[Cite as *State v. Rojas*, 2013-Ohio-1835.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio	Court of Appeals No. L-11-1276
Appellee	Trial Court No. CR0201101378
v.	
Jorge Rojas	**DECISION AND JUDGMENT**
Appellant	Decided: May 3, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

George J. Conklin, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, following a jury trial held on September 26 through September 29, 2011, in which appellant, Jorge Rojas, was convicted of five counts of complicity to commit aggravated robbery, each with a firearm specification, and two counts of complicity to commit

felonious assault, each with a firearm specification. Following a sentencing hearing on October 14, 2011, the trial court sentenced appellant to serve a total of 71 years in prison. On appeal, appellant sets forth the following seven assignments of error:

> Assignment of Error Number One: The trial court erred in failing to grant appellant's motion to sever.
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> Assignment of Error Number Two: The trial court erred to the prejudice of the appellant for failing to declare a mistrial upon appellant's request, thereby denying appellant due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution and sections 10 and 16 of the Ohio Constitution.
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> Assignment of Error Number Three: The trial court erred to the prejudice of the appellant when it denied his right to dismiss his attorney and provide new counsel as contrary to the Sixth Amendment of the United States Constitution and Section 10, Article 1 of the Ohio Constitution.
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> Assignment of Error Number Four: Appellant was denied effective assistance of trial counsel.
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> Assignment of Error Number Five: The verdicts of the jury were against the manifest weight of the evidence.
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> Assignment of Error Number Six: The cumulative effect of the errors committed by the trial court violated the appellant's right to a fair trial.

Assignment of Error Number Seven: The trial court should have merged several of the sentences as part of the same transaction or occurance [sic].

{¶ 2} In June and July 2010, a group of eight or nine young men committed robberies throughout the Toledo area. The first was on June 15, 2010, at 4:45 a.m., when six men, riding in a blue Chevrolet Impala, went into the carryout of a Marathon service station on Alexis Road. Two of the intruders, armed with shotguns, threatened the owner, Saravana Somasundaram, into giving them money from the cash drawer, as well as beer, cigarettes and other merchandise. On the way out of the store, one of the men fired a shot at the store's security camera.

{¶ 3} Similarly, on June 27, 2010, at 6:15 a.m., the group robbed a Circle K carryout on West Alexis Road in the same fashion. The only difference was that the members of the group exchanged articles of clothing and stole a blue van which they used to ride up to the carryout. After the robbery, they drove several blocks in the van before switching to the Impala and driving away. No shots were fired; however the same two men, armed with shotguns, threatened both the store clerk and a customer.

{¶ 4} During both of the above robberies, the men wore cut-off T-shirt sleeves on their heads to disguise their facial features. A witness stated, and the security cameras showed, one of the men wore a gray hoodie with red and white stripes on its sleeves. One of the robbers left a handprint on the door of the Circle K.

{¶ 5} On July 7, 2010, the group robbed a KeyBank on West Central Road in Sylvania at 11:00 a.m. At the time, three or four employees were in the bank. Upon arriving in a stolen van, the men ran into the bank. One of them fired a shot over the head of teller Heidi Birkenkamp. Another jumped over the counter and removed $1,002.50 from Birkenkamp's drawer. When assistant manager Shawn Flaherty and another employee ran to the basement, one of the men fired the shotgun at the door as it closed behind them.

{¶ 6} On July 15, 2010, at 6:00 a.m., the group, minus two of its members, robbed a Sunoco station on Monroe Street in Toledo. Using a stolen Jeep, they drove up to the station. One of the men pointed a handgun at the clerk, Tim Green, and forced him to the floor. A total of $600 was taken from the cash register, along with some merchandise. In addition, the men took Green's wallet and cellphone. After abandoning the Jeep several blocks away, the robbers got into the Impala and drove to a garage located at 857 Kingston. After searching the abandoned Jeep, police found a shirt sleeve containing DNA consistent with two of the men.

{¶ 7} On March 4, 2011, the Lucas County Grand Jury indicted appellant on 11 counts and specifications, all constituting felonies, arising from various robberies that occurred in 2010 on June 15, June 27, July 7, and July 15. The eleven counts included one count of aggravated burglary, six counts of aggravated robbery, one count of attempted murder, two counts of felonious assault, and one count of breaking and

entering. Also charged in the four robberies were co-defendants Martin Cheno, Edgar Ramirez and Javier Garcia.

{¶ 8} On September 23, 2011, appellant, through court-appointed counsel, filed a motion to sever pursuant to Crim.R. 14, in which appellant asserted that he would not receive a fair trial if he was not tried separately from his other co-defendants. In support, appellant argued that unfair prejudice would result because statements made by or about appellant's co-defendants could be wrongly applied to appellant and, in addition, such statements may contain prejudicial information about appellant. Appellant asked the trial court for a hearing on the motion to sever.

{¶ 9} A jury trial was held on September 26 to 29, 2011. On the first day of the trial, defense counsel renewed the motion to sever, which the trial court denied, and memorialized in a judgment entry issued on September 29, 2011. On that same day, the trial court, pursuant to the state's request, entered a nolle prosequi as Counts 1, 2, 3 and 10 of the original indictment, and the attending firearm specifications, as well as the gang specifications attached to the remaining Counts 4, 5, 6, 7, 8, 9 and 11.[1]

{¶ 10} At trial, the state presented witnesses to the actual robberies as follows: Marathon station owner Saravana Somasundaram testified that five men, two of which carried guns, entered the store and ordered him to open the register. After taking $800 in

[1] The remaining counts were referred to as follows at trial: Former Count 4 became Count 1, former Count 5 became Count 2, former Count 6 became Count 3, former Count 7 became Count 4, former Count 8 became Count 5, former Count 9 became Count 6, and former Count 11 became Count 7. All counts retained the firearm specification.

cash plus beer and cigarettes, they fired one shot at the ceiling and left. They wore masks, which covered everything except their eyes. They appeared to be white. One gunman wore a brown jacket and the other wore a black hoodie.

{¶ 11} Circle K assistant manager Gloria Case testified that five men got out of a green van and entered the store. They carried a "big like book bag." One put a shotgun to the back of Case's head. Case also testified that one man wore a gray hoodie and a red mask, one wore a "dark" hoodie with a red mask, two wore gray hoodies, and one wore a hoodie with red and white stripes on it. As the men left, one left the print of his left palm on the glass door. Circle K customer Tammy Davis testified that she saw five guys with ski masks and shotguns, and gave $20 to one of the guys with a gun. Davis did not see the men take anything from the store. She saw a dark minivan.

{¶ 12} KeyBank teller Heidi Birkenkamp testified that five men wearing masks exited a dark blue or green Dodge Caravan and entered the bank. One was wearing a Carhartt jacket and a red bandanna, and two or three had large guns. Birkenkamp stated that the man in the Carhartt jacket fired one shot into the ceiling over her head to stop her from setting off the silent alarm. They also fired at the bank's back door. Birkenkamp stated that all the men wore hoodies, masks and gloves, spoke "good English" and were possibly of "Arabic" descent. KeyBank employees Carmen Whityam and Shawn Flaherty both testified that they were in the bank's copy room when they heard a gunshot. Flaherty opened the copy room door and they saw five men wearing dark clothes and

masks. One wore a Carhartt jacket and carried a gun. Whityam and Flaherty both stated that the man in the Carhartt jacket fired a shot at the door as Flaherty closed it.

{¶ 13} Sunoco cashier Timothy Green testified that five men came into the store. Two wore Carhartt jackets, and one carried a revolver. Green said the men took $600 in cash and merchandise from the store. He also gave them his wallet, which contained credit cards and $200 in cash. On cross-examination, Green said one of the men may have been "black;" however, they all wore masks that covered their faces up to the bridge of their noses.

{¶ 14} The state also presented testimony by Toledo Police Detectives Scott Smith, Jay Gast and Terry Cousino. Smith testified that the print on the glass door at Circle K, which appeared to be fresh, belonged to Raul Moya. Cousino testified that police searched a home and garage at 847 Kingston Ave on July 21, 2010, pursuant to a search warrant. Items found in the garage were black "dot" gloves, red and blue bandannas, a tan Carhartt jacket, blue and black T-shirt sleeves, a gray ECHO hoodie with stripes on the sleeves, a light blue ECHO hoodie, and a gray T-shirt with the sleeves cut off. Cousino stated that evidence collected at the garage was depicted in photos taken from the different robberies. On cross-examination, Cousino testified that the clothing and gloves could have been worn while repairing automobiles at the garage. On redirect, Cousino testified that the gray hoodie with red and white stripes was similar to one shown in the video of the Circle K robbery.

{¶ 15} Sylvania Township officer Jim Rettig testified that he found gloves and a dark hoodie in the KeyBank parking lot after the robbery. He also found a KeyBank business card, a dark cloth and a book bag in the Dodge Caravan, which was parked two to three blocks away from KeyBank. On cross-examination, Rettig testified that the blue T-shirt sleeve had a mix of DNA from Victor Cheno, appellant's co-defendant, Ramirez, and an unknown individual.

{¶ 16} Raul Moya testified at trial that he was part of the group that robbed the Marathon station, the Circle K, KeyBank and the Sunoco station. Moya stated that, at the time of trial, he was 17 years old. Moya further stated that he was identified by the palm print he made on the glass door of the Circle K, and he was initially charged along with appellant, Ramirez and several other men; however, he was granted immunity in exchange for his testimony at trial.

{¶ 17} Moya testified that all the robberies were planned in the garage of appellant's home, at 847 Kingston. Moya said that appellant and Ramirez were armed, and that all the men were disguised with hoodies, long sleeves, sweats, and face masks made from T-shirt sleeves. Moya also stated they all wore latex gloves with dots that were also used by appellant to fix cars at his garage. Moya said they went to the robberies in appellant's navy blue Impala, and that a driver would stay in the Impala while the rest of the men robbed the stores and the bank. Moya testified that appellant shot at the security camera in the Marathon store. It was appellant's job to hold a shotgun while the others took money and placed other items in a bag. Moya further stated that,

after each robbery, the group went back to 847 Kingston to divide up the money and the stolen merchandise.

{¶ 18} Moya stated that the men "switched up" their clothes between the various robberies. He described each of the four robberies and the differences between them in detail. He said that appellant pointed a shotgun at the Circle K clerk and told her to open the cash register. He said that sometimes the group would get into a stolen vehicle and drive several blocks to meet Garcia in the Impala before going back to 847 Kingston. Moya identified appellant as the person who shot at the ceiling and the back door during the KeyBank robbery. He also said that appellant had a handgun during the Sunoco robbery, but did not fire the weapon. Moya identified items used during the robberies, i.e., masks, jackets, and various bags, from photographs of evidence recovered from the crime scenes and the garage at 847 Kingston. Moya stated that he left a palm print on the door of the Circle K because he only had one glove that day.

{¶ 19} On cross-examination, Ramirez's defense attorney began to question Moya concerning the robbery of an ATM machine on July 18, 2010. At that point, the prosecutor objected, on the basis that the ATM robbery, and the attempted shooting of a Toledo police officer during that robbery, was unrelated to the charges pending against appellant and Ramirez. Ramirez's counsel replied that he intended to question Moya's credibility because Moya testified under oath that he was with Ramirez on that day when, in fact, there is evidence that Ramirez was in jail at that time. Appellant's counsel then

stated that she would not object to questioning Moya's credibility in general. The court then overruled the prosecutor's objection, and questioning continued.

{¶ 20} Ramirez's counsel read into the record a portion of Moya's testimony concerning events surrounding the ATM robbery, to refresh his memory. In that testimony, Moya stated under oath that he was with Ramirez on July 18, 2010. Moya further stated that he, Ramirez, appellant, and several others were "hanging out" at 847 Kingston, smoking marijuana and drinking beer. Moya also recalled being interviewed by Gast for three to five hours on January 6, 2011, during which Moya repeatedly lied to protect Martin Cheno, another member of the group who was the father of Moya's sister's baby. Moya also stated that he lied during a second interview for that same reason. However, Moya said that he changed his mind later and began telling the truth to investigators, to keep them from involving his younger brother in the investigation.

{¶ 21} On cross-examination by appellant's counsel, Moya testified that he was arrested on July 19, 2010, and that appellant was with him at that time. Moya stated that he was charged with attempted murder, felonious assault and aggravated robbery in relation to the ATM robbery, and that he was offered a shorter sentence in return for his testimony concerning the other four robberies.

{¶ 22} Moya also testified that the charges were made because he shot at a cop during the ATM robbery. At that point, appellant's counsel objected; however, the trial court found that the door was open for that line of questioning and overruled the objection. Thereafter, Moya recounted the ATM robbery in detail, and named appellant

as a participant in that robbery. Appellant's counsel did not object to the detailed account of the robbery; however, the trial court interrupted the testimony twice to question its relevance, and noted that no objections were made to this line of questioning. The trial court also gave the jury an instruction limiting the application of Moya's testimony as to the ATM robbery as follows:

> As to other acts, that evidence is received for only a limited purpose, it is not received and you may not consider it to prove the character of the individual defendants in order to show that they acted in conformity or in accordance with the character relative to the allegations contained in the seven counts of the indictment for which each stands. You can only use it for purposes of testing the credibility of this witness [Moya] and for no other purpose.

{¶ 23} After the trial court's limiting instruction, Moya testified as more details regarding another co-defendant, Martin Cheno, with whom Moya's sister had a baby. The trial court again questioned the relevance of the questioning, and asked the jury to disregard it. Thereafter, the prosecutor questioned Moya about the planning of the ATM robbery. The trial court again interrupted and questioned the relevance, noting that no objection was made to the question. Appellant's counsel responded: "I'll object, judge, if you want me to." Moya then testified that, even though he lied before about details of the four robberies, he eventually decided "it was best at the end to come forward" and tell the truth.

{¶ 24} After Moya's testimony, appellant's counsel moved for a mistrial. In support of her motion, counsel referred to her motion to sever, in which she mentioned the potential for evidence to be elicited in Ramirez's defense that would be harmful to appellant. Defense counsel stated that she would not have moved for a mistrial but for Moya's testimony. After reviewing appellant's motion to sever, the trial court noted that no objections were made to Moya's testimony and, in fact, the court stopped the questioning on its own initiative and gave a limiting instruction because it was not relevant to the charges against appellant and Ramirez. Thereafter, the motion for a mistrial was denied.

{¶ 25} When the trial resumed, testimony as to DNA analysis was presented by Ohio Bureau of Criminal Identification and Investigation ("BCI") employee Cassandra Agosti, who testified that she tested a black shirt sleeve, a black hoodie, and a Carhartt jacket taken in connection with the Sunoco robbery and compared them to "standards" given by Ramirez and appellant. Agosti stated that appellant's DNA was not on any of those items. She also testified that a blue and black cloth taken in connection with the Marathon robbery contained a mixture of DNA; however, appellant was the major contributor.

{¶ 26} Toledo Police Detective William Jay Gast testified that he investigated all four robberies, as well as the ATM robbery attempt on July 19, 2010, and he was able to tie all the robberies together using cell phone records, analysis of the video evidence, and items seized during the search of 847 Kingston, along with DNA evidence that was

submitted later. Gast stated that the "MOs" employed in all the robberies "sure seemed to match." Gast also stated that Moya provided much information, and that police went to "great lengths" to "try to substantiate his information that [Moya] provided in his statements." Gast acknowledged that Moya initially lied to police to protect another co-defendant to whom Moya had family ties; however, enough evidence was obtained to substantiate Moya's claims.

{¶ 27} Testimony regarding the collection and analysis of video evidence was presented by Sylvania Township Detective William Hunt and Toledo Police Officers John Mattimore, Mark Johnson and Randall Navarro. After they were authenticated, videos of all four robberies were played for the jury.

{¶ 28} As part of Ramirez's defense, Lucas County Sheriff's Department Lieutenant James Williams then testified that Ramirez was arrested on an outstanding traffic warrant on July 18, 2010, and was booked into the Lucas County jail at 12:25 p.m. on that date. Williams stated that Ramirez remained in police custody until he was released at 7:55 p.m. on July 19, 2010. Julie Heinig, laboratory director for the DNA Diagnostic Center in Cincinnati, testified that items she tested for DNA contained a mixture of various contributors and that, although Ramirez could be excluded some of the items, neither he nor appellant could be excluded from all of them.

{¶ 29} Appellant and Ramirez chose not to testify on their own behalf. Appellant did not call any witnesses to testify in his defense, and appellant's defense counsel did not renew the motion for an acquittal or the motion to sever. After closing arguments, the

trial court instructed the jury as to the elements of the crimes charged and the applicable law. After a period of deliberation, the jury found appellant guilty of five counts of complicity to commit aggravated robbery (Counts 1, 2, 3, 4, and 7), with a firearm specification for each count, and two counts of complicity to commit felonious assault (Counts 5 and 6),[2] with firearm specifications for each count.

{¶ 30} A sentencing hearing was held on October 14, 2011, after which the trial court sentenced appellant to serve 4 years in prison for each of the 5 aggravated robbery convictions, and 9 years for each of the two felonious assault convictions, plus an additional mandatory 3 year sentence for each of 4 firearm specifications.[3] The sentences were ordered to be served consecutively, for a total prison sentence of 71 years. A timely notice of appeal was filed in this court on November 28, 2011.

{¶ 31} In his first assignment of error, appellant asserts that he did not receive a fair trial because the trial court did not grant his motion to sever. In support, appellant argues that Moya's testimony regarding appellant's involvement in the ATM robbery is an example of the prejudice that arose because the trial court refused to grant his motion to sever. We disagree, for the following reasons.

{¶ 32} Crim.R. 8(B), which governs joinder of defendants, provides, in relevant part, that:

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[2] As to Count 6, the jury found appellant not guilty of complicity to commit attempted murder, but guilty of the lesser included offence of felonious assault.

[3] The firearm specifications for Counts 5 and 6 were merged.

> Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or the in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. * * *

{¶ 33} Crim.R. 14, which governs relief from joinder, provides that a separate trial may be held upon motion, "if it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints * * *."

{¶ 34} It is well-settled in that joinder is favored and is to be "'liberally permitted.'" *State v. Scott*, 6th Dist. No. S-02-026, 2003-Ohio-2797, ¶ 13, quoting *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992). If a motion to sever is made at the outset of a trial, it must be renewed at the close of the state's case or at the conclusion of all of the evidence so that a Crim.R.14 analysis may be conducted in light of all the evidence presented at trial. *State v. Hoffman*, 9th Dist. No. 26084, 2013-Ohio-1021, ¶ 8. The consequence of failure to renew the motion to sever is loss of the issue on appeal. *Id.*

{¶ 35} It is undisputed that, in this case, appellant and Ramirez participated in the same or similar acts that constituted the charged offenses, and that were part of the same course of criminal conduct. The only references to appellant's motion to sever occur when the motion is discussed and denied at the outset of the trial and again after Moya's testimony, while appellant's counsel is arguing in favor of a mistrial. The record does

not show that appellant's counsel renewed the motion to sever at the conclusion of all the evidence. In addition, the record shows that the trial court, on its own initiative, questioned the relevance of Moya's testimony regarding the details of the ATM robbery and instructed the jury that it was to be considered only as to the issue of Moya's credibility. Under these circumstances, we cannot say that the trial court either abused its discretion by allowing Moya to testify, or prejudiced appellant, and therefore committed plain error, by not ordering appellant to be tried separately. Appellant's first assignment of error is not well-taken.

{¶ 36} In his second assignment of error, appellant asserts that the trial court erred when it denied his motion for a mistrial. In support, appellant argues that the attempt to elicit testimony from Moya concerning the attempted murder of a police officer during the ATM robbery prejudiced appellant so that a fair trial was impossible.

{¶ 37} On appeal, the trial court's decision to grant or deny a motion for a mistrial will not be overturned absent an abuse of discretion. *State v. Goerndt*, 8th Dist. No. 88892, 2007-Ohio-4067, ¶ 20. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983). Generally, the granting of a mistrial is proper only in cases where a fair trial has become impossible. *Goerndt*, 2007-Ohio-4067, ¶ 21. "[T]he essential inquiry on a motion for mistrial is whether the substantial rights of the accused are adversely or materially affected." *Id.*

{¶ 38} As set forth above, the trial court issued a limiting instruction to the jury as to the use of Moya's testimony. In such cases, the jury is presumed to have understood and correctly followed the trial court's instruction. *Id.* at ¶ 24.

{¶ 39} On consideration, we find that the trial court did not abuse its discretion when it denied appellant's motion for a mistrial. Appellant's second assignment of error is not well-taken.

{¶ 40} In his third assignment of error, appellant asserts that the trial court erred when it did not dismiss his appointed attorney and provide him with new counsel on the first day of trial. In support, appellant argued that his relationship with appointed counsel was broken down to the point that it jeopardized his right to effective assistance of counsel.

{¶ 41} It is well-settled that the right to competent appointed counsel does not "require that a criminal defendant develop and share a 'meaningful relationship' with his attorney." *State v. Swogger*, 5th Dist. No. 2011-CA-007, 2011-Ohio-5607, ¶ 12, citing *Morris v. Slappy*, 461 U.S. 1, 13, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). In that regard, a showing of hostility, tension, or even personal conflict between an attorney and his client are not sufficient to justify a change in appointed counsel, unless there is a showing that such conflict interferes with the preparation or presentation of a competent defense. *Id.* at ¶ 14. A mere disagreement between attorney and client as to trial tactics is not sufficient to justify a change in appointed counsel. *Id.*, citing *State v. Glasure*, 132 Ohio St.3d 227, 239, 724 N.E.2d 1165 (1999).

{¶ 42} The record shows that, prior to trial, appellant asked the trial court to replace his appointed counsel because she "no longer has my best interest in mind." Specifically, appellant stated that he was not ready to go to trial because counsel did not give him all of the discovery in the case, and she did not sufficiently confer with him regarding his defense. Counsel responded that she visited appellant in prison at least 12 times, and that she gave him the discovery that was in her possession prior to trial. At the conclusion of the exchange, the trial court denied appellant's request for new appointed counsel.

{¶ 43} On consideration, we find that the record does not demonstrate a conflict between appellant and his appointed counsel that is sufficient to interfere with the preparation of a competent defense, or that would otherwise prejudice appellant and keep him from having a fair trial. Accordingly, the trial court did not abuse its discretion by denying appellant's request for new counsel. Appellant's third assignment of error is not well-taken.

{¶ 44} In his fourth assignment of error, appellant argues that he was denied the effective assistance of trial counsel. In support, appellant argues that trial counsel made numerous errors during the trial, such as failure to object to testimony and to challenge inadmissible evidence, and failure to otherwise adequately protect his right to a fair trial. Specifically, appellant claims that counsel did not adequately pursue the motion to sever, did not maintain communication with appellant prior to trial, failed to consult with appellant prior to trial regarding the plea offer, did not object to the prosecutor's

improper statements during voir dire, did not object to Moya's testimony, failed to renew the Crim.R. 29 motion at the conclusion of trial, and generally conducted an inadequate defense.

{¶ 45} In *State v. Roberts*, 6th Dist. No. L-11-1159, 2013-Ohio-1089, ¶ 23, this court stated:

> [t]o prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. The standard requires appellant to satisfy a two-pronged test. First, appellant must show that the counsel's representation fell below an objective standard of reasonableness. Second, appellant must show a reasonable probability that, but for counsel's perceived error, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See, also, *State v. Plassman*, 6th Dist. No. F-07-036, 2008-Oho-3842. This burden of proof is high given Ohio's presumption that a properly licensed attorney is competent. State v. Newman, 6th Dist. No. OT-07-051, 2008-Ohio-5139, ¶ 27.

{¶ 46} Based on our determinations as to appellant's first and third assignments of error, we find no evidence to support appellant's claim that counsel's performance was inadequate as to the motion to sever or communication with appellant before trial. As to

appellant's claim regarding counsel's failure to challenge the prosecutor during voir dire, appellant does not claim that counsel's failure to object was anything other than trial strategy. *See State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 206, citing *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir.2001). (In the context of a claim of ineffective assistance of counsel, "[c]ounsel's actions during *voir dire* are presumed to be matters of trial strategy.")

{¶ 47} As to appellant's claim that counsel failed to adequately consult with him regarding the plea offer, the record shows that the state offered to dismiss all but one charge against appellant in exchange for a guilty plea. When appellant's attorney indicated she had not adequately discussed the latest version of the state's offer with appellant, the trial court gave counsel and appellant time to consult. Thereafter, the court inquired of appellant as to whether he wanted to accept the plea. Part of that discussion was an explanation that, if convicted on all counts, appellant could be 101 years old when he was released from prison. After that discussion, appellant stated: "[I want to] go forward with trial. But I would like to address the court that I would like to go to trial on all counts for interest in justice." Under such circumstances, we cannot say that counsel's performance was prejudicial or ineffective in regard to the plea offer.

{¶ 48} As to counsel's failure to renew the Crim.R. 29 motion at the end of the trial, we note that:

> [t]he standard of review for a Crim.R. 29(A) motion is generally the same as a challenge to the sufficiency of the evidence. *State v. Hollis*, 4th Dist.

No. 09CA9, 2010-Ohio-3945, 2010 WL 3294327, ¶ 19. See *State v. Hairston*, 4th Dist. No. 06CA3081, 2007-Ohio-3880, 2007 WL 2181535, at ¶ 16; *State v. Brooker*, 170 Ohio App.3d 570, 2007-Ohio-588, 868 N.E.2d 683, at ¶ 8. Appellate courts must determine whether the evidence adduced at trial, if believed, supports a finding of guilt beyond a reasonable doubt. See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). *State v. Grube*, 4th Dist. No. 12CA7, 2013-Ohio-692,¶ 67.

{¶ 49} For the reasons set forth in our determination of appellant's fifth assignment of error, the failure to renew the Crim.R. 29 motion was not erroneous. Appellant's argument that counsel was ineffective on that basis is without merit.

{¶ 50} As to appellant's argument that counsel generally put on an inadequate defense, appellant has demonstrated nothing to rebut the presumption that trial counsel's performance was adequate, or that her failure to "jump through all the hoops," as defined by appellant, would have produced another result.

{¶ 51} For the foregoing reasons, appellant's fourth assignment of error is not well-taken.

{¶ 52} In his fifth assignment of error, appellant asserts that the jury's verdict was against the manifest weight of the evidence and was not support by sufficient evidence. In support, appellant argues that no eyewitness except Moya placed appellant at the scene of any of the four robberies, and no eyewitnesses testified that it was appellant that either

carried or shot a gun during any of the robberies. Appellant also argues that no evidence was presented to show that the robbers intended harm to their victims.

{¶ 53} The term "sufficiency" of the evidence presents a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry in such cases 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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 54} "In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Davis*, 6th Dist. No. WD-10-077, 2012-Ohio-1394, ¶ 17, citing *Thompkins, supra,* at 387. In making this determination, the court of appeals sits as a "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 reversed and a new trial ordered." *Thompkins, supra*, at 386.

{¶ 55} After reviewing the trial court's record, we find sufficient evidence was presented to demonstrate that deadly weapons were used in the Marathon, Circle K, KeyBank and Sunoco robberies. As to Moya being the only witness to identify appellant as one of the robbers, Ohio courts have repeatedly recognized that the jury is in the best

position to judge the credibility of witnesses because it "is best able to view witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Cook*, 9th Dist. No. 21185, 2003-Ohio-727, ¶ 30, quoting *Giurbino v. Giurbino*, 89 Ohio App.3d 646, 659, 626 N.E.2d 1017 (8th Dist.1993).

{¶ 56} On consideration, we find that the record contains sufficient evidence to support appellant's convictions for complicity to commit aggravated robbery and complicity to commit felonious assault. In addition we find, after reviewing the entire record and weighing the evidence and all reasonable inferences, that the jury did not lose its way in reaching its verdicts. Appellant's fifth assignment of error is not well-taken.

{¶ 57} In his sixth assignment of error, appellant asserts that the cumulative effects of all the errors in the trial court deprived him of the right to a fair trial. The Supreme Court of Ohio has held that "a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. Hopkins*, 6th Dist. No. E-10-027, 2011-Ohio-5908, ¶ 60, citing *State v. DeMarco*, 31 Ohio St.3d 191, 196-97 (1987). Our review in of the record in this case shows that appellant has failed to establish any prejudice, either singularly or cumulatively. Appellant's sixth assignment of error is not well-taken.

{¶ 58} In his seventh assignment of error, appellant asserts that his two aggravated robbery convictions that resulted from the Circle K robbery (Counts 2 and 3), and the two nine-year sentences that resulted, should have been merged into one sentence because

they arose from the same transaction and were therefore allied offenses of similar import. In support, appellant points out that the trial court merged the two firearm specifications for those counts. Appellant is mistaken, for the following reasons.

{¶ 59} R.C. 2941.25(A), Ohio's multiple-count statute, provides that, "[w]here 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." As set forth above, there were two victims of the Circle K robbery—the store clerk, Gloria Case, and her customer, Tammy Davis. Although appellant's offenses arose from a single course of conduct, i.e., the Circle K robbery, each offense involved a separate victim, Case and Davis. Therefore, they were not allied offenses of similar import, and the trial court did not err by imposing two nine-year prison terms. *See State v. Feller*, 1st Dist. Nos. C-110775, C-110776, 2012-Ohio-6016, ¶ 36. The merger of the two firearm specifications pursuant to R.C. 2929.14(B)(1)(b) has no effect on whether or not the underlying offenses are allied offenses of similar import. *See State v. Marshall*, 8th Dist. No. 87334, 2006-Ohio-6271, ¶ 36 ("Although the crimes may be part of the same transaction and therefore the firearms specifications merge, it does not meant that the base charges are allied offenses of similar import."); and *State v. Jones*, 6th Dist. No. L-07-1292, 2009-Ohio-6973, ¶ 9, citing *State v. Gregory*, 90 Ohio App.3d 124, 129, 628 N.E.2d 86 (1993). ("[W]here a defendant commits the same offense against different victims during the same course of conduct, a separate animus exists for each offense.")

{¶ 60} For the foregoing reasons, appellant's seventh assignment of error is not well-taken. However, the state has brought to our attention the fact that the trial court erroneously sentenced appellant to serve a nine-year prison term for Count 6, complicity to commit felonious assault, a second degree felony when, pursuant to R.C. 2929.14(A)(2), the maximum sentence for a second degree felony is eight years.

{¶ 61} The judgment of the Lucas County Court of Common Pleas is hereby affirmed in part and reversed in part. Appellant's sentence as to Count 6 is hereby vacated, and the case is therefore remanded to the trial court for resentencing as to Count 6 only. All pending motions in this appeal are hereby rendered moot. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE