[Cite as *State v. Kohler*, 2025-Ohio-3202.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff - Appellee -vs- JAMES KOHLER, JR. Defendant – Appellant	Case No. 24-CA-00006 Opinion and Judgment Entry Appeal from the Perry County Court of Common Pleas, Case No. 22-CR-0064 Judgment: Affirmed Date of Judgment Entry: September 4, 2025

BEFORE: William B. Hoffman, Craig R. Baldwin, Kevin W. Popham, Appellate Judges

APPEARANCES: Terry J. Rugg, Perry County Prosecuting Attorney, for Plaintiff-Appellee; James F. Kohler, Jr., and Benjamin E. Fickel for Defendant-Appellant

OPINION

Hoffman, J.

{¶1} Defendant-appellant James Kohler appeals the judgment entered by the Perry County Common Pleas Court convicting him following jury trial of breaking and entering (R.C. 2911.13(A)), theft (R.C. 2913.02(A)(1)), complicity to attempted burglary (R.C. 2923.03A)(2), R.C. 2923.02(A), R.C. 2911.12(A)(3)), and complicity to burglary (R.C. 2923.03(A)(2)), R.C. 2911.12(A)(1)), and sentencing him to an aggregate term of forty-seven months of incarceration. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In July of 2022, Appellant was staying with Lily Iser's mother. On the morning of July 17, 2022, Appellant and Iser went for a drive to look for catalytic converters to steal. They came upon a house in which it appeared the occupants might be in the process of moving.

{¶3} The pair stopped at the house looking for things to steal. Initially, they went to a garage. Appellant gave Iser a boost to enter the garage through a window. She then unlocked the door, and Appellant entered the garage. Iser stole a crowbar. Appellant seemed interested in a motorcycle stored in the garage. Iser then went to a basement door of the house. She attempted to enter the door using a butter knife she brought with her, but was unable to gain entry. The pair left the property, planning to return the next day.

{¶4} The owner of the house had recently been placed in assisted living. The owner's son was managing the property pending listing it for sale, and had placed hunting cameras around the property for security purposes. He received an alert on his phone

around 8:00 a.m. on July 17, 2022. He received pictures from the cameras showing an orange and black Mustang on the property, a man leaning against the Mustang, and a woman carrying a crowbar. He was able to retrieve a license plate number from the Mustang. The Mustang was registered to Appellant. When the owner's son arrived at the property, he discovered the garage had been broken into, the door jamb of the garage was broken, and the window was left open. He also discovered the key to the motorcycle was missing.

{¶5} Iser and Appellant returned to the property on July 18, 2022, to see what they could find of value to steal. The plan was for Appellant to drop Iser off at the property, and return later to pick her up and load any items she found of value into the car. Appellant dropped Iser off. She discovered the door to the basement was unlocked, and went inside. When she reached the top of the stairs, she found the door was locked.

{¶6} Meanwhile, the owner's son again received an alert from the hunting cameras set up on the property. He was en route to the property at the time, and called the Perry County Sheriff's Department. Police apprehended Iser on the property.

{¶7} Appellant did not return for Iser, but as he was driving in the area, the Mustang was spotted by police. After a lengthy police chase, Appellant was apprehended in Fairfield County. Officers found a crowbar in his car.

{¶8} Appellant was indicted by the Perry County Grand Jury with breaking and entering, theft, and complicity to attempted burglary for the events which occurred on July 17, 2022. He was indicted with complicity to burglary for the events which occurred on July 18, 2022. The case proceeded to jury trial in the Perry County Common Pleas Court. The jury found Appellant guilty of all charges. The trial court convicted Appellant on all

counts, and sentenced him to six months of incarceration for breaking and entering, six months of incarceration for theft, seventeen months of incarceration for complicity to attempted burglary, and twenty-four months of incarceration for complicity to burglary.

{¶9} The sentence for theft was to run concurrently with all other sentences, while the remaining sentences were to run consecutively to each other but concurrently with the sentence for theft, for an aggregate term of forty-seven months of incarceration. The trial court ordered Appellant to serve this sentence consecutively to sentences imposed in cases from Fairfield and Pickaway Counties. It is from the May 24, 2024 judgment of conviction and sentence Appellant prosecutes his appeal.

{¶10} Appellate counsel for Appellant has filed a Motion to Withdraw and a brief pursuant to *Anders v. California,* 386 U.S. 738 (1967), *rehearing den*., 388 U.S. 924, indicating the within appeal is wholly frivolous. In *Anders*, the United States Supreme Court held if, after a conscientious examination of the record, a defendant's counsel concludes the case is wholly frivolous, then he or she should so advise the court and request permission to withdraw. *Id*. at 744. Counsel must accompany the request with a brief identifying anything in the record which could arguably support the appeal. *Id*. Counsel also must: (1) furnish the client with a copy of the brief and request to withdraw; and, (2) allow the client sufficient time to raise any matters the client chooses. *Id*. Once the defendant's counsel satisfies these requirements, the appellate court must fully examine the proceedings below to determine if any arguably meritorious issues exist. If the appellate court also determines the appeal is wholly frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements, or may proceed to a decision on the merits if state law so requires. *Id*.

{¶11} We find counsel has complied with *Anders*. Appellant has filed a pro se brief, and the State has filed a response brief to Appellant's pro se brief. Counsel sets forth three assignments of error which could arguably support the appeal:

> I. APPELLANT MAY ASSERT, AS AN ASSIGNMENT OF ERROR, THAT THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT THE STATE FAILED TO PROVE THAT HE WAS A PARTICIPATING ACTOR IN THE ALLEGED CRIMES. BECAUSE OF THIS ERROR, THE STATE FAILED TO PROVE INTENT, A MATERIAL ELEMENT OF ALL FOUR COUNTS OF THE INDICTMENT.
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> II. APPELLANT MAY ASSERT, AS AN ASSIGNMENT OF ERROR, THAT THE TRIAL COURT ERRED BY FAILING TO MERGE COUNTS ONE AND THREE FOR PURPOSES OF SENTENCING.
>
> III. APPELLANT MAY ASSERT, AS AN ASSIGNMENT OF ERROR, THAT THE STATE FAILED TO PROVE EACH AND EVERY ELEMENT OF COUNT ONE, BREAKING AND ENTERING.

I.

{¶12} In his first proposed assignment of error, Appellant argues the convictions were against the manifest weight of the evidence. He argues the State failed to prove intent as to all four charges because the State failed to prove he was a participating actor in the crimes.

{¶13} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.'" *State v. Thompkins*, 1997-Ohio-52, *quoting State v. Martin*, 20 Ohio App. 3d 172, 175 (1st Dist. 1983).

{¶14} R.C. 2923.03(A) defines complicity in pertinent part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> (2) Aid or abet another in committing the offense.

{¶15} An accomplice to a crime is subject to the same prosecution and punishment as the principal offender. R.C. 2923.03(F).

{¶16} The black and orange Mustang registered to Appellant was seen on pictures from the property trail cameras on both July 17 and July 18, 2022, and Appellant was identified by the property owner's son in one of the trail camera photographs from July 17. Iser testified on July 17, she and Appellant were driving around looking for catalytic converters to steal when they came upon the house in question. She testified Appellant gave her a boost to enter the garage through a window, then Appellant came inside after she unlocked the door. She testified she stole a crowbar from the garage, and while she didn't see Appellant steal the key to the motorcycle in the garage, he seemed very

interested in the motorcycle. The property owner's son testified the motorcycle key was missing following the garage break-in on July 17. Iser testified she tried unsuccessfully to break into the house through a basement door. She testified she and Appellant made plans to return the following day. On July 18, Appellant drove Iser to the property, then left. Iser testified the plan was she would look for valuables to steal, after which Appellant would return to pick her up and load the items in his car.

{¶17} We find the judgment is not against the manifest weight of the evidence. From the evidence presented, the jury could find Appellant participated in the breaking and entering into the garage, and he stole the motorcycle key while inside. The jury could also have found Appellant was complicit in Iser's theft of the crowbar, as well as her attempted burglary of the house on July 17 and her burglary of the house on July 18.

{¶18} The first proposed assignment of error is overruled.

II.

{¶19} In his second proposed assignment of error, Appellant argues the trial court erred by failing to merge counts one and three for sentencing as allied offenses of similar import. We disagree.

{¶20} R.C. 2941.25 governs allied offenses:

> (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.

{¶21} This test requires a court to ask three questions in conducting a merger analysis: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of [these questions] will permit separate convictions. The conduct, the animus, and the import must all be considered." *State v. Ruff,* 2015-Ohio-995, ¶ 31. An allied-offenses analysis must be driven by the facts of each case. "[T]he analysis must focus on the defendant's conduct to determine whether one or more convictions may result, because an offense may be committed in a variety of ways and the offenses committed may have different import." *Id*.

{¶22} There are two circumstances in which offenses will be deemed dissimilar in import, making sentences for multiple counts permissible. The first circumstance is "[w]hen a defendant's conduct victimizes more than one person [because] the harm for each person is separate and distinct." *Id*. at ¶ 26. The second circumstance is when a defendant's conduct against a single victim constitutes two or more offenses and "the harm that results from each offense is separate and identifiable from the harm of the other offense." *Id*. Therefore, the Ohio Supreme Court has held "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." *Ruff* at ¶ 26. Whether the offenses have similar import will be revealed by "[t]he evidence at trial or during a plea or sentencing hearing." *Id*.

{¶23} Appellant failed to object to the trial court's failure to merge the violation of a protection order conviction with the other convictions, and thus he must demonstrate plain error on appeal. To establish plain error, Appellant must show an error occurred, the error was obvious, and there is a reasonable probability the error resulted in prejudice, meaning the error affected the outcome of the trial. *State v. McAlpin*, 2022-Ohio-1567, ¶ 66, *citing State v. Rogers*, 2015-Ohio-2459, ¶ 22.

{¶24} In Count One, Appellant was charged with breaking and entering. In Count Three, Appellant was charged with complicity to burglary. The breaking and entering charge related to Appellant's entry into the garage, an unoccupied structure. The complicity to attempted burglary charge related to Iser's attempt to break into the house, an occupied structure, on the same day. Although committed on the same day, we find the offenses were committed separately because each count related to a different structure on the same property. Further, we find the offenses were dissimilar in import because the garage was an unoccupied structure, and the house was an occupied structure. We find the offenses were not allied offenses of similar import.

{¶25} The second proposed assignment of error is overruled.

III

{¶26} In his third proposed assignment of error, Appellant argues the State failed to present sufficient evidence to support the conviction of breaking and entering. We disagree.

{¶27} Breaking and entering is defined by R.C. 2911.13(A), "No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony."

{¶28} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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, paragraph two of the syllabus (1991).

{¶29} Iser testified Appellant boosted her up to enable her to enter the garage through the window. The son of the property owner, who was managing the property at the time, testified they did not have permission to be in the garage. Iser unlocked the door to allow Appellant inside. Iser testified she and Appellant were looking for things to steal in the garage. We find the State presented sufficient evidence to support the conviction of breaking and entering.

{¶30} The third proposed assignment of error is overruled.

{¶31} Appellant has set forth four assignments of error in his pro se brief:

I. APPELLANT'S CONVICTION FOR ATTEMPTED BURGLARY AND COMPLICITY TO BURGLARY IS NOT SUPPORTED BY SUFFICIENT EVIDENCE WITHIN THE MEANING OF R.C. 2909.01(C)(1) OR 2909.01(C)(2) UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND ART. I, SEC. 1 AND ART. I, SEC. 16 OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT COMMITTED ERROR DENYING THE CRIM. R. 29 MOTION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

III. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FAILING TO RAISE ALLIED OFFENSES UNDER R.C. 2941.25(A) BEFORE SENTENCING TO RECEIVE MERGER OF OFFENSES CAUSING A PLAIN ERROR UNDER CRIM. 4. 52(B) AND VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

IV. THE TRIAL COURT COMMITTED ERROR TO PREJUDICE THE APPELLANT OF A CONCURRENT SENTENCE TO UNDER [SIC] CONVICTIONS WITHIN THIS STATE PURSUANT TO R.C. 2929.41(A).

I., II.

{¶32} In his first and second, assignments of error, Appellant argues the State did not present sufficient evidence to prove the house was "occupied," and therefore the evidence was insufficient to convict him of complicity to attempted burglary and burglary. For the same reason, he argues the trial court erred in overruling his Crim. R. 29(A) motion for a judgment of acquittal.

{¶33} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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, paragraph two of the syllabus (1991).

{¶34} A trial court should not sustain a Crim. R. 29 motion for acquittal unless, after viewing the evidence in a light most favorable to the State, the court finds no rational finder of fact could find the essential elements of the charge proven beyond a reasonable doubt. *State v. Franklin*, 2007–Ohio–4649, ¶ 12 (5th Dist.), *citing State v. Dennis*, 1997–Ohio–372.

{¶35} Burglary is defined by R.C. 2911.12(A):

> (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;
>
> (2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an

accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.

{¶36} "Occupied structure" is defined by R.C. 2909.01(C):

(C) "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it.

{¶37} Appellant argues the house was not "occupied" because the owner had moved to an assisted living facility, and no one was living in the house at the time of the

offenses. The owner's son testified he placed the trail cameras around the property to secure the property and the items inside the home, and continued to maintain the home after his father's relocation to an assisted living facility. At the time of the offenses, the owner's son was in the process of listing the home for sale and/or auction. Although temporarily unoccupied, the home was maintained by the owner's son as a permanent or temporary dwelling pending its sale.

{¶38} We find the State presented sufficient evidence the home was an "occupied structure" as defined by statute. The first and second pro se assignments of error are overruled.

III.

{¶39} In his third assignment of error, Appellant argues his counsel was ineffective for failing to raise the issue of merger of offenses. He does not specifically argue which convictions should have merged, but argues generally the offenses should have been merged into a single conviction. We disagree.

{¶40} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, Appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Bradley,* 42 Ohio St.3d 136, (1989). In other words, Appellant must show counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id*.

{¶41} The legal standard of review to determine if offenses should merge is set forth earlier in this opinion under proposed assignment of error two. For the reasons stated in our discussion of proposed assignment of error, we find the offenses of complicity to attempted burglary and breaking and entering are not allied offenses of similar import.

{¶42} We find the offenses of theft and breaking and entering caused separate and distinct harm. The property owner's son testified the door jamb of the garage was broken and the window was left open due to the offense of breaking and entering. The harm caused by the theft of the keys to the motorcycle was separate from the harm caused by the forced entry into the garage.

{¶43} The conduct underlying the charge of complicity to burglary occurred on a different day from the conduct underlying the remaining offenses, and thus we find this offense was committed separately.

{¶44} The third pro se assignment of error is overruled.

IV.

{¶45} In his fourth pro se assignment of error, Appellant argues the trial court erred in ordering his sentence in the instant case to be served consecutively to the sentences imposed in separate cases in Fairfield County and Pickaway County. We disagree.

{¶46} R.C. 2929.14(C)(4) provides:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison

terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶47} The trial court must make the R.C. 2929.14(C)(4) findings at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings, nor must it recite certain talismanic words or phrases in order to be considered to have complied. *State v. Bonnell*, 2014-Ohio-3177, syllabus.

{¶48} The Ohio Supreme Court has recently clarified the standard of review this Court is to apply in reviewing consecutive sentences:

> Nowhere does the appellate-review statute direct an appellate court to consider the defendant's aggregate sentence. Rather, the appellate court must limit its review to the trial court's R.C. 2929.14(C)(4) consecutive-sentencing findings. In this case, the court of appeals purported to review the trial court's findings. But much of its analysis focused on its disagreement with the aggregate sentence. The appellate court emphasized that Glover's aggregate sentence was "tantamount to a life sentence," 2023-Ohio-1153, 212 N.E.3d 984, ¶ 59 (1st Dist.), and determined that it was too harsh when compared with the sentences that the legislature has prescribed for what the court considered more serious crimes, *id*. at ¶ 97-98. To the extent that the court of appeals premised its holding on its disagreement with Glover's aggregate sentence rather than its review of the trial court's findings, it erred in doing so.
>
> The statute does not permit an appellate court to simply substitute its view of an appropriate sentence for that of the trial court. An appellate court's inquiry is limited to a review of the trial court's R.C. 2929.14(C) findings. R.C. 2953.08(G)(2). Only when the court of appeals concludes that the record clearly and convincingly does not support the trial court's findings or it clearly and convincingly finds that the sentence is contrary to law is it permitted to modify the trial court's sentence. *Id*.

Thus, an appellate court may not reverse or modify a trial court's sentence based on its subjective disagreement with the trial court. And it may not modify or vacate a sentence on the basis that the trial court abused its discretion. Rather, the appellate court's review under R.C. 2953.08(G)(2)(a) is limited. It must examine the evidence in the record that supports the trial court's findings. And it may modify or vacate the sentence only if it "clearly and convincingly" finds that the evidence does not support the trial court's R.C. 2929.14(C)(4) findings. R.C. 2953.08(G)(2)(a).

Though "clear-and-convincing" is typically thought of as an evidentiary standard, the General Assembly has chosen to use that standard as the measure for an appellate court's review of a trial court's R.C. 2929.14(C)(4) findings. As we have explained, "clear and convincing evidence" is a degree of proof that is greater than a preponderance of the evidence but less than the beyond-a-reasonable-doubt standard used in criminal cases. *Gwynne*, 2023-Ohio-3851, 231 N.E.3d 1109, at ¶ 14 (lead opinion), citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. The appellate-review statute does not require that the appellate court conclude that the record supports the trial court's findings before it may affirm the sentence. Rather, the statute only allows for modification or vacation only when the appellate court "clearly and convincingly finds" that the evidence does not support the trial court's findings. R.C. 2953.08(G)(2)(a). "This language is plain and unambiguous and expresses the General Assembly's intent that appellate courts employ

a deferential standard to the trial court's consecutive-sentence findings. R.C. 2953.08(G)(2) also ensures that an appellate court does not simply substitute its judgment for that of a trial court." *Gwynne*, 2023-Ohio-3851, 231 N.E.3d 1109, at ¶ 15 (lead opinion).

{¶49} *State v. Glover,* 2024-Ohio-5195, ¶¶ 43-46.

{¶50} The trial court made the findings required by R.C. 2929.14(C)(4) to impose consecutive sentences. The trial court based its decision on Appellant's felony record, which dated back to 1990. We do not clearly and convincingly find the evidence does not support the trial court's findings in support of consecutive sentences.

{¶51} Appellant's fourth pro se assignment of error is overruled.

{¶52} After independently reviewing the record, we agree with Counsel's conclusion no arguably meritorious claims exist upon which to base an appeal. Hence, we find the appeal to be wholly frivolous under *Anders*, grant counsel's request to withdraw, and affirm the judgment of the Perry County Court of Common Pleas.

{¶53} For the reasons stated in our accompanying Opinion, the judgment of the Perry County Court of Common Pleas is affirmed. Costs to Appellant.

By: Hoffman, J.

Baldwin, P.J. and

Popham, J. concur