantial rights," see 28 U. S. C. §2111, an error must have "substantial and injurious effect or influence in determining the . . . verdict." *Kotteakos*, supra, at 776." 124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240.

{¶18} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶19} Appellant first argues nothing in the bill of particulars specifically addresses the misdemeanor charge of receiving stolen property as set forth in Count Two of the indictment or the charge of obstructing justice as set forth in Count Three of the indictment.

{¶20} An indictment is sufficient if it: (1) contains the elements of the charged offense; (2) gives the defendant adequate notice of the charges; and, (3) protects the defendant against double jeopardy. *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d 626, 631, citing *Russell v. U.S.* (1962), 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240. Appellant correctly points out that Crim.R. 7(E) provides that when requested by a defendant, the state must provide a bill of particulars setting forth specifically the nature of the offense and the defendant's conduct constituting the offense. *State v. Stepp* (1997), 117 Ohio App.3d 561, 565, 690 N.E.2d 1342. When the state possesses the specific dates and times of an alleged offense, it must supply these in the bill of particulars. *State v. Sellars* (1985), 17 Ohio St.3d 169, 478 N.E.2d 781, syllabus. However, a bill of particulars "is not designed to provide the accused with specifications of evidence or serve as a substitute for discovery." *Sellars* at 171, 478 N.E.2d 781

{¶21} In the case at bar, the question of whether appellant had knowledge of the nature and cause of each charge through either the indictment or the bill of particulars turns on whether appellant's lack of knowledge actually prejudiced her in her ability to fairly defend herself. *State v. Chinn*, 85 Ohio St.3d 548, 570, 709 N.E.2d 1166, 1183, 1999-Ohio-288.

{¶22} The bill of particulars in this case recited the statutory language of the offense, that “on or about the 25th day of December, 2007 at the County of Richland,

[the defendant] did receive, retain, or dispose of certain property, the property of another, knowing or having reasonable cause to believe said property had been obtained through the commission of a theft offense."

{¶23} The bill further stated, "On or about December 25, 2007, the defendant accompanied Ryan Reed and Robert Tubbs to the Duke and Duchess store on South Main Street in Mansfield, Ohio. There, the defendant and Robert Tubbs distracted the cashier while Ryan Reed removed various items from the rear of the store without paying for them and without the consent of the store. The total value of the items stolen was over $500. Once the party was finished stealing, the defendant drove said persons and stolen items away from the store."

{¶24} In the case at bar the bill of particulars as provided by the State in no way precluded or otherwise hindered appellant from effectively presenting her defense. Appellant's defense was a complete one: she attempted to show that she had no idea that Ryan Reed was stealing anything. Appellant was entitled to the unqualified right to have the prosecution prove every element of the offenses beyond a reasonable doubt and if the state was unable to do so, she was entitled to an acquittal. *State v. Kilby* (1977), 50 Ohio St.2d 21, 24, 361 N.E.2d 1336, 1338. Aside from a vague reference to a denial of due process, appellant fails to show or allege any surprise or other prejudice at trial resulting from the specific allegations contained in either the indictment or the bill of particulars.

{¶25} Appellant, relying on *State v. Vitale* (1994), 96 Ohio App.3d 695, 645 N.E.2d 1277**,** further contends that the indictment violates her right to be tried only for the crimes on which the grand jury found probable cause. While we agree that *Vitale*

stands for the proposition that a defendant can be indicted only for the crimes on which the grand jury found probable cause, that proposition is inapplicable here. In *Vitale,* the court found error in the trial court's decision to allow an indictment to be amended to change the date of a charged theft offense. This amendment, the *Vitale* court reasoned, created the risk that the defendant could be convicted of an offense that was not presented to the grand jury. Id. at 699, 645 N.E.2d 1277. There is no such concern here, as the State did not amend the indictment against appellant. *Vitale* is inapplicable to the present case. *State v. Crosky*, Franklin App. No. 06AP-655, 2008-Ohio-145 at ¶ 88.

{¶26} In the case at bar, the record clearly establishes that appellant was placed on notice that the receiving stolen property charge related to the two stolen cartons of cigarettes that were found beneath her feet in her vehicle. The record further establishes that appellant was placed on notice the obstructing justice charge related to her driving the perpetrator of the crime and the stolen items away from the store. Therefore, the record simply does not support appellant's claims that she lacked specific information as to the offenses charged. *Chinn,* supra. It is clear, therefore, that appellant suffered no prejudice as a consequence of the wording of the indictment or the bill of particulars. We find no error, plain or otherwise.

{¶27} Next, appellant argues that her trial attorney's failures to raise in the trial court the issues concerning the bill of particulars of error rendered counsel's performance ineffective.

{¶28} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry in whether counsel's performance fell below an objective standard of

reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶29} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St. 3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

{¶30} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial; a trial whose result is reliable. *Strickland* 466 U.S. at 687; 694, 104 S.Ct. at 2064; 2068. The burden is upon the defendant to demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.; *Bradley*, supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra; *Bradley*, supra.

{¶31} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged

deficiencies." *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

{¶32} Since we have found no grounds for reversal of her convictions in any of appellant's issues concerning the bill of particulars, we obviously do not consider her counsel ineffective in this regard. Because we have found no instances of error, we find appellant has not demonstrated that she was prejudiced by trial counsel's performance.

{¶33} Appellant's first assignment of error is overruled.

II.

{¶34} In her second assignment of error, appellant maintains that the trial court erred in entering a conviction to the charge of aiding and abetting theft and the charge of receiving stolen property because the two offenses are allied offenses of similar import. She further argues obstructing justice is an allied offense of similar import to the charge of aiding and abetting theft. Finally, appellant contends that her convictions for aiding and abetting theft and obstructing justice constitute multiple punishments for the same conduct in violation of the federal and state constitutions' double jeopardy provisions.

{¶35} At the outset, we note that appellant argued during sentencing that the counts of aiding and abetting theft and receiving stolen property were allied offenses of similar import; appellant did not argue that obstructing justice was an offense of similar import to either the theft or the receiving charge. (Sent. T. Oct. 6, 2008 at 293).

{¶36} The federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the "same offense." *State v. Moss* (1982), 69 Ohio St.2d 515, 518; *State v. Basham*, Muskingum App. No. CT2007-0010, 2007-

Ohio-6995 at ¶ 41. Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the "same offense" without violating double jeopardy protections. *State v. Rance* (1999), 85 Ohio St.3d 632, 635, citing *Albernaz v. United States* (1981), 450 U.S. 333, 344. Under the "cumulative punishment" prong, double jeopardy protections do "no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter* (1983), 459 U.S. 359, 366. When a legislature signals its intent to either prohibit or permit cumulative punishments for conduct that may qualify as two crimes, the legislature's expressed intent is dispositive. *Rance,* at 635. Therefore, when determining the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary. *Moss,* at 518, citing *Brown v. Ohio* (1977), 432 U.S. 161. The trial court's authority to impose multiple punishments is contained in Ohio's multi-count statute, R.C. 2941.25.

{¶37} R.C. 2941.25 provides:

{¶38} "(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.

{¶39} "(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."

{¶40} Recently, the Supreme Court of Ohio in *State v. Cabrales,* 118 Ohio St.3d 54, 57, 2008-Ohio-1625, 884 N.E.2d 181, instructed as follows:

{¶41} "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in the commission of the other, then the offenses are allied offenses of similar import."

{¶42} Nonetheless, even though the offenses are of similar import under R.C. 2941.25(A), Subsection (B) permits convictions for two or more similar offenses if the offenses were either (1) committed separately, or (2) committed with a separate animus as to each. See *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph five of the syllabus.

{¶43} Appellant was convicted of obstructing justice, aiding and abetting theft, and receiving stolen property.

{¶44} The elements of obstructing justice are: (1) no person, with purpose to hinder the discovery, apprehension, prosecution, conviction or punishment; (2) of another for crime, or to assist another to benefit from the commission of a crime; (3) provide the other person with money, transportation, a weapon, a disguise, or (4) other means of avoiding discovery or apprehension. R.C. 2921.32(A) (2).

{¶45} The elements of aiding and abetting theft are: (1) A) No person, with purpose to deprive the owner of property or services, (2) shall knowingly obtain or exert control over either the property or services; (3) without the consent of the owner or person authorized to give consent; or (4) beyond the scope of the express or implied consent of the owner or person authorized to give consent; or (5) by deception. R.C. 2913.02.

{¶46} R.C. 2923.03 sets forth the essential elements for a complicity offense. The complicity statute provides, in relevant part:

{¶47} "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

{¶48} "(1) Solicit or procure another to commit the offense;

{¶49} "(2) Aid or abet another in committing the offense;

{¶50} "(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

{¶51} "(4) Cause an innocent or irresponsible person to commit the offense.

{¶52} "(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

{¶53} "(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.

{¶54} "* * *"

{¶55} The elements of receiving stolen property are: (1) no person shall receive, retain, or dispose of property of another; (2) knowing or having reasonable cause to

believe; (3) that the property has been obtained through commission of a theft offense. R.C. 2913.51.

{¶56} The record in the case at bar reflects that the State presented evidence at trial demonstrating that appellant committed two separate acts. The distraction of the store clerk while her accomplice removed the cartons of cigarettes from the storeroom completed the aiding and abetting theft offense. Appellant then provided transportation to the accomplice in order to hinder the discovery, apprehension, prosecution, conviction or punishment of the accomplice.

{¶57} Committing obstructing justice will not necessarily result in committing an aiding and abetting theft offense or a receiving stolen property offense. Thus, they are not allied offenses of similar import. Therefore, appellant can be convicted of obstructing justice in addition to either aiding and abetting theft or receiving stolen property. Further, the state did not rely on the same conduct to prove two offenses. Appellant's convictions did not originate from a single act; therefore, the trial court did not err in sentencing appellant for each offense. *State v. Basham,* supra at ¶ 44.

{¶58} We now turn to the question of whether appellant can be convicted of aiding and abetting theft and receiving stolen property.

{¶59} "Although receiving is technically not an included offense of theft, it is, under R.C. 2941.25, an 'allied offense of similar import.' An accused may be tried for both, but may be convicted and sentenced for only one. The choice is given to the prosecution to pursue one offense or the other, and it is plainly the intent of the General Assembly that the election may be of either offense." *City of Maumee v. Geiger* (1976) 45 Ohio St.2d 238, 244, 344 N.E.2d 133, 137. Accordingly, we must proceed to the

second step of the analysis in which we must determine whether appellant committed these offenses with a separate animus under R.C. 2941.25(B). *State v. Cabrales*, supra, 118 Ohio St.3d at 62, 886 N.E.2d 181, 188, 2008-Ohio-1625 at ¶ 31.

{¶60} In the case at bar, the State argued that appellant committed the aiding and abetting theft offense by distracting the store clerk while her accomplice stole the cartons of cigarettes from the storage room. (2T. at 268-269). The receiving stolen property charge relates to the two cartons of cigarettes found inside the car under her feet where appellant was seated in the car. (Id. at 162; 269-270; State's Exhibit 39).

{¶61} In *State v. Jones*, the Supreme Court observed

{¶62} "This court has generally not found the presence or absence of any specific factors to be dispositive on the issue of whether crimes were committed separately or with a separate animus. But, see, *State v. Barnes* (1981), 68 Ohio St.2d 13, 17, 22 O.O.3d 126, 129, 427 N.E.2d 517, 520-521 (Celebrezze, C.J., concurring). Instead, our approach has been to analyze the particular facts of each case before us to determine whether the acts or animus were separate. See *State v. Nicholas* (1993), 66 Ohio St.3d 431, 435, 613 N.E.2d 225, 229; *State v. Hill* (1992), 64 Ohio St.3d 313, 332, 595 N.E.2d 884, 899-900; *State v. Jells* (1990), 53 Ohio St.3d 22, 33, 559 N.E.2d 464, 475; *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, 83-84, 549 N.E.2d 520, 522; *State v. Powell* (1990), 49 Ohio St.3d 255, 262, 552 N.E.2d 191, 199. Thus, we must examine the record to determine whether the two acts…were committed separately or with a separate animus…." 78 Ohio St.3d 12, 14, 676 N.E.2d 80, 81-82, 1997-Ohio-38.

{¶63} In the case at bar, appellant's possession of the cigarettes was coincidental to her participation in the theft of the cigarettes. There was no evidence

presented at trial of a significant intervening act that would justify a finding that the two acts were committed with a separate animus.

{¶64} On the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence on Count Two, receiving stolen property is vacated.

{¶65} For the foregoing reasons, the judgment of the Court of Common Pleas for Richland County, Ohio is affirmed in part and vacated in part. On the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, appellant's conviction and sentence for Count Two, Receiving Stolen Property, is vacated. Appellant's convictions and sentences for aiding and abetting theft and obstructing justice, including the trial court's determination that the sentences are to run consecutive to each other are affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 0604

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
BOBBI LAVONNE TUBBS	:	
Defendant-Appellant	:	CASE NO. 2008-CA-0108

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas for Richland County, Ohio is affirmed in part and vacated in part. On the authority contained in Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, appellant's conviction and sentence for Count Two, Receiving Stolen Property, is vacated. Appellant's convictions and sentences for aiding and abetting theft and obstructing justice, including the trial court's determination that the sentences are to run consecutive to each other are affirmed. Costs to shared equally between the parties.

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HON. W. SCOTT GWIN

_____

HON. WILLIAM B. HOFFMAN

_____

HON. JOHN W. WISE