[Cite as *State v. Burton*, 2015-Ohio-2247.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 13 JE 39
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
DRAKE BURTON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court
Case No. 13-CR-85

JUDGMENT: Reversed and Remanded in Part; Limited Resentencing.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Mary DeGenaro
Hon. Cheryl L. Waite
Hon. Carol Ann Robb

Dated: June 8, 2015

DEGENARO, J.

{¶1} Defendant-Appellant, Drake Burton, appeals the judgment of the Jefferson County Court of Common Pleas convicting him of four counts of aggravated burglary, four counts of felonious assault, one with an attached firearm specification, one count of having weapons under disability and one count of tampering with evidence. On appeal, Burton asserts that the tampering conviction is against the manifest weight of the evidence. He also challenges his sentence, claiming that the aggravated burglary convictions should have merged, or that imposition of consecutive sentences for those offenses was improper.

{¶2} Upon review, Burton's merger argument has merit: the aggravated burglary convictions are allied offenses of similar import because they all involved a single occupied structure. Accordingly, the judgment of the trial court is reversed in part, and the matter is remanded for a limited resentencing where the State will elect which of the four aggravated burglary charges to pursue for sentencing purposes.

Facts and Procedural History

{¶3} Burton was indicted by grand jury on four counts of aggravated burglary, three under R.C. 2911.11(A)(1) and one under R.C. 2911.11(A)(2) all first-degree felonies; four counts of felonious assault, three under R.C. 2903.11(A)(1) and one under R.C. 2903.11(A)(2)—which also included an R.C. 2941.145 firearm specification— all second-degree felonies; one count of weapons under disability, R.C. 2923.13(A)(3), and one count of tampering with evidence, R.C. 2921.12(A)(1), both third-degree felonies.

{¶4} Burton was accused of taking part in a home invasion during which several victims were pistol-whipped and one was shot in an attempt to steal money and possibly drugs from the home. Burton was also accused of attempting to cover up the crime after the fact by asking his girlfriend to destroy potential evidence. Two other men were involved in the home invasion, but they were apparently indicted separately and their cases proceeded separately.

{¶5} Burton was arraigned and entered pleas of not guilty. Counsel was appointed. He waived his speedy trial rights, and the case proceeded to a jury trial. The following evidence was adduced.

{¶6} Addison Zane, 18 years old at the time of trial, but a minor at the time of the offense, testified she was contacted by Stedmund Creech, a man with whom she had a prior sexual relationship, in the early afternoon hours of May 16, 2013. Creech asked Zane to give him, along with two other men, a ride from Steubenville, Ohio to Mingo Junction, Ohio.

{¶7} Zane picked them up. She recognized Burton on sight, but only knew his nicknames of "Savage" and "Jig." The third man identified himself to her only as "Jim." Zane testified that the person who identified himself as "Jim" sat in the front seat of the vehicle next to her. Creech sat behind her. Burton sat in the rear passenger seat. (*Id*.) Zane testified that all three were wearing tool belts, hard hats and reflective vests; they dressed as though they were going to do construction or utility work. The men told her that they needed a ride to Mingo because they were going to fix a washer and dryer. (*Id*.) Zane dropped them off on Union Street and remained in the car. (*Id*.)

{¶8} Inside the residence were Michael Gray, his girlfriend Yolanda Cronin, their two-year-old daughter A.G., and Yolanda's 13-year-old sister S.C. All except for the two-year-old testified at trial. According to S.C., when the two-year-old saw the three men approaching the front door, she walked toward it and began to open it. Michael followed close behind her. At that point, he saw three men wearing construction gear with a clipboard.

{¶9} S.C. was seated on the couch with her laptop and she recalled the men asking who owned the home. As Yolanda began to answer that she was the homeowner, all three men came inside the house and produced firearms. Michael, Yolanda and S.C. all testified that they were certain all three men had guns.

{¶10} The men advised the occupants of the home that this was a robbery. They took the laptop computer that 13-year-old S.C. was holding on her lap and threw it onto the floor and demanded S.C. get on the floor along with Yolanda and A.G. The three men confiscated all of the victims' cell phones so that they could not call for help.

One of the men instructed the females not to look up, and one of them began leading Michael through the house looking for money.

{¶11} When Yolanda and S.C. would look up, they were struck in the head with guns. Yolanda's forehead was split open after she was struck with a firearm. When the blood from her head began to drip onto her two-year-old daughter, the child began to cry. This angered the intruders who then struck the young child at least twice in the head with a firearm. S.C., who was huddled alongside her sister and her niece, was struck multiple times in the head with a firearm as well.

{¶12} The intruders were convinced that Michael had money hidden in the house and ransacked the house looking for this money. Michael testified that he grew and sold marijuana in the past, and had been involved in programs through the drug court. At trial, he stated that at times in the past he had large amounts of money in the house, but said that day he did not. According to Detective Jason Hanlin though, during his earlier statements to police, Michael apparently stated that $1,200.00 and a quarter pound of marijuana were also stolen from the house.

{¶13} The victims offered up the money they had in a cookie jar and insisted that it was all of the money that was inside the residence. One of the three men continuously held Michael at gunpoint from behind, also striking him in the head with the gun and forcing him to separate areas of the home, including the basement area, while the other two held Yolanda, S.C., and A.G. hostage. The intruders then shoved duct tape into Yolanda's mouth, put duct tape on the mouth of the two-year-old, and attempted to tie all of the witnesses to each other with duct tape so that they could not escape and call for help.

{¶14} The men threatened to kill Michael in front of his family if he did not produce money that they believed was in the house. Michael was also struck multiple times in the head with a gun. Finally, one of the men apparently came to believe that there was no additional money in the house, and placed a cushion over Michael's leg and shot him in the thigh. The three men then fled the house, warning the residents again that if they came outside, they would be subjected to additional harm.

{¶15} At that point, the three men returned to Zane's vehicle. Zane testified that she did not know what had happened inside the house. She said that the men were

still dressed in the same clothes and that they did not make any comments about what had happened inside the home. She drove them back to Steubenville, dropping them off near the high school.

{¶16} One of the victims' neighbors had noticed the vehicle, wrote down the license plate, and upon realizing that his neighbors had been harmed, gave the police the plate information. Zane's vehicle was then stopped in Steubenville and she was arrested at that time.

{¶17} Two-year-old A.G. was treated first at a local hospital and then had to be life-flighted to Children's Hospital in Pittsburgh for a concussion that resulted from repeated blows to the head. 13-year-old S.C. was treated locally for the multiple blows to her head. Yolanda required a number of sutures to close the open wound in her forehead. Michael, who was shot in the leg, was treated, although the bullet could not be removed from the inside of his body.

{¶18} When Zane was interviewed by the Jefferson County Sheriff's Department, she initially denied involvement but eventually identified two of the three men: Creech and Burton.

{¶19} Police recovered Burton's fingerprints on a bottle in Zane's car. Forensic scientists found a DNA match on a cigarette butt that was found in a jacket inside Zane's car. Burton and Creech both left DNA matches on a water bottle found inside the vehicle. Zane testified that prior to that day none of the three men had ever been inside of her car.

{¶20} When Burton was taken into custody, he made a statement admitting that he participated in the burglary, but lied to officers about the identity of the third individual. He also attempted to downplay his participation, claiming that he merely served as a lookout for police.

{¶21} Soon after his arrest and while incarcerated in the Jefferson County jail, Burton began to make recorded telephone calls to his girlfriend, Precious Turner, during which he urgently instructed her to move something. On the recording, he directs her below a porch area of a residence that they shared with one another, told her to look for a "Jordan box" and when she advised him that she found it, he stated, "You know what to do."

{¶22} Later that day Burton called Turner after he had been apprised of his charges, which included weapons charges. He then told Turner he would not have to worry about those charges because she did what he told her to do.

{¶23} Detective Hanlin went out to the house Turner and Burton shared, and after getting consent from Turner to search, verified that the porch was as described on the phone call. He did not find the shoe box.

{¶24} On a later recording, Burton also asked Turner to move his car. His car was eventually processed by the police who found nothing of evidentiary value inside.

{¶25} Burton elected to testify in his own defense. He admitted he was a convicted felon. He recanted his earlier statement about being a participant in the burglary and assaults. He claimed that he lied to police initially to help secure the release of his girlfriend, Turner. He explained that at that time the two had a severely premature baby son in a Pittsburgh hospital and he wanted to make sure Turner was able to go see the baby. Despite the fact that some of the information he gave to police matched what was found at the crime scene and the testimony of other witnesses, Burton claimed he fabricated his earlier statement to police and that he had no part in the burglaries and assaults.

{¶26} Burton also admitted he made the phone calls to Turner asking her to move a shoe box from under the porch. However, he denied asking Turner to conceal evidence of any crime. Instead, he claimed that the shoe box he mentions during the telephone calls actually contained information that he considered his "get out of jail free" card in the event that he ever found himself in criminal trouble. Specifically, he claimed to have been keeping a journal of criminal incidents that happened in Steubenville that he planned to disclose to police in the event he found himself in trouble. However, he had no concrete explanation of why he would need to dispose of that immediately after his arrest or what effect it would have on his weapons charges.

{¶27} During his testimony, Burton further claimed that police officers took his fingerprints from his car and lied to the jury when they claimed that the prints were taken from Zane's car. This was his explanation regarding the DNA evidence as well.

{¶28} On cross-examination, Burton admitted that he had a screen name for his Instagram account of "Cocaine Crazy" and a nickname of "Jig" tattooed on his arm.

Testimony at trial from Zane had also indicated that she was Instagram friends with Burton and knew his screen name to be Cocaine Crazy. She further knew him to go by the nickname of "Jig" (as well as Savage). Burton admitted that he had no evidence supporting his claim that a BCI Agent had framed him.

{¶29} The jury found Burton guilty of all 10 counts in the indictment, along with the firearm specification.

{¶30} A sentencing hearing was held. Defense counsel advocated that all sentences should be run concurrently, with the exception of the firearm specification. Although couched in terms of concurrent sentences as opposed to merger, in essence defense counsel argued that counts one through four for aggravated burglary should merge because they all involved the same occupied structure. The prosecutor advocated for a 30-year aggregate sentence. The trial court asked Burton if he had anything to say in mitigation of punishment and Burton declined to make a statement.

{¶31} The trial court found that consecutive sentences were necessary to protect the public and to punish the offender, determined that Burton was under court-ordered sanctions (probation at the time that he committed these offense), that the harm inflicted by Burton (pistol whipping a 13-year-old, a 2-year-old, the mother of the 2-year-old and shooting the father of the 2-year-old, or being complicit in the same) was so great and unusual that a single term would not adequately reflect the seriousness of the conduct; and, the court further found that Burton's criminal history showed that consecutive terms were needed to protect the public.

{¶32} Then, after also considering principles and purposes of felony sentencing, along with the seriousness and recidivism factors, the trial court sentenced Burton to 6 years in prison on count 1 (aggravated burglary), 6 years in prison on count 2 (aggravated burglary), 6 years in prison on count 3 (aggravated burglary), and ordered that each of those sentences be served consecutively to one another. Additionally, the court sentenced Burton to 6 years in prison for count 4 (aggravated burglary) and ordered that that sentence be served concurrent with the sentences imposed in counts 1, 2 and 3.

{¶33} As to the felonious assault convictions, the trial court sentenced Burton to 5 years in prison on count 5 and 5 years in prison on count 6. The trial court ordered

that those sentences be served concurrently with each other and with the sentences imposed in counts 1, 2, 3 and 4 of the indictment. The trial court ordered Burton to serve a term of imprisonment of 5 years for count 7 (felonious assault), and ordered that that sentence be served concurrently with the sentence imposed in counts 1, 2, 3, 4, 5 and 6.

{¶34} On count 8 (felonious assault), the trial court ordered Burton to serve 5 years in prison and ordered that that term be served consecutively to the sentences imposed in Counts 1, 2, 3, 4, 5, 6 and 7. On the firearm specification attached to count 8, the trial court sentenced Burton to an additional 3 years of mandatory imprisonment, which the court ordered must be served consecutive to and prior to all other sentences imposed.

{¶35} Finally, the trial court sentenced Burton to 2 years in prison on count 9 (having a weapon while under disability) and 2 years in prison on count 10 (tampering with evidence) and ordered that each of those sentences be served consecutive to all other counts. Thus, Burton's aggregate sentence was 30 years in prison, with the first 3 years being mandatory. The trial court also imposed a mandatory term of 5 years of post-release control.

Manifest Weight

{¶36} In his first of two assignments of error, Burton asserts:

{¶37} "The conviction for tampering with evidence was against the manifest weight of the evidence."

{¶38} "Weight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id*. This is so because the trier of fact is in a better position to determine credibility issues, since it personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). On review, an appellate court must consider the entire record, weigh the evidence and all reasonable inferences and determine 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* at 387.

{¶39} Burton only challenges his tampering with evidence conviction as against the manifest weight of the evidence:

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

R.C. 2921.12(A)(1).

{¶40} In addition, the complicity statute is relevant here:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> (1) Solicit or procure another to commit the offense;
>
> (2) Aid or abet another in committing the offense;
>
> (3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code; * * *
>
> (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.

R.C. 2923.03(A)(1)-(3) and (C).

{¶41} Importantly, R.C. 2923.03(F) also provides: "Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense." The Ohio Supreme Court held that this subsection "adequately notifies defendants that the jury may be

instructed on complicity, even when the charge is drawn in terms of the principal offense." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶181, citing *State v. Keenan*, 81 Ohio St.3d 133, 151, 689 N.E.2d 929 (1998), citing *Hill v. Perini*, 788 F.2d 406, 407-408 (6th Cir.1986).

{¶42} The State presented ample evidence in support of the tampering conviction. Soon after his arrest and while incarcerated in the Jefferson County jail, Burton began to make recorded telephone calls to his girlfriend, Precious Turner, during which he urgently instructed her to move something. On the recording, he directs her below a porch area of a residence that they shared with one another, told her to look for a "Jordan box" and when she advised him that she found it, he stated, "You know what to do."

{¶43} More specifically, the following can be heard on the DVD recording of the call which was made by Burton on May 17, 2013, at 3:44 p.m.

Burton: Hey, where you at?
Turner: I'm at home
* * *
Burton: Go to the back door real quick
* * *
Burton: You there?
Turner: Yeah, I'm here
Burton: Go outside.
* * *
Turner: Alright
Burton: Go down the steps
* * *
Burton: You down?
Turner: Yeah
Burton: Go to the end of the porch by the gate
Turner: Alright
Burton: You by the end of the porch?

Turner: Yeah
Burton: Alright, you know the bottom bricks
Turner: Telling (dogs) to move – “Alright”
Burton: See that Jordan Box. You know what to do. I’ll call you later
Turner: Alright

{¶44} Later that day, Burton called Turner after he had been apprised of his charges, which included weapons charges. He then told Turner he would not have to worry about those charges because she did what he told her to do. Specifically, the following can be heard on the DVD recording of the call which was made on May 17, 2013, at 7:37 p.m.

Turner: Hello
Burton: Hello, you do that?
Turner: Yes
* * *
Turner: Um, you gonna be comin back to the house?
Burton: I don’t know cause they hit me with, I mean I’ve got five counts right now, that’s what they hit me with –inaudible-
Turner: They gave you charges already?
Burton: Yeah
Turner: That’s why they put it on the news, my mom just saw it. What’d you get charged with
Burton: I got all felonious assaults. They charged me with felonious assault with a gun specification and three regular felonious assaults and a weapons under disability
Turner: Oh
Burton: That’s why I had you do what you did
* * *
Turner: More than likely because it’s the end of the month and they’re gonna bound you over * * *

Burton: Yeah, yeah, I ain't trippin, I mean, as long as you did what you did when I called earlier, that gonna (inaudible) for real. * * *

{¶45} Detective Hanlin went out to the house Turner and Burton shared on May 20, 2013, and after getting consent from Turner to search, verified that the porch was as described on the phone call. He did not find the shoe box. Det. Hanlin testified:

Q All right. And do you attempt to go to the area where he described where this box might be?

A In the back of the house off of the back rear door there is an elevated porch, just a small porch with enough head room to walk underneath, that is the direct area where the dog had been fenced in or tied, which you can hear her yelling at the dog. Underneath that porch were typically cement blocks that looks like they built something there at some point, and that wall had kind of crumbled. Half the blocks were up, and half the blocks had crumbled on the ground. That's the area which I believe she was directing him to the Jordan box.

Q By the time you can get there on the 20th, is it still there?

A It's not there.

Q All right. But the area is as long it's described on the telephone call?

A It's exactly as described, under the porch.

{¶46} Although Burton is correct that there was no direct evidence of tampering, the recorded jail-house calls are circumstantial evidence that Burton directed Turner to destroy potential evidence. Circumstantial evidence is sufficient to convict a criminal defendant under Ohio law. *State v. Trimacco*, 7th Dist. No. 12 CO 7, 2013-Ohio-1114, ¶37. " '[P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and

circumstantial evidence has no less value than the others. Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable.' (Internal citations and quotations omitted.)" *Id*., quoting *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988).

{¶47} The defense presented Burton's testimony, in which he admitted making the calls but denied asking Turner to conceal evidence of any crime. Instead, he claimed that the shoe box he mentions during the calls actually contained information that he considered his "get out of jail free" card in the event that he ever found himself in criminal trouble. Specifically, he claimed to have been keeping a journal of criminal incidents that happened in Steubenville that he planned to disclose to police in the event he found himself in trouble.

{¶48} However, on cross-examination, Burton had no concrete explanation of why he would need to dispose of that immediately after his arrest or what effect it would have on his weapons charges.

Q: Did you hear yourself on those phone calls?

A: Yes, ma'am.

Q: And is that you identifying yourself as Cocaine Crazy?

A: Yes, ma'am.

Q: And is that you telling her when she finds that Jordan box that she knows what to do?

A: Yes, ma'am.

Q: And is that you telling her that you have weapons charges against you, including felonious assault with a gun specification and weapons under disability?

A: Yes, ma'am.

Q: And is that you saying, "That's why I had you do what you did?

A: Yes, ma'am.

Q: Then why on earth would a box full of journals have to do with the fact you had weapons charges?

A: Just, I mean, the documents that I had, you know what I mean, me knowing what I know or me saying whatever in the journals could bring up many charges.

Q: No. Your testimony on direct examination was that the notes you had in that box would be like your lawyers words were, "Get out of jail free card" because you would know about murders, and you would know about drug trafficking?

A: Correct.

Q: The fact that you are facing weapons charges, why would that necessitate the box being moved?

A: Just for personal reasons.

Q: Well, pick an answer, and let's stick with which one is the truth.

A: I don’t have an answer.

{¶49} Where there are two conflicting versions of events, neither of which is unbelievable, it is not within an appellate court's province to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). Rather, a reviewing court must defer to the jury who was best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, and gestures of the witnesses testifying before it, including appellant himself. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984); *DeHass*, *supra*, 10 Ohio St.2d at 231.

{¶50} Here, in convicting Burton of tampering with evidence it appears the jury reasonably believed the State's version of events over Burton's. Thus, it does not appear the jury lost its way in convicting Burton of tampering; his conviction is not against the manifest weight of the evidence. Accordingly, Burton's first assignment of error is meritless.

Merger/Consecutive Sentences

{¶51} In his second and final assignment of error, Burton asserts:

{¶52} "The court erred by sentencing the Appellant to consecutive sentences for counts one, two and three."

{¶53} Although Burton framed his assignment of error as a challenge to his consecutive sentences, in the body of his brief he also argues that his aggravated burglary convictions for counts 1 through 3 should have merged.

{¶54} R.C. 2941.25, which codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution prohibits multiple punishments for the same offense. *State v. Underwood*, 124 Ohio St.3d 365, 2010–Ohio–1, ¶23.

> (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.

R.C. 2941.25

{¶55} In *State v. Ruff*, ––– Ohio St.3d ––––, 2015–Ohio–995, the Supreme Court of Ohio recently clarified the test courts must apply when determining whether offenses are allied offenses of similar import. There the Court held that "courts must evaluate three separate factors—the conduct, the animus, and the import." *Id*. at paragraph one of the syllabus. "Two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) * * * if the harm that results from each offense is separate and identifiable." *Id*. at paragraph two of the syllabus. "[A] defendant whose conduct supports multiple offenses may be convicted of all the offenses if * * * the

conduct constitutes offenses of dissimilar import[.]" *Id*. at paragraph three of the syllabus. Thus, in sum, the Court held: 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." *Id*. at ¶25.

{¶56} Burton argues it was erroneous not to merge the first three aggravated burglary counts. Count 1 of the Indictment, aggravated burglary pursuant to R.C. 2911.11(A)(1), alleges that Burton did by force, stealth or deception, trespass in 122 Union Avenue, Mingo Junction, an occupied structure, as defined in R.C. 2909.01, when another person is present, with purpose to commit therein a criminal offense and that Burton inflicted, or attempted or threatened to inflict, physical harm on Yolanda Cronin. Counts 2 and 3, aggravated burglary pursuant to R.C. 2911.11(A)(1), contain the same statutory language regarding the trespass with intent to commit a criminal offense, but specify that Burton inflicted, or attempted or threatened to inflict, physical harm on S.C. and A.G., respectively.

{¶57} In *State v. Marriott*, 189 Ohio App.3d 98, 2010-Ohio-3115, 937 N.E.2d 614 (2d Dist.), the court held that aggravated burglary convictions under R.C. 2911.11(A) were subject to merger where one structure was involved, even though there were two separate occupants who were physically harmed during the burglary. The court reasoned that aggravated burglary is not defined in terms of harm to another, but rather essentially that the *trespass* is at the heart of the offense:

> [T]he purpose of R.C. 2911.11(A) is to elevate burglary to an aggravated offense when the defendant's conduct raises the risk of harm to persons by having a deadly weapon or by threatening or inflicting physical harm. The aggravated-burglary statute thus criminalizes and enhances the seriousness of the trespass under those circumstances. However, R.C. 2911.11(A) is not meant to criminalize an offender's conduct toward the occupants of the structure; rather, the prosecutor

> may charge the defendant with an assault offense to satisfy that interest. Accordingly, when a defendant, such as Marriott, enters a residence and threatens, attempts, or inflicts physical harm on more than one occupant during the burglary, the aggravated-burglary offenses merge.

Marriott at ¶46.

{¶58} Likewise in *State v. Lynott*, 8th Dist. No. 89079, 2007-Ohio-5849, the Eighth District concluded that failing to merge multiple counts of aggravated burglary involving one structure was plain error:

> * * * Lynott entered only one residence for the purposes of committing a criminal offense. Nevertheless, the trial court entered convictions against Lynott on three counts of aggravated burglary. Although Lynott does not raise this issue, this court finds plain error. *State v. Thiam*, Cuyahoga App. No. 87981, 2007-Ohio-282.
>
> As this court has observed, the basic offense of "burglary" primarily is defined in terms of the offender's conduct, rather than his conduct toward another person. *State v. Powers, supra*, ¶12. At common law, the offense was intended to punish the "breaking of the close."
>
> [R.C. 2911.11(A)] which defines aggravated burglary, raises the degree of the criminal conduct if certain factors attend the offender's entry. However, it does not contain an additional penalty for each person affected by the conduct. See, e.g., *State v. Johnson*, supra; see also, *State v. Allen*, Cuyahoga App. No. 82618, 2003-Ohio-6908, citing *State v. Harrison* (Dec. 9, 1999), Cuyahoga App. No. 75294.
>
> Based upon the foregoing, one of Lynott's convictions for aggravated burglary together with his convictions on two counts of felonious assault are affirmed. Two of Lynott's convictions for aggravated burglary are vacated. His sentence remains unaffected. *State v. Powers*, supra, ¶ 25.

Lynott at ¶27-30.

{¶59} Similarly, in *State v. Adkins*, 8th Dist. No. 95279, 2011-Ohio-5149, the court noted that: "Although the seriousness of a burglary offense is related to the relative risk to persons, the burglary offenses punish trespasses into structures. * * * [I]t is [the defendant's] single entry into the dwelling with the requisite intent that constitutes the crime." (internal citations omitted.) *Id*. at ¶39.

{¶60} The court continued:

> Should the state prevail in its argument that a defendant may be convicted on more than one count of burglary based upon the number of persons present in the residence when the defendant entered, it would turn 500 years of burglary law on its head. It would transform burglary from an offense against the sanctity of the dwelling house into an offense against the person. Logically, one of the unintended consequences of such a transformation may be that the act of burglary, which is completed as soon as the dwelling is entered with the requisite intent, will be viewed as an allied offense to the crimes the defendant commits therein. See [*State v.*] *Bridgeman,* [2d Dist. No. 2010 CA 16, 2011–Ohio–2680] .This court does not believe such was the legislature's intent. [*State v*.] *Gardner*, [118 Ohio St.3d 420, 2008–Ohio–2787, 889 N.E.2d 995].

Adkins at ¶41.

{¶61} Accordingly, the Eighth District concluded: "In this case, Adkins made a single entry into Barr's house. Regardless of the number of people in the house, he committed that particular act with a single animus; thus, he could not be convicted for more than one count of aggravated burglary." *Adkins* at ¶40 (citations omitted.)

{¶62} *State v. Lewis*, 11th Dist. No. 2012–L–074, 2013-Ohio-3974, cited by the State in support of its argument that the aggravated burglary charges need not merge, is factually distinguishable because there the court was deciding whether aggravated robbery must merge with aggravated burglary. *Id*. at ¶111. It did not involve multiple counts of aggravated burglary as here. *State v. Chaney*, 8th Dist. No. 97872, 2012-

Ohio-4934, also cited by the State, is inapplicable because it addressed merger of felonious assault and attempted felonious assault convictions concerning multiple victims. *Id*. at ¶25. *State v. Garcia*, 8th Dist. No. 79917, 2002-Ohio-4179 is inapposite because it involves the merger of aggravated arson convictions. *Id*. at ¶132-144. Finally, *State v. Tapscott*, 2012-Ohio-4213, 978 N.E.2d 210 (7th Dist.), concerns the merger of aggravated robbery convictions. *Id*. at 33-46.

{¶63} And although *Marriott*, *Lynott* and *Adkins* were decided under earlier variants of the allied offenses test, the same result is dictated when this issue is viewed through the recently revamped test set forth by the Ohio Supreme Court in *Ruff*, *supra*. While on first blush it might appear, in light of the separate victims, that the aggravated burglary offenses herein are of dissimilar in import or significance—in other words, that each offense caused separate, identifiable harm—under the rationale of *Marriott*, *Lynott* and *Adkins* those victims are what elevated the offense from a simple burglary to the more severe "aggravated" form of the offense. At the heart of an aggravated burglary is the trespass. And there was only one identifiable trespass into the home here.

{¶64} In addition, under the rationale of *Marriott*, *Lynott* and *Adkins,* count 4, aggravated burglary under R.C. 2911.11(A)(2), must also merge with counts 1, 2 and 3. Count 4 of the Indictment contains the same language regarding the trespass with intent to commit a criminal offense as counts 1 through 3; however, the aggravating factor in count 4 is that Burton had a deadly weapon or dangerous ordnance on or about his person. Again, there was only one identifiable trespass, so count 4 must also merge.

{¶65} In sum, pursuant to *Marriott*, *Lynott* and *Adkins* all four of Burton's aggravated burglary convictions are allied offenses of similar import that the trial court should have merged. Accordingly, a remand is required for the State to elect which charge to pursue. *State v. Whitfield*, 124 Ohio St.3d 319, 2010–Ohio–2, 922 N.E.2d 182, ¶17. Notably, “[s]entencing concurrently on merged counts does not satisfy the merger doctrine as no sentence at all should be entered on one of the two merged counts.” *State v. Gardner*, 7th Dist. No. 10 MA 52, 2011–Ohio–2644, at ¶ 24, citing *Whitfield* at ¶ 17–18.

{¶66} In light of our disposition of Burton's merger argument, his challenge to the imposition of *consecutive sentences* for counts 1 through 3 is moot.

Conclusion

{¶67} In sum, Burton's manifest weight argument concerning his tampering with evidence conviction is meritless. However, his merger argument has merit. The aggravated burglary convictions are allied offenses of similar import that the trial court should have merged. Accordingly, the judgment of the trial court is reversed in part, and the matter is remanded for a limited resentencing where the State will elect which of the four aggravated burglary convictions to pursue for sentencing purposes.

Waite, J., concurs.
Robb, J., concurs.