[Cite as *State v. Wilson*, 2015-Ohio-5588.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- KEITH D. WILSON Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 15CA015 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Holmes County Common Pleas Court
JUDGMENT:	Affirmed, in part; Reversed, in part; and Remanded
DATE OF JUDGMENT ENTRY:	December 31, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
F. CHRISTOPHER OEHL Assistant Prosecuting Attorney Holmes County, Ohio 164 E. Jackson Street Millersburg, Ohio 44654	CLARK W. OWENS 132 S. Market Street, Suite 204 Wooster, Ohio 44691

Hoffman, J.

{¶1} Defendant-appellant Keith D. Wilson appeals his convictions entered by the Holmes County Court of Common Pleas on one count of aggravated robbery, two counts of aggravated burglary, one count of grand theft, and one count of burglary, as well as attendant firearm specifications. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Richard Tyler owns the Iron Pony Saloon and Route 3 Drive Thru in Holmes County, Ohio. His apartment is above and behind the business. In order to enter his apartment, one must utilize a door on the back corner of the building, near the public entrance to the bar and restaurant. A stairwell from an outside door leads to the entrance of the apartment, as well as the kitchen of the bar. Tyler testified he keeps $30,000 worth of change for waitresses and bartenders in his office of the apartment.

{¶3} Tyler testified he first met Lidia Briley at Walmart in Ontario, Ohio in the fall of 2014. Briley then visited Tyler's apartment with a friend in December of 2014. Briley contacted Tyler via text message again later in December, 2014.

{¶4} Before Christmas of 2014, Briley and Tyler had dinner together and went back to Tyler's home. Tyler then drove Briley back to her home.

{¶5} On January 4, 2015, Tyler picked up Briley and brought her back to his apartment. She told him she had been kicked out of her living situation due to a fight with her roommate. Tyler and Briley later engaged in sexual intercourse.

{¶6} The next morning, Tyler came back into his apartment after checking on his business activities and observed Briley with her cell phone in her hand. Tyler noticed Briley's demeanor had changed and she would no longer acknowledge him. Tyler

discovered Briley had emptied his wallet. When he approached her, Briley started running for the door. Tyler testified his wallet was in the nightstand in the bedroom and had contained just under $10,000.00.

{¶7} Tyler blocked the door to the apartment by planting his foot in front of the door in order to prevent Briley from leaving. Briley then screamed for help. Tyler locked the door, and Briley pulled a gun and pointed it at his face. Tyler testified he had placed his gun on the kitchen counter the night before. Briley then threatened to shoot Tyler in the face with the gun. Tyler reached behind him, unlocked the door to the apartment, opened the door, to allow Briley to leave the apartment.

{¶8} Tyler testified when he swung the door open, Briley looked away and he slid the slide back on the pistol so the gun could not fire. He then took the gun from her, and followed her around the corner outside of the apartment. He then had the gun in his hand.

{¶9} At the time Tyler rounded the corner into the hallway of his residence, he was hit by two people. One person swung at his face and another tried to choke him from behind around his throat. Tyler was at the top of the stairs when the altercation caused the group to stumble down to the bottom of the stairwell.

{¶10} Briley then darted back into the apartment. Appellant ran up the stairs and into the apartment. One of the other individuals ran out the outside door. Tyler then called the police, while keeping the gun pointed up the stairs at the apartment. Tyler remained on the phone with the police department for a period of time. Eventually, he ran back upstairs to the apartment when he discovered Briley and Appellant had escaped out of a bedroom window.

{¶11} Tyler observed his office was trashed, files were on the floor, money was on the floor, equipment was pulled out away from the walls and money was missing. Tyler then found some money outside of his residence on the ground.

{¶12} An employee of Tyler's witnessed the individuals leaving in a white van, and wrote down the license plate number of the vehicle in the snow. Briley, Appellant and a co-defendant were later apprehended by the Ohio State Highway Patrol on US Route 30 near the Ashland and Wayne County border.

{¶13} As a result of the incident, Appellant was indicted on the following counts: Count 1, Aggravated Robbery, in violation of R.C. 2911.01(A)(1) and (C), with a firearm specification in violation of R.C. 2941.145(A); Count 2, Aggravated Burglary, in violation of R.C. 2911.11 (A)(2) and (B), with a firearm specification, in violation of R.C. 2941.145(A); Count 3, Aggravated Burglary, in violation of R.C. 2911.11(A)(2) and (B), with a firearm specification, in violation of R.C. 2941.145(A); Count 4, Grand Theft, in violation of R.C. 2913.02(A)(1) and (B)(2) and Count 5, Burglary, in violation of R.C. 2911.12(A)(1) and (D).

{¶14} Following the jury trial, Appellant was convicted on all five counts and all three gun specifications. The trial court sentenced Appellant to eight years on each count, except the Grand Theft count, on which he received twelve months, with all counts to run concurrent. The trial court imposed a mandatory three year sentence on each gun specification, to run concurrent with each other, but consecutive with the other counts. The court further ordered Appellant pay $10,145 in restitution and costs.

{¶15} Appellant assigns as error:

{¶16} "I. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT KEITH WILSON ON ALL FIVE COUNTS IN THE INDICTMENT AND THREE GUN SPECIFICATIONS.

{¶17} "II. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO MERGE THE COUNTS AT SENTENCING, IN VIOLATION OF THE RIGHT AGAINST DOUBLE JEOPARDY AND OHIO REVISED CODE 2941.25, BECAUSE THE CRIMES WERE ALLIED OFFENSES OF SIMILAR IMPORT. THE CONCURRENT SENTENCES WERE THUS CONTRARY TO LAW UNDER 2953.08(A)(4).

{¶18} "III. SOME OR ALL OF KEITH WILSON'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} "IV. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR TO ADMIT THE EVIDENCE OF TELEPHONE COMPANY RECORDS WITHOUT AN AUTHENTICATING WITNESS, AND THE RECORDS WERE IMPROPERLY READ INTO EVIDENCE BY THE PROSECUTING ATTORNEY.

{¶20} "V. IT WAS STRUCTURAL ERROR OR PLAIN ERROR TO CONTINUE THE TRIAL WHEN THE VICTIM WAS SEEN TALKING TO A JUROR DURING A SIDEBAR CONFERENCE, IN VIOLATION OF KEITH WILSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

{¶21} "VI. THE TRIAL COURT ERRED BY OVERRULING KEITH WILSON'S MOTION FOR MISTRIAL. OTHERWISE, KEITH WILSON'S SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS RIGHT TO A FAIR ADJUDICATION AND TO AN APPEAL ARE COMPROMISED BY A FAULTY TRIAL TRANSCRIPT.

{¶22} "VII. KEITH WILSON SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶23} "VIII. THE COURT COMMITTED PLAIN ERRORS IN SENTENCING, CONTRARY TO LAW."

I. and III.

{¶24} In the first and third assignments of error, Appellant maintains his convictions are against the sufficiency and manifest weight of the evidence.

{¶25} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilty beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

{¶26} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 overturned and a new trial ordered." *State v. Thompkins,* supra, at 387, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶27} Herein, Appellant was charged in the indictment on five counts:

{¶28} One: Aggravated Robbery, in violation of R.C. 2911.01(A) (1) and (C), which read,

> (A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:
>
> (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
>
> ***
>
> (C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

{¶29} Two: Aggravated Burglary, in violation of R.C. 2911.11(A) (2) (B), which reads,

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the

separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(2) The offender has a deadly weapon or dangerous ordinance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

{¶30} Three: Aggravated Burglary, in violation of R.C. 2911.11(A) (2) (B), as set forth above.

{¶31} Four: Grand Theft, in violation of R.C. 2913.02(A) (1) (B) (2), which reads,

(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:

(1) Without the consent of the owner or person authorized to give consent;

(B)(1) Whoever violates this section is guilty of theft.

{¶32} Five: Burglary, in violation of R.C. 2911.12(A) (1) (D), which reads,

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

***

(D) Whoever violates division (A) of this section is guilty of burglary. A violation of division (A) (1) or (2) of this section is a felony of the second degree. A violation of division (A) (3) of this section is a felony of the third degree.

{¶33} Counts 1, 2 and 3 carried attendant firearm specifications, in violation of R.C. 2941.145(A), which reads,

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

{¶34} The State filed a Bill of Particulars only as to Count 5 of the Indictment. The Bill of Particulars reads,

> ***did by force, stealth, or deception, trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person, not the accomplice of the offender, was present, with purpose to commit in the structure***Theft, ORC§2913.02***Further this Burglary occurred after the Armed Robbery and Aggravated Burglary in Counts 1, 2 & 3 when the defendant left the stairwell and entered the apartment proper of the victim and stole additional moneys. The defendant and his accomplice then fled out a second story window.

{¶35} As to Count 1, viewing the evidence in light most favorable to the State, we find sufficient evidence existed Appellant's codefendant and accomplice, Briley committed Aggravated Robbery. She stole money from Tyler's wallet and had a gun on her person, and displayed it while fleeing Tyler's apartment. We also find the jury verdict was not against the manifest weight of the evidence.

{¶36} As to Count 2, although Briley had consent initially to enter Tyler's apartment, once she committed an act of theft, the consent was revoked and Briley's status became that of a trespasser. *State v. Cutts,* Stark App. No. 2008CA000079, 2009 Ohio 3563. Where a defendant commits an offense against a person in the person's private dwelling, the defendant forfeits any privilege, becomes a trespasser and can be culpable for aggravated burglary. See, e.g., *State v. Steffen* (1987), 31 Ohio St.3d 111, 115, 509 N.E.2d 383.

{¶37} Therefore, Appellant's codefendant and accomplice, Briley, committed Aggravated Burglary when she removed money from Tyler's wallet and had a firearm on her person while trespassing in an occupied structure in which another was likely to be present with purpose to commit a theft offense.

{¶38} Accordingly, we find Appellants convictions on the first two counts of the indictment, as well as the attendant firearm specifications, are supported by the sufficiency and manifest weight of the evidence.

{¶39} The video evidence introduced at trial of the Iron Pony stairwell and the outside entrance demonstrate a struggle inside the residence at the interior stairwell door leading to Appellant's apartment entrance. The outside entrance to the apartment, accessible from the stairwell, is opened at approximately 13:18:02 and Appellant is seen entering with a co-defendant at the bottom of the stairwell leading to the residence. Appellant appears to quietly and stealthily walk up the stairway. He then waits outside the residential entrance for approximately 15 seconds, edging himself up the wall to make himself unseen when the victim opens the door.

{¶40} At approximately 13:18:17, the victim herein engaged in a struggle with Ms. Briley. He is then jumped by Appellant and another codefendant. A struggle ensues as they cascade down the staircase. Briley immediately proceeds back into the residence. Appellant and his codefendant are seen beating and choking Tyler. Appellant then runs back up the staircase to the residence, and his codefendant runs out of the outside doorway. Tyler is seen on his cell phone calling authorities, holding a gun, and talking to an employee for the remainder of the video testimony.

{¶41} At this point, and as relevant to Counts 3 and 5, Appellant reentered Tyler's apartment to steal additional monies, while Tyler was still in the stairwell. Thereby he committed Burglary, in violation of R.C. 2911.12(A) (1) (D). Because the testimony of Tyler demonstrates Tyler was in possession of the gun prior to the altercation in the stairway, Count 3 was not committed with a weapon. Therefore, Appellant's conviction on Count 3 for Aggravated Burglary and the attendant firearm specification was based on insufficient evidence and is against the manifest weight of the evidence. Accordingly, Count 3 should be dismissed.

{¶42} Count Four of the Indictment charges Appellant with Grand Theft. We find the manifest weight and sufficiency of the evidence supports Appellant's conviction on the charge of Grand Theft. The evidence demonstrates Appellant entered and fled Tyler's residence while exerting control over Tyler's money without Tyler's consent.

{¶43} We sustain Appellant's assignments of error as to Appellant's conviction on Count Three, Aggravated Burglary, and the attendant firearm specification, but overrule it as to all other convictions.

II.

{¶44} In the second assignment of error, Appellant maintains the trial court erred in failing to merge the counts at sentencing as the counts are allied offenses of similar import.

{¶45} Revised Code, Section 2941.25 reads,

> (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} In *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court held,

Under R.C. 2941.25, the court must determine prior to sentencing whether the offenses were committed by the same conduct. Thus, the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger.

In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. [*State v.*] *Blankenship,* 38 Ohio St.3d [116] at 119, 526 N.E.2d 816 [(1988)] (Whiteside, J., concurring) ("It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses." [Emphasis sic]). If the offenses correspond to such a degree that

the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.

If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." [*State v.*] *Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting).

If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

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

Recently, the Ohio Supreme Court in *State v. Ruff,* 2015-Ohio-995, 143 Ohio St.3d 114, addressed the issue of allied offenses, determining the analysis set forth in *Johnson* to be incomplete. The Court in *Ruff,* held,

When the defendant's conduct constitutes a single offense, the defendant may be convicted and punished only for that offense. When the conduct supports more than one offense, however, a court must conduct an analysis of allied offenses of similar import to determine whether the offenses merge or whether the defendant may be convicted of separate offenses. R.C. 2941.25(B).

A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance—in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.

At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

{¶47} Here, we find Count 2, Aggravated Burglary, wherein Briley engaged in a theft offense and possessed a firearm, constituted separate conduct from her threatening Tyler with a gun in order to leave the apartment in Count One, Aggravated Robbery. We find the offenses were committed separately and constituted separate conduct. Further, Appellant's later engaging in force with Tyler in the hallway, then running back up the steps to engage in an additional theft offense of monies is also separate conduct from Briley's earlier theft offense. Accordingly, Count 5 of Burglary is not an allied offense of Counts 1 and 2.

{¶48} We further find Count 4, Grand Theft, is not an allied offense of Counts 1, 2 or 5, Aggravated Burglary, Aggravated Robbery and Burglary, respectively.

{¶49} Accordingly, Appellant's second assignment of error is overruled.

IV.

{¶50} In the fourth assignment of error, Appellant maintains the trial court erred in admitting evidence of telephone company records without an authenticating witness. Specifically, Appellant argues the testimony of Nicholas Jenkins, a computer forensic specialist for the Ohio Bureau of Criminal Investigation and Identification who analyzed the records, does not fit the self-authenticating records exception under Evidence Rule 902; therefore, is hearsay.

{¶51} The record reveals the log and text messages testified to at trial were messages stored on a small, red cell phone recovered during the stop of Appellant. Jenkins testified the text messages were recovered as part of the criminal investigation, and were not business records. The messages were recovered from the cell phone itself, not from the cellular carrier. We agree.

{¶52} Furthermore, upon review, we find any alleged error to be harmless. Appellant's codefendant Briley testified at trial as to Appellant's involvement in the planning and commission of the events at issue. She further testified as to her communication with Appellant relative to the events herein. Appellant can be seen on the videotape evidence of the incident. Therefore, Appellant has not demonstrated prejudice as a result of the admission of the evidence.

{¶53} The fourth assignment of error is overruled.

V.

{¶54} In the fifth assignment of error, Appellant argues the trial court committed plain error and he was denied the Constitutional Right to a fair trial when the victim engaged in a conversation with a juror during a sidebar conference.

{¶55} Appellant maintains the victim herein, Tyler, was seen talking with a juror during a sidebar conference. The trial court instructed counsel to approach the bench, and the trial court admonished Tyler and the witnesses not to talk to the jury.

{¶56} Upon review of the record, we find Appellant has not demonstrated prejudice as a result of the conversation; therefore, we find any claimed error to be harmless.

{¶57} The fifth assignment of error is overruled.

VI.

{¶58} In the sixth assignment of error, Appellant argues the trial court erred in denying his motion for a mistrial. Specifically, Appellant notes the transcript of the trial is unreadable from p. 281-283. Appellant claims that portion contained an admission wherein Appellant admitted to touching the cell phone at issue. Appellant argues the

statement is incorrect, and based on interviews, the investigating officers claim all suspects touched the phone.

{¶59} Upon review of the record in its entirety, we do not find the trial court erred in denying Appellant's motion for mistrial based upon the transcript of the trial being unreadable, as the error was harmless and did not materially affect his substantial rights.

{¶60} The sixth assignment of error is overruled.

VII.

{¶61} In the seventh assignment of error, Appellant maintains he was deprived of the effective assistance of trial counsel.

{¶62} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

{¶63} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶64} Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice"

prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

{¶65} Appellant argues his counsel was ineffective in failing to move for a mistrial, in neglecting to object to the lack of a foundational witness to the cell phone records, and failing to argue allied offenses of similar import.

{¶66} Based upon our analysis and disposition of Appellant's prior assignments of error, we overrule Appellant's claims as to failing to move for a mistrial and not objecting to a lack of foundation for the cell phones records.

{¶67} As to Appellant's argument with regard to allied offenses of similar import, we have addressed the argument in our analysis and disposition of Appellant's second assignment of error and, indirectly, by our decision of to Count 3 in Appellant's first and third assignments of error.

{¶68} Appellant's seventh assignment of error is overruled.

VIII.

{¶69} In the eighth assignment of error, Appellant argues the trial court committed plain error in sentencing.

{¶70} Based upon our disposition of Appellant's first and third assignments of error regarding Appellant's conviction on Count 3, we sustain this assignment of error.

{¶71} The judgment of the Holmes County Court of Common Pleas is affirmed, in part; reversed, in part; and remanded for further proceedings in accordance with the law and this Opinion.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur