[Cite as *State v. Allen*, 2013-Ohio-513.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 11AP-1130 (C.P.C. No. 10CR-12-7172)
v.	:	(REGULAR CALENDAR)
Cornelius Allen,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 14, 2013

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yavitch & Palmer Co., L.P.A., and *Nicholas Siniff*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

I. Introduction

{¶ 1} On November 29, 2011, a jury in the Court of Common Pleas of Franklin County found defendant-appellant, Cornelius Allen, guilty of two felony offenses: (1) engaging in a pattern of corrupt activity, in violation of R.C. 2923.32 (a section of the Ohio Corrupt Practices Act ("OCPA"))[1], and (2) participating in a criminal gang, in violation of R.C. 2923.42. The trial court did not impose a sentence on the corrupt activity offense. Rather, the trial court sentenced appellant to four years' imprisonment on the criminal gang participation offense and ordered the sentence to run concurrently with

[1] The Ohio Corrupt Practices Act was modeled on the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") Section 1962, Title 18, U.S. Code. R.C. 2923.32(A)(1) has been denominated "Ohio's RICO statute." *State v. Schlosser*, 79 Ohio St.3d 329, 331 (1997).

a two-year sentence previously imposed on appellant in an unrelated case. For the reasons that follow, we affirm.

II. Facts

{¶ 2} On December 8, 2010, the Grand Jury of the Franklin County Court of Common Pleas issued an indictment alleging that 19 individuals, including appellant, had committed criminal offenses while employed by, or associated with, an enterprise known as the Short North Posse. The indictment charged appellant with three criminal counts. Count 1 alleged that appellant had, from May 20, 2009 to November 9, 2010, violated R.C. 2923.32, which forbids engaging in a pattern of corrupt activity. As predicate offenses for the charge, the indictment included: the criminal offenses of trafficking of marijuana, cocaine, and heroin; tampering with evidence; carrying a concealed weapon; and possession of crack cocaine. Count 2 alleged that appellant had, between January 1, 2006 to November 9, 2010, violated R.C. 2923.42, which forbids participation in a criminal gang. Count 3 charged appellant with selling cocaine in the vicinity of a school on June 4, 2009, in violation of R.C. 2925.01.

{¶ 3} Appellant was tried with two other co-defendants, and the jury returned verdicts finding appellant guilty of Counts 1 and 2, but not guilty as to Count 3—the cocaine trafficking charge. In its judgment entry, the trial court stated that "counts one and two merge for sentencing" and that the state had elected to proceed to sentencing only on the criminal gang offense.[2] (Nov. 29, 2011 Judgment Entry.) That is, despite the jury's verdict that appellant was guilty of the corrupt activity offense, the court did not impose a sentence for that offense. Rather, the trial court entered a judgment of conviction of appellant, including a sentence, only for the offense of criminal gang participation as described above.

{¶ 4} Appellant timely appealed, raising three assignments of error, as follows:

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[2] During the sentencing hearing, the trial court acknowledged an error in its jury instructions relative to the charge of engaging in a pattern of corrupt activity in violation of the OCPA. See the discussion in Section III of this decision. In this appeal, neither of the parties has argued any legal issues concerning the imposition of sentence on only one of the two offenses of which the jury found appellant guilty, and the record does not disclose the specific basis of the trial court's "merger" of the two offenses. We therefore express no opinion as to the propriety of the trial court's merging of the OCPA offense and the criminal gang participation offense for sentencing purposes, whether based on the allied offenses statute, R.C. 2941.25, the plain error doctrine, prosecutorial discretion, or otherwise.

ASSIGNMENT OF ERROR NO. 1:

IT WAS PLAIN ERROR FOR THE TRIAL COURT TO ENTER CONVICTIONS FOR ENGAGING IN A PATTERN OF CORRUPT ACTIVITY AND PARTICIPATING IN A CRIMINAL GANG WHERE THE CHARGE TO THE JURY INCLUDED [AN] INCORRECT STATEMENT THAT IMPROPER HANDLING OF A FIREARM COULD SUPPORT A CONVICTION FOR ENGAGING IN A PATTERN OF CORRUPT ACTIVITY THEREBY VIOLATING APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S CRIM.R. 29 MOTION FOR JUDGMENT OF ACQUITTAL AND THEREBY DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION BY ENTERING VERDICTS OF GUILTY, AS THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. Analysis

Alleged plain error in jury instructions—OCPA charge

{¶ 5} In instructing the jury on the offense of engaging in a pattern of corrupt activity, the trial court stated that, in appellant's case, " 'corrupt activity' means proof of trafficking in marijuana or cocaine or in heroin, carrying a concealed weapon, including a firearm, *or improperly handling a firearm in a motor vehicle*."[3] (Emphasis added.) (Tr.

[3] Quoted in full, the trial court instructed the jury as follows: " 'Corrupt Activity' means engaging in or attempting to engage in or conspiring to engage in or soliciting, coercing, or intimidating another person to

Vol. VII, 116.) The criminal offense of carrying a concealed weapon is codified in R.C. 2923.12. The criminal offense of improperly handling a firearm in a motor vehicle is codified at R.C. 2923.16.

{¶ 6} In charging appellant with a corrupt activity offense, the indictment alleged that appellant, while employed by or associated with the Short North Posse, conducted or participated in the affairs of that enterprise through a pattern of corrupt activity by engaging in, conspiring to engage in, attempting to engage in, or soliciting or coercing or intimidating another to engage in violations of law. The indictment then specified that the Short North Posse's alleged violations of law included trafficking in marijuana, cocaine, and heroin; tampering with evidence; and "carrying a concealed weapon as alleged in count 11" of the indictment. Count 11 charged that another indicted alleged member of the Short North Posse, William Jody Hawk, had a concealed loaded handgun ready at hand on April 22, 2010, in violation of the concealed weapon statute, R.C. 2923.12. Moreover, at appellant's trial, the state produced evidence that, on April 22, 2010, police discovered a loaded handgun in the glove box of an automobile Hawk was driving. But the indictment did not identify the offense of improperly handling a firearm in a motor vehicle as a predicate offense of the corrupt activity offense.

{¶ 7} In his first assignment of error, appellant alleges that it was plain error for the trial court to instruct the jury that improper handling of a firearm in a motor vehicle in violation of R.C. 2923.16 could serve as a predicate offense for the OCPA charge of engaging in a pattern of corrupt activity. The court's jury instructions indeed included that offense as a possible predicate offense for purposes of the corrupt activity charge. It is also true that R.C. 2923.31(I)[4] defines the term "corrupt activity" to include the violation of a number of specified criminal statutes, including R.C. 2923.12 (the concealed weapon statute). But the offense of improperly handling a firearm in a motor vehicle, as

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engage in criminal acts. Specifically in this case, corrupt activity means proof of trafficking in marijuana or cocaine or in heroin, carrying a concealed weapon, including a firearm, or improper handling a firearm in a motor vehicle so long as the proceeds or value of the contraband illegally possessed, sold, or purchased exceeded $500." (Tr. Vol. VII, at 116.)

[4] R.C. 2923.31(I) provides a lengthy definition of "corrupt activity," and references over 90 sections of the Ohio Revised Code, violations of which constitute corrupt activity. R.C. 2923.12, carrying a concealed weapon, is included in section R.C. 2923.31(I)(2)(a). R.C. 2923.16, the improper handling offense, however, is not includeded within the definition of corrupt activity in R.C. 2923.31(I).

proscribed by R.C. 2923.16, is not included in the list of criminal offenses specified in R.C. 2923.31(I), violation of which constitutes "corrupt activity." Appellant concludes that the trial court's instructions stated incorrectly that violation of the improper handling statute could serve as a predicate offense supporting an OCPA corrupt activity conviction. Appellant acknowledges that he did not object to the instruction but contends that the instruction constituted plain error and that he could not therefore be convicted of the corrupt activity charge.

{¶ 8} We need not, however, determine whether the court's instruction to the jury on the corrupt activity charge constituted plain error because appellant was not "convicted" of that offense. The law is clear that a conviction requires both a finding of guilt and a sentence. Crim.R. 32(C), defining a conviction, states: "A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, *and the sentence*. * * * The judge shall sign the judgment and the clerk shall enter it on the journal." (Emphasis added.) *See also State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12 ("[F]or purposes of R.C. 2941.25, a 'conviction' consists of a guilty verdict *and* the imposition of a sentence or penalty." (Emphasis sic.)).

{¶ 9} In this case, the trial court did not impose a sentence on the OCPA offense of engaging in a pattern of corrupt activity, even though the jury found him guilty of that offense, nor did the court sign a judgment of conviction of that offense, and the clerk did not enter such a conviction on the journal. We therefore reject the premise stated in appellant's first assignment of error that the trial court "entered a conviction" for the OCPA offense. There being no conviction on that offense, we reject appellant's argument that a conviction of that offense must be reversed.

Alleged plain error in jury instructions—criminal gang participation

{¶ 10} Appellant was, however, found guilty and sentenced on the criminal gang participation statute, and the trial court journalized both the finding of guilt and sentencing. Appellant was therefore "convicted" of the criminal gang participation offense charged in Count 2. In his first assignment of error, appellant further argues that the trial court erred in convicting appellant of Count 2 based on the trial court's instructional error as to the corrupt practices offense in Count 1, as discussed above. Appellant asserts that the error improperly prejudiced the jury in its consideration of

Count 2, the criminal gang participation charge. We reject appellant's argument for the reason that improper handling of a firearm in a motor vehicle is specifically included as a predicate offense for the crime of criminal gang participation.

{¶ 11} We begin by quoting, in part, the text of several of the relevant criminal gang statutes. R.C. 2923.42, of which appellant was convicted, proscribes participation in a criminal gang. It states:

> No person who [1] actively participates in a [2] criminal gang, [3] with knowledge that the criminal gang engages in or has engaged in a pattern of criminal gang activity, [4a] shall purposely promote, further, or assist any criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code, or [4b] shall purposely commit or engage in any act that constitutes criminal conduct, as defined in division (C) of section 2923.41 of the Revised Code.

{¶ 12} R.C. 2923.41(A) defines a "criminal gang" as:

> [A]n ongoing formal or informal organization, association, or group of three or more persons to which all of the following apply:
>
> (1) It has as one of its primary activities the commission of one or more of the offenses listed in division (B) of this section.
>
> (2) It has a common name or one or more common, identifying signs, symbols, or colors.
>
> (3) The persons in the organization, association, or group individually or collectively engage in or have engaged in a pattern of criminal gang activity.

{¶ 13} R.C. 2923.41(B) defines "pattern of criminal gang activity," as follows:

> (1) "Pattern of criminal gang activity" means, subject to division (B)(2) of this section, that persons in the criminal gang have committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of two or more of any of the following offenses:
>
> (a) A felony or an act committed by a juvenile that would be a felony if committed by an adult;

> (b) An offense of violence or an act committed by a juvenile that would be an offense of violence if committed by an adult;
>
> (c) A violation of section 2907.04, 2909.06, 2911.211 [2911.21.1], 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 or 2923.16 of the Revised Code, section 2925.03 of the Revised Code if the offense is trafficking in mari[j]uana, or section 2927.12 of the Revised Code.
>
> (2) There is a "pattern of criminal gang activity" if all of the following apply with respect to the offenses that are listed in division (B)(1)(a), (b), or (c) of this section and that persons in the criminal gang committed, attempted to commit, conspired to commit, were in complicity in committing, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in committing:
>
> (a) At least one of the two or more offenses is a felony.
>
> (b) At least one of those two or more offenses occurs on or after January 1, 1999.
>
> (c) The last of those two or more offenses occurs within five years after at least one of those offenses.
>
> (d) The two or more offenses are committed on separate occasions or by two or more persons.

{¶ 14} R.C. 2923.41(C) defines "criminal conduct" as follows:

> "Criminal conduct" means the commission of, an attempt to commit, a conspiracy to commit, complicity in the commission of, or solicitation, coercion, or intimidation of another to commit, attempt to commit, conspire to commit, or be in complicity in the commission of an offenses listed in division (B)(1)(a), (b), or (c) of this section * * *.

{¶ 15} Count 2 of the indictment charged that appellant had "actively participat[ed] in a criminal gang * * * with knowledge that the criminal gang engaged in or had engaged in a pattern of criminal gang activity, [and] did purposely promote, further, or assist and/or commit or engage in criminal conduct." The indictment named

the following as the predicate offenses satisfying the "criminal gang activity" element of the offense: trafficking of marijuana and cocaine; possession of cocaine; tampering with evidence; carrying a concealed weapon and/or improperly handling a firearm in a motor vehicle; having a weapon while under disability, aggravated robbery; and trafficking in heroin.

{¶ 16} We do find error in the trial court's charge on the criminal gang offense, although we find that error to be harmless. In instructing the jury on the offense of participating in a criminal gang in violation of R.C. 2923.42, the trial court stated that a criminal gang has as one of its primary activities the commission of "one or more criminal gang activity felony offenses" it would thereafter identify. It continued:

> A "pattern of criminal gang activity" means the persons in the criminal gang have * * * solicited, coerced or intimidated another to commit * * * two or more of any of the following offenses on separate occasions:
>
> (a) A felony;
>
> (b) An offense of violence;
>
> (c) A *felony violation* of Ohio law; to wit, trafficking in marijuana, heroin or cocaine, carrying a concealed weapon, including a firearm, *or improperly handling a firearm in a motor vehicle.*

(Emphasis added.) (Tr. Vol. VII, 119.)

{¶ 17} The trial court did not adhere to the text of R.C. 2923.41(B)(1) in instructing the jury that only *felony* conduct may serve as a predicate offense in determining whether a criminal gang has engaged in a pattern of criminal gang activity. Subsections (a) and (b) of R.C. 2923.41(B)(1) specify that any felony offense, as well as any offense of violence, may serve as a predicate offense supporting a finding of a pattern of criminal gang activity. But, R.C. 2923.41(B)(1)(c) identifies the following offenses as additional predicate offenses for purposes of the criminal gang participation statute:

> A violation of section 2907.04, 2909.06, 2911.211 [2911.21.1], 2917.04, 2919.23, or 2919.24 of the Revised Code, section 2921.04 *or 2923.16 of the Revised Code* [*i.e., improper handling of a firearm in a motor vehicle*], section 2925.03 of

> the Revised Code if the offense is trafficking in mari[j]uana, or section 2927.12 of the Revised Code.

(Emphasis added.)

{¶ 18} Our review of the statutory sections listed in subsection (c) of R.C. 2923.41(B)(1)[5] discloses that their violation may constitute either a felony offense or a misdemeanor offense, depending on the facts and circumstances. And R.C. 2923.41(B)(1)(c) does not require that violations of the listed statutes be *felony* violations to serve as predicate offenses for a criminal gang participation charge. In referencing in subsection (c), "violations of" the listed statutes, the General Assembly included *misdemeanor* violations of the listed statutes as well as *felony* violations. Indeed, if only felony violations of the enumerated offenses could serve as predicate offenses, subsection (c) would be duplicative of subsection (a), as subsection (a) provides that any felony violation may serve as a predicate offense.

{¶ 19} The trial court therefore erred in instructing the jury that only a *felony* violation of the improper handling of a firearm statute could serve as a predicate offense for finding that the Short North Posse engaged in a pattern of criminal gang activity. It is true that at least one predicate offense must be a felony in order for the state to establish a pattern of criminal gang activity. *See* R.C. 2923.41(B)(2)(a). But *misdemeanor violations* of the improper handling of a firearm statute, R.C. 2923.16, may qualify as predicate offenses for purposes of R.C. 2923.42, the criminal gang participation statute.

{¶ 20} The trial court's instructional error, however, can only be deemed harmless. The trial court's instruction made it more difficult for a jury to find appellant guilty of criminal gang participation—not less. Accordingly, the trial court's instruction helped rather than harmed appellant's cause.

{¶ 21} Moreover, we reject appellant's argument that the instructional error in including improper handling of a firearm as a potential predicate offense as to the OCPA corrupt activity charge "bled over" and prejudicially tainted the jury's consideration of the

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[5] The sections listed in R.C. 2923.41(B)(1)(c) as predicate offenses for a criminal gang participation charge prohibit the following conduct: unlawful sexual conduct with a minor (R.C. 2907.04); criminal damaging (R.C. 2909.06); aggravated trespass (R.C. 2911.211); failure to disperse (R.C. 2917.04); interference with custody (R.C. 2919.23); contributing to the delinquency or unruliness of a minor (R.C. 2919.24); intimidation of a witness, attorney or victim (R.C. 2921.04); improper handling of a firearm in a motor vehicle (R.C. 2923.16); trafficking in marijuana (R.C. 2925.03); and ethnic intimidation (R.C. 2927.12).

criminal gang participation charge. The argument fails because a violation of the improper handling of a firearm statute (R.C. 2923.16) is specifically included as a predicate offense for the criminal gang participation statute. R.C. 2943.41(B)(1)(c). Had the trial court omitted any reference to the improper handling offense in the corrupt practices charge, the court could still have referenced that alleged offense in instructing the jury on the criminal gang participation charge.

{¶ 22} Accordingly, the jury could properly find appellant guilty of the criminal gang participation charge if the jury found that appellant had actively participated in a criminal gang with knowledge that the gang engages in a pattern of criminal gang activity. The Short North Posse was a criminal gang if it met the criteria of R.C. 2923.41(A)(1), (2), and (3). To establish the criterion of R.C. 2923.41(A)(3), the state was required to show that members of the Short North Posse had engaged in a pattern of criminal gang activity, i.e., had "committed, attempted to commit, conspired to commit, been complicitors in the commission of, or solicited, coerced, or intimidated another to commit, attempt to commit, conspire to commit, or be in complicity in the commission" of two or more predicate offenses, i.e., felonies, offenses of violence, or violations of the statutory sections listed in R.C. 2923.41(B)(1)(c) (whether misdemeanors or felonies), including improper handling of a firearm in a motor vehicle and trafficking in heroin, cocaine or marijuana. It was, therefore, not improperly prejudicial for the trial court to reference in its instructions the improper handling of a firearm by Hawk, an alleged member of the Short North Posse. Rather, the trial court correctly instructed the jury that improper handling of a firearm could serve as a predicate offense in determining whether the Short North Posse had engaged in a pattern of criminal gang activity.

{¶ 23} We therefore overrule appellant's first assignment of error.

Denial of Crim.R. 29 motion for acquittal—criminal gang participation

{¶ 24} In his second assignment of error, appellant contends the trial court erred in denying his Crim.R. 29 motion for acquittal. We first address whether the trial court should have acquitted appellant of the criminal gang participation charge at the close of the state's case based on insufficiency of the state's evidence.

{¶ 25} A Crim.R. 29(A) motion for acquittal tests the sufficiency of the evidence. *State v. Reddy*, 10th Dist. No. 09AP-868, 2010-Ohio-3892, ¶ 12, citing *State v.*

Knipp, 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶ 11. Accordingly, in determining whether the trial court erred in denying appellant's Crim.R. 29 motion for acquittal, we apply the same standard applicable to a sufficiency of the evidence review. *Id*., citing *State v. Darrington*, 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶ 15.

{¶ 26} Our analysis is governed by well-developed law:

> Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. * * * Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. * * * In determining whether the evidence is legally sufficient to support a conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." * * * "A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact." * * *
>
> In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed, but whether, if believed, the evidence supports the conviction.

(Citations omitted.) *State v. Ingram*, 10th Dist. No. 11AP-1124, 2012-Ohio-4075, ¶ 18-19.

{¶ 27} In reviewing the sufficiency of the evidence, a court must not evaluate the credibility of witnesses but, rather, must assume that the state's witnesses testified truthfully and determine if that testimony satisfies each element of the crime. *Id.*, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80, and *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4.

{¶ 28} We turn to examination of the testimony offered by the state's witnesses to determine whether the state produced sufficient evidence to support a jury's finding of the existence of the elements of the crime of criminal gang participation as specified in R.C. 2923.42. Those elements are that: (1) a criminal gang existed (the "criminal gang" element); (2) in which the appellant actively participated (the "active gang participation" element; (3) with knowledge that the criminal gang engaged in, or had engaged in, a pattern of criminal gang activity (the "knowledge" element); and (4) appellant had either purposely promoted, furthered, or assisted any criminal conduct, as defined in R.C.

2923.41(C), or himself purposely committed or engaged in any act that constitutes criminal conduct, as "criminal conduct" is defined in R.C. 2923.41(C) (the "individual conduct" element). We address each of these elements separately.

Criminal gang element

{¶ 29} The first element of the crime of criminal gang participation in violation of R.C. 2923.42 is that a criminal gang existed.

{¶ 30} To be a "criminal gang," a group or organization must consist of three or more persons and have as one of its primary activities the commission of certain enumerated offenses, or predicate offenses, identified in R.C. 2923.41(B). *See* R.C. 2923.41(A) (quoted at ¶ 12 of this decision). The group must have a common name or one or more common, identifying signs, symbols or colors. R.C. 2923.41(A)(2). Finally, persons in the group must either individually or collectively engage in, or have engaged in the past, in a pattern of criminal gang activity. R.C. 2923.41(A)(3).

{¶ 31} The state called as a witness Sherman Brown, an individual who was charged in the same indictment as appellant, but who agreed to testify against appellant and others in exchange for a recommendation that criminal charges against him would be resolved in a manner agreeable to him. Prior to agreeing to testifying for the state in appellant's prosecution, Brown had been found guilty of involuntary manslaughter after having been charged with murder. In addition, Brown acknowledged that he had a criminal record and had sold illegal drugs over the years.

{¶ 32} Brown testified that he lived on North 4th Street, across the street from a neighborhood store, the D & J Carryout, which is located at the corner of 4th Street and 8th Avenue. Brown testified that he was aware there was a group in the area that identified itself as the Short North Posse based on the presence of graffiti on buildings and walls throughout the neighborhood and use of other signs and symbols by members of the group in their interactions with each other. He testified that he was aware of the Short North Posse as early as ten years before the trial but that he himself was not a member. He testified that appellant and other indicted individuals would exchange identified handshakes and hand signs associated with the Short North Posse, which he described as being a part of a nationwide organization known as the "Crips." Brown also testified as to the organizational structure of the Short North Posse, describing it as "basically like a

corporation that has smaller corporations. A major corporation, which is the umbrella corporation, with three small factions under it." (Tr. Vol. V, 234.)

{¶ 33} In addition, the state offered the testimony of multiple police officers, both officers who patrolled the area surrounding the intersection of 4th Street and 8th Avenue in the city of Columbus and officers assigned to the department's Strategic Response Bureau, which served as a centralized anti-gang unit of the Columbus police department and monitored gang-related activities.

{¶ 34} In general, the patrol officers testified that they had observed activities of individuals they concluded were members of the Short North Posse. They described observing the individuals making hand signs and engaging in stylized handshakes associated with Crips. They observed the individuals wearing blue clothing, considered to be a color associated with Crips. They testified that they had observed, and in some cases videotaped, the sale of drugs by those individuals; and that they had made numerous drug-related arrests in the area. They further described incidents in which individuals would approach suspected Short North Posse members, disappear for a short time, and later be apprehended and found to be in possession of drugs. Officers testified as to repeated arrests of individuals possessing drugs after observing them engaging in hand-to-hand transactions with individuals police had identified as being members of the Short North Posse.

{¶ 35} One officer testified that there was a "typical crew" of individuals in the area, that they wore "colors" and that they gave each other stylized handshakes, including hooking two fingers in a "C" configuration (for Crips). The state introduced photographs, taken from an internet social networking site, showing individuals known to frequent the 4th Street and 8th Avenue area holding up four fingers (for 4th Street). The police recognized this as a common hand sign made by individuals they believed to be members of the Short North Posse. Police obtained two of these photos from appellant's own Facebook page, and two other photographs showed Short North Posse members, including appellant, displaying fistfuls of cash. Other visual exhibits bore the words "SNP" and "Crip" and included images of the municipal street signs at 4th Street and 8th Avenue. Police testified that the presence of graffiti was a continuing problem in the area and that the graffiti bore symbols representing the Short North Posse, such as

representations of the light pole that bore the 4th Street and 8th Avenue signs and the words "4th Street" and "SNP."

{¶ 36} Brown's testimony and that of police officers further supports the conclusion that the Short North Posse engaged in a pattern of criminal gang activity. Brown stated that the individuals he observed on a daily basis at the carryout frequently sold drugs and that some of the purchasers were people to whom Brown himself had sold drugs. In addition, Brown stated that some of those purchasers had indicated to Brown, either before or after entering the apartments, that they wanted to obtain drugs.

{¶ 37} Another patrol officer testified that he had observed drug sales in the area of 4th Street and 8th Avenue so many times that he "couldn't even count the number," and that some drug sales occurred openly while others took place hidden from the public's view. (Tr. Vol. I, 99.) The state introduced videotapes of drug sale transactions committed by individuals they recognized as members of the Short North Posse.

{¶ 38} We are convinced that the testimony described above, as well as additional evidence, was sufficient to justify the conclusion that the Short North Posse was a criminal gang as defined in R.C. 2923.41. Moreover, appellant does not dispute that such a group existed, nor that it used common signs, symbols, and colors. Further, the evidence was compelling that a primary purpose of the group was to generate money through criminal activity. Accordingly, the state produced sufficient evidence to satisfy the first element of the crime of criminal gang participation—that a criminal gang existed. *Accord State v. Stewart*, 3d Dist. No. 13-08-18, 2009-Ohio-3411.

Active gang participation element

{¶ 39} The second element of the crime of criminal gang participation is that the accused himself actively participated in a criminal gang. To establish this element, the state was required to prove that appellant actively participated in the Short North Posse. This is consistent with established law that the criminal gang participation statute does not "punish nominal, inactive purely technical, or passive membership, even if such is accompanied by knowledge and intent." *State v. Williams*, 148 Ohio App.3d 473, 2002-Ohio-3777 (10th Dist.), ¶ 35.

{¶ 40} In this case, the state produced sufficient evidence to support the conclusion that appellant "actively participated" in the Short North Posse. Brown testified

that he had observed appellant engaging in drug transactions, and police officers testified that they had observed appellant directing potential drug purchasers to other gang members to facilitate drug sales. One officer testified that he had observed appellant on the corner of the intersection of 4th Street and 8th Avenue almost every day over a two-year period. Officers recounted conversations they had had with appellant in which appellant described himself as being a "five-star general," i.e., a high-ranking person in the organization, and acknowledging that younger men in the neighborhood "respected" him; that no one would "mess with" him in the neighborhood; and that younger men in the neighborhood knew that appellant "had their back." (Tr. Vol. V, 230.) On one occasion, appellant admitted to an officer that he was at that time "representing Crip" by wearing blue—the color associated with Crips. (Tr. Vol. V, 52.) Similarly, another police officer testified that appellant had admitted that he "had his boys to protect him" and that they would "take a bullet" for him. (Tr. Vol. IV, 136.) One police officer described appellant as giving the impression that appellant was "running the show" and "in charge of the drug trade out there." (Tr. Vol. II, 126.) The state produced evidence that appellant had regularly interacted with individuals who used the same signs and handshakes that appellant himself used. In addition to the testimony of police officers, Brown also testified that appellant was respected by the younger individuals in the neighborhood, who knew that appellant "had their back." (Tr. Vol. V, 230.)

{¶ 41} Accordingly, the state produced sufficient evidence to support the jury's conclusion that appellant had "actively participated" in the Short North Posse.

Knowledge of gang's pattern of criminal gang activity element

{¶ 42} The third element of the crime of criminal gang participation is that the accused knew that the gang, here the Short North Posse, engaged in a pattern of criminal gang activity. As discussed above, the state produced evidence that appellant had widespread involvement on a regular basis with other individuals who used the same signs, handshakes, and colors and had himself facilitated drug sales by those individuals. Both Brown and police officers regularly observed appellant at the 4th Street and 8th Avenue carryout location that multiple witnesses characterized as the primary location where drug transactions were arranged, facilitated or made. This evidence was sufficient

to support a finding that appellant was well aware that members of the Short North Posse were regularly selling drugs and committing other predicate criminal offenses.

Individual conduct element

{¶ 43} Finally, the state produced evidence to satisfy the final element of the crime of criminal gang participation, as provided in R.C. 2923.42(A), i.e., that appellant either "purposely promot[ed], further[ed] or assist[ed] in criminal conduct" or "engage[ed] in an act that constitutes criminal conduct." Although this court has not previously interpreted the phrase "purposely promot[ed], further[ed] or assist[ed] in criminal conduct," the Ninth District Court of Appeals has held that this element requires the equivalent of a finding that the individual was an aider or abettor to a crime committed by a fellow gang member. *State v. Stallings*, 150 Ohio App.3d 5, 12 (9th Dist.2002). A person "aids or abets another when he supports, assists, encourages, cooperates with, advises, or incites the other person in the commission of the crime and shares the other person's criminal intent." *State v. Hairston*, 9th Dist. No. 23663, 2008-Ohio-891, ¶ 19, citing *State v. Johnson*, 93 Ohio St.3d 240 (2001). *Accord State v. Peterson*, 10th Dist. No. 07AP-303, 2008-Ohio-2838, ¶ 81, et seq. (elements of the offense of criminal gang participation in violation of R.C. 2923.41(A) established through the testimony of a confidential informant who had been involved in past drug transactions, a former prosecutor, and a police detective assigned to the Strategic Response Bureau of the Columbus Police Department, who testified that he was very familiar with a particular gang and that the defendant was a member of the gang).

{¶ 44} Brown testified that he had observed appellant in the neighborhood on an everyday basis selling drugs, either alone or in concert with appellant's two co-defendants, or with other individuals named in the indictment. Brown further testified that he saw appellant on multiple occasions directing people to sell or give drugs to other people; that "[s]omebody would come up wanting something, and he directed them to somebody else," after which both would walk off together to go to another location, such as an apartment, and that appellant himself went in and out of those apartments. (Tr. Vol. VI, 8-9.) Similarly, a police officer testified that he observed appellant speaking with an individual "at the beginning of a drug transaction"; that the individual was thereafter stopped and found to be in possession of illegal drugs, and that the individual identified a man

matching appellant's description as having sold him the drugs. (Tr. Vol. V, 60.) The officer further testified that he observed appellant himself engaging in a drug transaction at the D & J Carryout.

{¶ 45} This evidence was sufficient to support a jury finding that appellant had himself either "purposely promot[ed], further[ed] or assist[ed] in criminal conduct" or "engage[ed] in an act that constitutes criminal conduct." Accordingly, the state produced evidence sufficient to satisfy the individual conduct element of the crime of criminal gang participation.

{¶ 46} We therefore find that, viewing the evidence described above in a light most favorable to the prosecution, the jury could rationally have found all of the essential elements of the crime of participation in a criminal gang proven beyond a reasonable doubt.

Denial of Crim.R. 29 motion for acquittal—OCPA charge

{¶ 47} Appellant similarly argues that the trial court should have granted his Crim.R. 29 motion for acquittal of the charge that he violated R.C. 2923.32(A)(1), the corrupt activity statute, which states that: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity * * *."

{¶ 48} We have previously observed that:

> R.C. 2923.31(E) defines "pattern of corrupt activity" as "two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." R.C. 2923.31(E) further states that "[u]nless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity." R.C. 2923.31(E) also requires that at least one of the incidents forming the pattern constitutes a felony.

State v. Silverman, 10th Dist. No. 05AP-837, 2006-Ohio-3826, ¶ 118.

{¶ 49} R.C. 2923.31(I) defines "corrupt activity," as "engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person

to engage in" any of a number of specifically identified criminal offenses, among which is R.C. 2925.03, which prohibits drug trafficking of controlled substances, including marijuana and cocaine. As discussed above, the state's witnesses produced sufficient evidence that members of the Short North Posse had engaged in illegal drug activity since at least 2006.

{¶ 50} Indeed, appellant does not argue that the state produced insufficient evidence that the Short North Posse was an enterprise whose affairs were conducted through a pattern of corrupt activity. Rather, he argues he was not "employed by, or associated with, any enterprise" and that the state provided insufficient evidence that he "conduct[ed] or participat[ed] in, the affairs of the enterprise." He argues that violation of R.C. 2923.32, like violation of the criminal gang participation statute, R.C. 2923.42, requires active participation in criminal activity and states that "the voluminous record in this case is void of any evidence Appellant committed a crime or helped facilitate anyone else in committing crimes." (Appellant's brief, at 13.) But, as previously discussed, we have found that the state did produce evidence sufficient to justify the jury in concluding that appellant had actively participated in the affairs of the Short North Posse as, at a minimum, an aider and abettor.

{¶ 51} We therefore overrule appellant's his second assignment of error, wherein he contended that the trial court erred in overruling appellant's Crim.R. 29 motion for judgment of acquittal of the OCPA corrupt activity charge.

Manifest weight of the evidence challenge to jury verdict

{¶ 52} Appellant further suggests that his conviction was contrary to the manifest weight of the evidence. We begin by considering the governing legal standards for a manifest-weight challenge:

> "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." * * * "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." * * * " 'The court, 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.' " * * * This discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " * * *

(Citations omitted.) *State v. McClendon*, 10th Dist. No. 11AP-354, 2011-Ohio-6235, ¶ 7.

{¶ 53} In light of the evidence discussed above, as well as the record in its entirety, and applying the standard stated above, we do not find that the jury clearly lost its way in resolving conflicts and assessing the credibility of witnesses and created a manifest miscarriage of justice in convicting appellant of violating R.C. 2923.42(A), the criminal gang participation statute. Similarly, we do not find that the jury lost its way or created a manifest miscarriage of justice in finding appellant guilty of the OCPA corrupt activity offense.

{¶ 54} We therefore overrule appellant's third assignment of error that appellant's conviction should be reversed as being against the manifest weight of the evidence.

IV. Conclusion

{¶ 55} For the foregoing reasons, all three of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
