[Cite as *State v. Olcese*, 2009-Ohio-5057.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0094**
- vs -	:	
L. PETER OLCESE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2005 CR 0062.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Erik M. Jones, 1700 West Market Street, #195, Akron, OH 44313-7002 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} The instant matter, submitted on the record and briefs of the parties, is before this court on appeal from the judgment entry of the Portage County Court of Common Pleas convicting appellant, L. Peter Olcese, on one count of aggravated theft of more than one million dollars, a felony of the first degree.

{¶2} Mr. Olcese considered himself the smartest guy in the room. Holding himself out as a successful financial planner with international business ties, John and Patricia Rohal sought his advice on the best way to invest over one million dollars they held in Davey Tree stock. Given their financial aims, Mr. Olcese first advised the

Rohals to liquidate their stocks and, through him, set up a foundation in Panama. Such an arrangement, Mr. Olcese observed, would provide them with certain, unnamed tax advantages. He then advised the Rohals to create a United States company through which they could exercise total control over the foundation's business. Mr. Olcese assured the Rohals that this model was legal, ethical, and would help them actualize financial goals they were unable to achieve before. Unfortunately, the Rohals accepted Mr. Olcese's invitation and, in doing so, unwittingly wandered into a Serbonian Bog.

{¶3} The evidence submitted at trial revealed that, after the necessary arrangements were made, Mr. Olcese alighted to Panama and, via "dummy" corporations and a mysterious shadow figure held out as the "Grant Administrator" of the foundation, he was able to plausibly misdirect the Rohals' queries and concerns regarding the status of their money for many years. Indeed, the denouement of Mr. Olcese's many intrigues revealed he masterminded, through unflinching temerity and expert prestidigitation, a near complete theft of the Rohals' considerable "nest egg," the great balance of which had not been conclusively traced at the time of trial. For the reasons herein, we now affirm Mr. Olcese's conviction.

{¶4} **Factual Background and Procedural Posture**

{¶5} Patricia Rohal's father, David Quincy Grove, was a founding member of the Davey Tree Expert Company, an employee-owned company. As a privately held company, Davey Tree's shareholders are either current employees or former employees who own stock via stock certificates. Upon Mr. Grove's death, the stock certificates he accumulated as an employee passed to his wife, Jean Grove, Patricia Rohal's mother. In 1985, upon Mrs. Grove's death, 77,520 common shares of Davey

Tree stock passed, via inheritance, to John and Patricia Rohal. The stock was ultimately valued at over $1,400,000.

{¶6} Throughout the late-1980s, into the 1990s, the Rohals received quarterly dividend checks from Davey Tree in the amount of $7,000 (two $3,500 checks made payable to each individual). However, the Rohals desired to utilize their stock in a manner that could benefit their children and grandchildren as well as give them the option of donating to charities if they so chose. They initially decided to establish a trust. However, for reasons unknown, the trust was never funded and was eventually abandoned. They subsequently discussed their wishes with Sergio Alvarez, their friend and owner of a local garage where the Rohals had their vehicles serviced. Mr. Alvarez indicated he had an associate, Mr. Olcese, who had some financial expertise. Upon Mr. Alvarez's recommendation, the Rohals contacted Mr. Olcese and set up a meeting.

{¶7} During late 1996 through early 1997, the Rohals developed a professional relationship with Mr. Olcese. Mr. Olcese frequently met the Rohals at their residence where they discussed their financial goals. He offered several financial plans on the best way to serve the Rohals' interests and achieve their goals. The Rohals regularly emphasized that whatever financial plan they pursued, they wanted it to be "on the up and up." Mr. Olcese assured them any plan he recommended would not involve anything "immoral or illegal." Given Mr. Olcese's demeanor and business insights, the Rohals believed he was competent, trustworthy, and well above reproach.

{¶8} Upon Mr. Olcese's specific advice, the Rohals eventually decided to liquidate their stocks, establish an off-shore foundation in Panama, and create a corporation in the United States to oversee the operations of the foundation. Pursuant

to their conversations with Mr. Olcese, the Rohal family would occupy seats as officers of the company and therefore have complete control and discretion over the operations of the foundation. In order to obtain funds from the foundation, Mr. Olcese explained that the Rohals would simply have to make a formal request for the funds to be released to the company. Once the company received the funds, the Rohals could utilize the funds as they wished. In honor of Patricia's father, the Rohals named the foundation "The David Quincy Grove Family Foundation" and the company was incorporated as the "D.Q.G. Consulting Services, Inc." The Rohals paid appellant $4,000 for his advice and assistance as well as the expenses he incurred traveling to create the foundation.

{¶9} The Rohals subsequently contacted Davey Tree about selling back their shares. They requested the stocks be liquidated and the money be donated to The David Quincy Grove Family Foundation. Davey Tree complied and, on June 20, 1997, it issued a check in the amount of $1,410,864 to The David Quincy Grove Family Foundation. The Rohals gave Mr. Olcese the authority to pick up the check from Davey Tree and deposit the check, on behalf of the foundation, into a bank account in Panama.

{¶10} Once the foundation was established, the Rohals instructed Mr. Olcese to create a system in which they would receive a default quarterly distribution of $7,000, as the Rohals did not want to make continuous formal requests from the foundation but desired a consistent cash flow from the foundation similar to the dividends they received prior to liquidating the stock. Although Mr. Olcese indicated he would make the necessary arrangements, the Rohals received nothing until November 19, 1998. On that date, they received a check in the amount of $1,450, money requested from the

foundation to pay for their granddaughter's orthodontia work. Although the check had an insignia on it which read "Banco Disa Republica De Panama," it was drawn on Chase Bank, New York, New York. Further, a cover letter which explained the purpose of the check was sent on stationary bearing the name "Alba Management International, S.A."[1] Neither the check nor the cover letter included a reference to the foundation. Furthermore, there were no actual signatures or names on the letter and, while the check included two "authorized signatures," they were illegible.

{¶11} Mr. Rohal testified that, from June 20, 1997 through November of 1998, he had requested Mr. Olcese to provide him with paperwork relating to the foundation, as well as the status of its accounts, e.g., a bank, an account number, a balance. He received no responses. On December 12, 1998, the Rohals arranged a meeting with Mr. Olcese at their home. Mr. Rohal and his son were present for the meeting, but Mrs. Rohal was unable to attend due to a prior commitment. The purpose of the meeting was to inquire as to why appellant had failed to provide the Rohals with any information regarding their money. The Rohals asked Mr. Olcese to provide any information or documentation he had relating to the Rohals' money, e.g., bank statements, receipts, disbursements, bookkeeping information, etc. Mr. Olcese arrived, however, with no records and offered no meaningful insight into the status of the foundation or its account(s). Mr. Rohal stated that if Mr. Olcese was unable or unwilling to provide the information, he intended to contact the police and file a report.

1. The foundation's charter indicated that "The Council of the Foundation shall be constituted by Alba Management International, S.A., a corporation with domicile in the city of Panama, Republic of Panama ***." Pursuant to the charter, the Council for the Foundation exercised all administrative control over the business workings of the foundation. At trial, Mr. Rohal testified he had never before seen the charter. He indicated, and the record reflects, that everything he reviewed relating to the foundation and company, he copied and dated and initialed. The copies of the charter submitted into evidence bore no dates or initials.

{¶12} After delivering the ultimatum, Sergio Alvarez, the Rohals' friend (and Mr. Olcese's former associate), arrived at the Rohal residence. At the sight of Alvarez, Mr. Olcese stood up and "bolted" toward the door. Mr. Rohal followed Mr. Olcese, still demanding answers and accountability. On his way out, Mr. Olcese announced that he refused to remain at the Rohal home and would answer no questions. Mr. Olcese entered his car and left leaving Mr. Rohal and his son looking on "in awe."

{¶13} On the heels of Mr. Olcese's abrupt flight, the Rohals contacted the Portage County Sheriff's Department. After Mr. Rohal explained their situation, the deputy merely instructed them to "tell [Mr. Olcese's] boss." No charges were filed against Mr. Olcese. In an unusual turn of events, however, Mr. Rohal was subsequently charged in the Portage County Municipal Court for allegedly assaulting Mr. Olcese. Mr. Rohal retained counsel and appeared to answer the charge. A date was set for trial, but the matter was dismissed for Mr. Olcese's failure to appear.

{¶14} On December 14, 1998, the Rohals wrote to Alba Management International, the "Council" of the foundation and the company apparently behind the issuance of the November check, regarding the status of the foundation and Mr. Olcese's role in administrating or overseeing the same. Their letter was addressed to one "Gustavo Chin, Grant Administrator," an individual Mr. Olcese had previously represented as an officer with whom the Rohals could communicate if they had questions relating to the administration of the foundation. The letter acknowledged that appellant had been "informally representing" them in matters relating to the foundation. However, the Rohals communicated their belief that Mr. Olcese no longer represented their best interests or the best interests of the foundation. The Rohals asked that Alba

Management, as an identifiable entity who played a role in issuing the November draft, to sever Mr. Olcese's ability to access "information or financial matters concerning the David Quincy Grove Family Foundation."

{¶15} The Rohals made additional attempts, through Gustavo Chin, to remove Mr. Olcese from any dealings relating to the foundation. They never received a reply from Mr. Chin and, in fact, at the time of trial, it was unclear whether he truly existed.

{¶16} On December 15, 1998, one day after the letter to Gustavo Chin was faxed, the Rohals received their first checks (totaling $7,000) which they believed were issued from the foundation pursuant to their original wishes. Similar to the November 1998 check, the checks bore the name of "Banco Disa" but were drawn on Chase Bank. Furthermore, these checks were accompanied by a cover letter written on stationary bearing the name "Consulting Board, Inc." According to the stationary, Consulting Board, Inc., was located in the same building as Alba Management International, i.e., World Trade Center, Panama. Further, the checks were sent via Federal Express in boxes bearing a return address to an additional company, "Sterling International Trustee, S.A." This company was *also* ostensibly operated out of the World Trade Center in Panama. The Rohals continued to receive these quarterly checks, drawn from banks in the United States, until March 17, 2001.

{¶17} In the meantime, on January 21, 1999, Mr. Olcese wrote the Rohals instructing them that he had been advised not to communicate with them via telephone due to the purported assault he suffered during the December 12, 1998 meeting. Mr. Olcese's letter concluded that he would only discuss matters with the Rohals by way of written correspondence. Mr. Olcese's letter was written on the corporate stationary of

yet another apparent entity: "The Company of Arosemena and Olcese, Ltd." The address of this company was exactly the same as the address used by Alba Management International, S.A.

{¶18} On March 2, 1999, the Rohals wrote Mr. Olcese in response to his January 21, 1999 letter. In this letter, they emphasized that they had "old questions that have never been answered properly by [Mr. Olcese]." They therefore requested somebody from Alba Management International or the foundation to contact them in order to handle their business "more professionally and promptly." After receiving no response, the Rohals again attempted to communicate with Mr. Olcese on May 27, 1999. The Rohals, through Mrs. Rohal, expressing frustration and some exasperation wrote:

{¶19} "On[] December 1, 1998, we received a letter from Alba Management, S.A., Foundation Council, signed by Mr. Gustavo Chin, Grant Administrator. Later[,] on December 14, 1998, we faxed him a memo with some inquir[i]es where we specifically asked him to acknowledge receiving the above-mentioned memo. Needles[s] to say, he never replied nor made it a point to contact us in any way. After dozens of unanswered phone messages to you, I finally received a l[e]tter signed by you, dated January 21, 1999, with a copy of the fax we sent to Mr. Chin attached. In this letter, you stated that[,] as a result of our correspondence to Mr. Chin, and some kind of incident which I frankly had no knowledge of, you had been advised not to communicate with me by telephone. However, I'm still puzzled as to how you obtained and used the private fax we sent to Mr. Chin. Why didn't Mr. Chin acknowledge our request? Furthermore, why haven't we been contacted by any representative[?]

{¶20} "*** It is with the hope that this time you will contact me or be so kind as to provide me with information on how to contact someone who can help in this situation. Any effort to do so would be expected and appreciated."

{¶21} On June 10, 1999, Mr. Olcese responded to Mrs. Rohal's letter. He first discussed the way in which a foundation functions, viz., a person or legal entity must submit an application to the foundation for a grant; once submitted, the foundation must decide whether to approve the funding of the grant. He observed that because no proposals for grants have been submitted, the foundation was, at that point, unable to act. He further indicated any such proposals or inquires should be sent to "the Foundation at the World Trade Center Panama, P.O. Box 832-0280, Panama City, Republic of Panama[,]" the same address as the "Consulting Board, Inc." (the company ostensibly controlling the issuance of the Rohals' quarterly distributions.) Mr. Olcese then explained that any questions about "Mr. Chin's actions or lack thereof must be answered by Mr. Chin."

{¶22} On August 27, 1999, the Rohals, through Mrs. Rohal, responded to Mr. Olcese's last correspondence. In part, Mrs. Rohal wrote:

{¶23} "*** I considered you a trustworthy and honest man. However, your inability to provide information and your evasive answers have proven to be incredibly frustrating not to mention detrimental to my health as well as the stability of my family.

{¶24} "***

{¶25} "*** In my files, I have several addresses which link to the same building. However, I repeatedly asked you [o]n various occasions to provide name/s, telephone and fax numbers and any other additional information relative to the Foundation in order

to establish a better line of communication, instead of such an impersonal 'To The Foundation' that you so kindly suggested. That specific information, needless to say, also was never received.

{¶26} "*** In your memo you stated: 'my understanding is that in calendar year 1999, to date, no applications or proposals for grants have been received by the Foundation.' May I ask to whom you refer *** in order to obtain the information that leads you to such an amazingly accurate understanding? If you would give me this person's name and telephone number, perhaps I would speak with him/her.

{¶27} "This kind of resource that you seem to have access to, and for some inexplicable reason, you've never disclosed to me. I don't think I am being unreasonable in my request, after all, it should've been rightfully delivered to me by now."

{¶28} Mrs. Rohal again requested Mr. Olcese to provide tangible records relating to the foundation and concluded with a proposal to meet with Mr. Olcese personally.

{¶29} On September 29, 1999, Mr. Olcese, designating himself "Dr. L. Peter Olcese" for the first time, responded to Patricia Rohal's August correspondence. In his letter, he declined to meet personally with Mrs. Rohal because his life had been previously threatened after he declined to participate in a fraud scheme allegedly devised by Mr. Rohal. He further explained that the building addresses were the same because that particular building was the location of the post office in Panama. In other words, he asserted "[t]he mail in Panama is not delivered as it is in the U.S. The mail is inserted into a mail box and someone must go to the post office to obtain the mail."

{¶30} The record indicates the Rohals made more attempts to communicate with appellant and/or the foundation, but never received a response. However, because they were still receiving the $7,000 distribution payments, they were basically confident the foundation was operating. On February 11, 2001, the Rohals, through D.Q.G. Consulting Services, Inc., directed the Consulting Board to double the quarterly payments to $14,000. The Rohals did not receive a response. However, on March 17, 2001, the quarterly payment they received was still $7,000. This payment was the last distribution the Rohals received.

{¶31} In July of 2001, after the Rohals did not receive their quarterly payment, they contacted the FBI. The FBI eventually referred the investigation to Portage County authorities. Although they diligently continued their attempts to contact Mr. Olcese as well as various other entities with which they were familiar, they were unable to reach anybody. In fact, many of the fax and/or phone numbers the Rohals possessed relating to the foundation were disconnected.

{¶32} After a lengthy investigation, the Portage County Grand Jury indicted Mr. Olcese on aggravated theft, in violation of R.C. 2913.02, a felony of the first degree. The grand jury supplemented the indictment with charges of theft, in violation of R.C. 2913.02, a felony of the fifth degree, and engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, a felony of the first degree. Mr. Olcese entered a plea of not guilty to the charges and moved the court to dismiss the indictment on three bases: (1) improper venue; (2) a speedy trial violation; and (3) a violation of relevant statutes of limitations. The motions were overruled and the matter proceeded to a bench trial. After receiving all evidence, Mr. Olcese was convicted of aggravated theft; he was

acquitted of the charge of theft; and the charge of engaging in a pattern of corrupt activity was dismissed for defects in the indictment. Mr. Olcese was subsequently sentenced to a term of five years imprisonment. Mr. Olcese appeals his conviction and proposes five assignments of error for our review.

{¶33} **Sufficiency of the Evidence**

{¶34} Mr. Olcese's first assigned error asserts:

{¶35} "The appellant's conviction is not supported by sufficient evidence."

{¶36} Evidential sufficiency invokes an inquiry into due process, and examines whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13. "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶37} Mr. Olcese was convicted of aggravated theft, in violation of R.C. 2913.02. The indictment charged him in the alternative under subsections (A)(2) and (3), which read:

{¶38} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: ***

{¶39} "***

{¶40} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

{¶41} "(3) By deception;"

{¶42} The statute sets forth a facially clear definition of the prohibited conduct. However, the definition of aggravated theft, like many statutory crimes, is built upon a careful tessellation of words, many of which possess their own specific meanings within the code. Therefore, in order to properly address Mr. Olcese's sufficiency challenge, we must further "unpack" the statute by setting forth the legal meaning of the terms which possess a codified definition.

{¶43} **"Purposely" and "Knowingly"**

{¶44} With respect to culpable mental states, the state was required to prove, beyond a reasonable doubt, Mr. Olcese acted "purposely" as well as "knowingly." Pursuant to R.C. 2901.22:

{¶45} "(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

{¶46} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain

nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶47} **To "Deprive"**

{¶48} Under R.C. 2913.01(C), "deprive" means any of the following:

{¶49} "(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

{¶50} "(2) Dispose of property so as to make it unlikely that the owner will recover it;

{¶51} "(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration."

{¶52} **The "Owner" and "Property"**

{¶53} Owner is defined as "*** any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful." R.C. 2913.01(D). Further, "property" is defined, in relevant part, as "*** any property, real or personal, tangible or intangible, and any interest or license in that property." R.C. 2901.01(A)(10)(a). It includes, but is not limited to "*** checks, drafts, warrants, money orders, notes of indebtedness, certificates of deposit, letters of credit, bills of credit or debit cards, financial transaction authorization mechanisms, marketable securities, ***." Id.

{¶54} **"Deception"**

{¶55} Finally, "deception" means:

{¶56} "*** [K]nowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact." R.C. 2913.01(A).

{¶57} Because the General Assembly is not required to define each word used in a statute, those words not defined by law are "accorded [their] common, everyday meaning." *State v. Dorso* (1983), 4 Ohio St.3d 60, 62.

{¶58} With these points in mind, Mr. Olcese argues the state offered no evidence to prove he ever obtained or exerted control over the victims' property beyond any express or implied consent, or by deception. Mr. Olcese contends that the Rohals were not "owners" of the liquidated proceeds from the stock at the time it was allegedly stolen, i.e., prior to their sale, the stocks were donated to the foundation and the proceeds from the sale were issued to the foundation. Consequently, Mr. Olcese maintains, the record is devoid of any evidence that he exerted control over the Rohals' property beyond their consent or by deception. We disagree.

{¶59} We first point out that "R.C. 2913.02 and the definitional statute, R.C. 2913.01(D) must be read *in pari materia*." (Emphasis sic.) *State v. Rhodes* (1982), 2 Ohio St.3d 74, 76. As indicated above, R.C. 2913.01(D) defines an "owner" as one who possesses "*** control of, or who has any license or interest in property or services ***." Thus, for the purpose of proving ownership under the theft statute, the state need not

prove "title ownership in a specific person other than the defendant." *Rhodes*, supra, at 76. Rather, to meet its burden of production, the state must simply prove that "a defendant deprived someone of property who had 'possession or control of, or any license or any interest in' that property." Id. Accordingly, "'[i]t is *** the *defendant's* *** relationship to the property which is controlling. The important question is not whether the person from whom the property is stolen was the actual owner, but rather whether the defendant had any lawful right to possession.'" (Emphasis added.) *State v. Grayson,* 11th Dist. No. 2006-L-153, 2007-Ohio-1772, at ¶26, quoting *Rhodes,* supra.

{¶60} The evidence demonstrated that the Rohals authorized the donation (and subsequent liquidation) of their Davey Tree stocks to the foundation, an entity over which they were led to believe they had *total* control. We recognize that the Rohals were factually unable to exercise any meaningful control over the administration of the foundation and its substantial funds. However, the evidence demonstrated that their inability to exercise the control they believed they possessed was occasioned by Mr. Olcese's various actions and omissions. Regardless of actual control, it is beyond cavil that the Rohals had an interest in the property at issue. Given the record, the state submitted sufficient evidence to prove, beyond a reasonable doubt, the Rohals had control of or, at the very least, an interest in the property at issue and Mr. Olcese had no lawful right to possess that property.

{¶61} Further, the state put forth evidence that Mr. Olcese advised the Rohals to create an off-shore foundation into which they should direct their considerable, new-found wealth. Mr. Olcese represented he could establish the foundation and recommended Panama as a location due to certain economic advantages the Rohals

might reap. Mr. Olcese further advised the Rohals they should establish a corporation, in which they would occupy seats as officers, to control the manner in which the foundation utilized the money. The Rohals agreed, donated their stock to the foundation, liquidated the stock, and gave Mr. Olcese the authority to deposit the check into a bank in Panama on the foundation's behalf.

{¶62} Mr. Olcese ostensibly deposited the money, but regularly refused to provide the Rohals with any information on the status of the foundation, its finances, account(s), or administration. The evidence demonstrated the Rohals regularly sought documentation, such as withdrawals, deposit receipts, and other such accounting information, but their requests were regularly ignored or deflected. Even when appellant would dignify the Rohals' questions, his answers were *always* circular or evasive.

{¶63} The evidence further indicates that when Mr. Olcese set up the foundation, he placed managerial control in Alba Management International, S.A, in total contravention of the Rohals' express directive. Moreover, according to the record, Alba Management had an agent by the name of Gustavo Chin. Mr. Chin was designated as the "Grant Administrator." Although Mr. Olcese acted as though he had no contact with the so-called Mr. Chin, he regularly referenced faxes sent by the Rohals to Mr. Chin in his responses to Mrs. Rohal's various letters. The state was unable to locate Mr. Chin and no one ever met him. Given the evidence adduced at trial, it appears Gustavo Chin was an alias created by Mr. Olcese to deflect his accountability.

{¶64} This inference is bolstered by other aspects of the record. The most striking evidence was the authority Mr. Olcese wielded over Alba Management itself. At

some point after Mr. Olcese and the Rohals began their business relationship, Mr. Olcese was given power of attorney over Alba Management International, S.A. The powers he possessed were sweeping, giving him carte blanche to act on the company's behalf in an executive or administrative capacity with respect to, inter alia, its assets, properties, finances, and business dealings. To the extent Mr. Olcese had such authority to act, all additional company operatives would have been inconsequential.

{¶65} Ignoring for a moment the evidence that Chin, Alba Management, and Olcese had no meaningful, separate identity, an additional inculpatory inference can be drawn from the foregoing; namely, that the foundation itself, controlled by Alba Management (qua Mr. Olcese) was also another "alter ego" of Mr. Olcese. In essence, the circumstantial evidence supports the conclusion that Mr. Olcese had actual control over *all* major entities in this case.

{¶66} With this in mind, we underscore that the record is devoid of any evidence that the Rohals agreed to cede or relinquish control of the foundation (or its assets). To the contrary, through the creation of the corporation, they expected to remain in *direct control*. Mr. Olcese led them to believe their expectations would be fulfilled. However, once the check from Davey Tree was in his hands, the Rohals were completely divested, through Mr. Olcese's deceptive and overreaching conduct, of any ability to control the foundation or its money.

{¶67} The evidence, viewed in a light most favorable to the prosecution, demonstrated that Mr. Olcese specifically intended to withhold the assets at issue, with the awareness that he was exerting control over the assets and the control he exercised was completely beyond the express as well as implied consent of the Rohals. See R.C.

2913.02(A)(2). Not only was the evidence sufficient to prove Mr. Olcese lacked the authority to act as he did, it also demonstrated Mr. Olcese regularly utilized deceptive practices, i.e., he used misleading tactics to creating false impressions to achieve his goals. See R.C. 2913.02(A)(3). Under either statutory subsection, the evidence was sufficient to prove aggravated theft beyond a reasonable doubt.

{¶68} Mr. Olcese's first assignment of error is overruled.

{¶69} **Manifest Weight of the Evidence**

{¶70} Mr. Olcese's second assignment of error alleges:

{¶71} "The appellant's conviction is against the manifest weight of the evidence."

{¶72} While a test of evidential sufficiency requires a determination of whether the state has met its burden of production, a manifest weight inquiry analyzes whether the state met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring). That is, a manifest weight challenge concerns:

{¶73} "'[T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) Id. at 387, citing Black's Law Dictionary (6th Ed. 1990).

{¶74} Mr. Olcese first argues his conviction rests upon the state's position that every entity associated with the foundation was an alter ego of Mr. Olcese utilized for no other purpose than separating the Rohals from the foundation and its property. Mr.

Olcese contends, however, the state only demonstrated that each entity (Alba Management International, S.A., The Consulting Board, The Company of Arosemena and Olcese, Ltd., and Sterling International Trustee, S.A.) had offices in the same building in Panama City and Mr. Olcese was affiliated with only Alba. In Mr. Olcese's view, the state's evidence in this regard is entitled to little if any weight.

{¶75} Mr. Olcese's construction of the evidence is highly selective. Not only did the evidence show these entities were in the same building, it also demonstrated that Alba and Arosemena and Olcese had the *exact same* office address. The evidence also revealed that Mr. Olcese had the authority to exercise supreme authority over Alba Management (the so-called "Council" for the foundation) through an exceptionally broad power of attorney. Further, in his letter to Mrs. Rohal on June 10, 1999, Mr. Olcese provided an address the Rohals could use to contact the foundation; this address was the *exact same* address as that ascribed to The Consulting Board. Mr. Olcese was therefore obviously aware of and somehow connected to Arosemena and Olcese, The Consulting Board, and, most importantly, Alba Management. This evidence is not insignificant and, when viewed together with the remaining evidence, a very strong circumstantial case exists to support the state's theory.

{¶76} Next, Mr. Olcese argues the evidence, viewed objectively, reveals he merely acted pursuant to the actual authority bestowed upon him by the Rohals. He set up the foundation and the company. He deposited the check in a Panamanian bank on behalf of the foundation and no evidence was submitted to show he removed or withdrew any money over which the Rohals possessed control. Mr. Olcese's

construction whitewashes the evidence and displays the same dazzling effrontery as his criminal scheme.

{¶77} The greater weight of credible evidence demonstrated the assets the Rohals transferred to the foundation were sequestered to a foreign country and ostensibly deposited in a Panamanian bank. Mr. Olcese created a false business tableau which allowed him to have direct access to the assets without the Rohals' awareness or consent. Over one year passed before the Rohals received any distribution from the foundation. When the distributions finally began, the checks the Rohals received bore the imprimatur of "Banco Disa" (the Panamanian bank into which the Rohals were led to believe the funds were originally deposited); however, the checks were drawn on accounts from banks in the United States strongly suggesting Mr. Olcese had, at some point, re-channeled the foundation's money to assist him in the theft. Mr. Olcese ignored or evaded regular and repeated requests from the Rohals relating to the financial status and administration of the foundation. Mr. Olcese avoided disclosing any accounting of the foundation and even set up a straw man, one Gustavo Chin, as a liaison between the Rohals and the foundation to deflect the Rohals' questions and his own accountability.

{¶78} Moreover, the lack of any evidence that Mr. Olcese removed funds from the foundation's account is not surprising. Mr. Rohal testified and multiple exhibits were submitted which indicated any attempt at obtaining direct contact information for the bank, an account number, account details, or any summary of the financial transactions was either met with aggressive resistance or completely stonewalled. Documentation relating to the foundation's financial activity did not exist and the evidence indicated Mr.

Olcese was primary engineer of such a noteworthy absence. Because evidence of the foundation's account activity would have likely been damaging to Mr. Olcese, the lack of such evidence does not affect the state's case.

{¶79} Finally, we reemphasize that Mr. Olcese established the foundation after convincing the Rohals that such a vehicle would help them realize their financial goals. By way of its charter, however, Mr. Olcese, as plenipotentiary of Alba Management, had total, actual control of the foundation and its resources. Given the sequence of events, the role Mr. Olcese played in managing the Rohals' "financial plan," and Mr. Olcese's persistent obscurantism regarding the status of the foundation, the greater weight of circumstantial evidence indicates the foundation, itself, was nothing more than an additional alter ego of Mr. Olcese.

{¶80} The evidence offered at trial, viewed as a whole, circumstantially proved beyond a reasonable doubt that Mr. Olcese was the transparent signifier for various off-shore companies which he used to execute and complete a large-scale theft. We therefore conclude the evidence in this case does not weigh heavily against the conviction nor can we hold the trial court clearly lost its way.

{¶81} Mr. Olcese's second assignment of error lacks merit.

{¶82} **Venue**

{¶83} For his third assignment of error, Mr. Olcese argues:

{¶84} "The trial court erred by denying the appellant's motion to dismiss for improper venue where the record reveals that no element of the alleged offense took place in Portage County, Ohio."

{¶85} An appellate court reviews a trial court's judgment relating to a motion to dismiss de novo. *State v. Palivoda* (Dec. 8, 2006), 11th Dist. No. 2006-A-0019, 2006-Ohio-6494, at ¶4.

{¶86} R.C. 2901.12, Ohio's criminal venue statute, provides, in relevant part:

{¶87} "(A) The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed."

{¶88} "Venue is neither a jurisdictional matter nor a material element of a criminal charge." *State v. Cunningham,* 11th Dist. No. 2007-L-034, 2008-Ohio-1127, at ¶43. Nevertheless, it is a personal privilege which the state must prove beyond a reasonable doubt unless waived by the accused. Id., citing *State v. McCartney* (1988), 55 Ohio App.3d 170. As long as it is clear from the facts and circumstances of the case, venue need not be proved by express terms. *Cunningham,* supra.

{¶89} During Mr. Rohal's direct examination, he testified that all meetings with Mr. Olcese regarding their financial planning occurred at the Rohals' home in Portage County. Mr. Rohal made it clear to Mr. Olcese that he and his wife desired to exercise control over the foundation and its considerable resources. Mr. Olcese recognized this and caused the Rohals to believe their expectations would be met. However, once Mr. Olcese absconded to Panama with the $1,410,864 check the Rohals lost all control of the money and were inexplicably unable to have any meaningful contact (let alone control over) the foundation.

{¶90} Furthermore, on April 28, 1997, some two months before the Davey Tree check was issued, Mr. Olcese set up the foundation via a formal deed or charter. Mr.

Rohal denied ever viewing this document prior to trial. Two different versions of the charter were placed in evidence, one written in English and one written in Spanish. Although the documents purported to accomplish the same goal, i.e., set up the foundation, the Spanish version had two pages that were not included in the English version. The lengthier Spanish version spelled out in detail that Alba Management International, S.A., an anonymous corporation, would act as the founder of the foundation. Both the English version as well as the Spanish version indicated not only would Alba Management act as founder, but would also constitute "Council of the Foundation." The charters indicate, inter alia, that the "Council of the Foundation is the highest body of the Foundation"; "The Council *** is in charge of the administration and representation of the Foundation, in an unlimited manner, ***"; "The Council *** is empowered to exercise the right to sign on behalf of the Foundation and shall not have to justify before third parties its capacity to order and to dispose ***"; "Shall the Council *** be comprised of one member, said member shall make decisions and shall issue resolutions by himself/herself ***."

{¶91} During their various meetings in Portage County, many of which occurred *after* the charter was filed, Mr. Olcese never gave the Rohals any impression that Alba Management International, S.A., a company over which he wielded considerable if not entire control, would hold complete managerial control over the foundation. Moreover, prior to establishing the foundation, at a meeting in their residence, the Rohals gave Mr. Olcese a specific directive that they, via the corporation, desired to have control over the acts of the foundation (allowing them to retain control over their money). Nevertheless, Mr. Olcese ignored this directive and never disclosed his actions at

subsequent meetings. In doing so, Mr. Olcese transcended the specific authority bestowed upon him by the Rohals and engaged in misleading and deceptive practices. This evidence is adequate to prove that Mr. Olcese, at the least, engaged in deceptive behavior in Portage County in an effort to complete his scheme. Venue in Portage County was therefore proper.

{¶92} Mr. Olcese's third assignment of error is overruled.

{¶93} **Statute of Limitations**

{¶94} Mr. Olcese's fourth assignment of error asserts:

{¶95} "The trial court erred by failing to grant appellant's motion to dismiss the aggravated theft charge, filed beyond the expiration date of the applicable statute of limitations."

{¶96} R.C. 2901.13(A)(1)(a) provides that a criminal prosecution for a felony must commence no more than six years after the commission of the offense. However, "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered." R.C. 2901.13(F). "The *corpus delicti* of a crime is the body or substance of the crime, included in which are usually two elements: (1) the act and (2) the criminal agency of the act." (Emphasis sic.) *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph one of the syllabus.

{¶97} The record indicates that the Rohals were "displeased" with Mr. Olcese's failure to provide a meaningful flow of information regarding the status of the foundation as early as December of 1998. In fact, during their December 12, 1998 meeting, Mr. Rohal threatened to contact the authorities if Mr. Olcese did not provide the Rohals with the information they had requested. However, immediately after that meeting, the

Rohals began receiving distribution checks which predictably and continuously arrived on time until March of 2001. The consistency and regularity of these payments over a period of years maintained a reasonable, although perhaps minimal, appearance of validity. Irrespective of the Rohals' displeasure with Mr. Olcese and the seeming lack of transparency of his business practices, we cannot conclude they were aware or should have been on notice, of the criminal nature of Mr. Olcese's actions. For purposes of measuring the corpus delicti, therefore, Mr. Olcese's criminal enterprise was clearly manifest when the distribution checks stopped.

{¶98} In February of 2001, the Rohals attempted to increase their distributions. They followed the prescribed procedure for doing so. When they received their March 17, 2001 distribution, however, the amount had not increased. As it turns out, this distribution proved to be their last. When the Rohals did not receive their quarterly checks in July of 2001, Mr. Rohal knew then that something was seriously amiss and contacted the authorities. We believe it is reasonable and proper to measure the corpus delicti of Mr. Olcese's theft from this point. Because Mr. Olcese was indicted on February 25, 2005, we hold his charge was well within the applicable six year statute of limitations.

{¶99} Mr. Olcese's fourth assignment of error is overruled.

{¶100} **Speedy Trial**

{¶101} For his final assignment of error, Mr. Olcese charges:

{¶102} "The trial court erred by denying the appellant's motion to dismiss when the record reveals that more than ninety days had passed between the appellant's initial incarceration and the day that the trial began."

{¶103} The right to a speedy trial finds its roots in both the Ohio and United States Constitutions. "[T]his constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: '[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself.'" (footnote omitted) *Smith v. Hooey* (1969), 393 U.S. 374, 377-378, quoting, *United States v. Ewell* (1965), 383 U.S. 116, 120. Ohio's criminal code sets forth specific requirements to which the state must adhere to avoid violating a defendant's right to a speedy trial. In particular, R.C. 2945.71 provides, in relevant part:

{¶104} "(C) A person against whom a charge of felony is pending:

{¶105} "***

{¶106} "(2) Shall be brought to trial within two hundred seventy days after the person's arrest. ***

{¶107} "***

{¶108} "(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. ***"

{¶109} Certain situations may toll the running of the statutory time. Germane to this case is R.C. 2945.72, which provides in pertinent part:

{¶110} "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

{¶111} "(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;"

{¶112} When an appellant asserts his right to a speedy trial has been violated, an appellate court must "count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71." *State v. Blumensaadt,* 11th Dist. No. 2000-L-107, 2001-Ohio-4317, 2001 Ohio App. LEXIS 4-283, *17. With this procedure in mind, it is necessary to point out that the tolling provisions under R.C. 2945.72 are to be strictly construed against the state. *State v. Singer* (1977), 50 Ohio St.2d 103, 109.

{¶113} At the motion hearing, the following stipulations were entered into evidence: (1) Mr. Olcese was arrested in Georgia on May 18, 2008; (2) he waived extradition on May 19, 2008; (3) on May 20, 2008, notice of Mr. Olcese's waiver was sent to the Portage County Sheriff's Office; (4) Mr. Olcese was returned to Ohio and served with the indictment on June 3, 2008; and (5) Mr. Olcese was arraigned on June 5, 2008.

{¶114} Mr. Olcese was incarcerated from the date of his arrest through the date of his trial. He consequently argues he was denied his right to a speedy trial because his trial commenced 102 days after his arrest, 12 days outside the statutory window.[2]

2. Pursuant to statute, Mr. Olcese's trial commenced 101 days after his arrest. The day of arrest is not counted against the state as speedy trial is measured "two hundred seventy days *after the* person's arrest." R.C. 2945.71(C)(2).

Mr. Olcese's calculations fail to acknowledge the interplay between R.C. 2945.71(C) and R.C. 2945.72(A).

{¶115} In extradition cases, R.C. 2945.72(A) expressly tolls the speedy trial clock where a defendant challenges his or her extradition. In a case such as the matter sub judice, where a defendant is incarcerated in another state and waives extradition, the speedy trial clock is also tolled as the "accused is unavailable for hearing or trial[.]" See *State v. Adkins* (1982), 4 Ohio App.3d 231, 232 (holding where a defendant is arrested in another state, waives extradition, and is transported to Ohio, the speedy trial requirements of R.C. 2945.71, et seq., toll until the defendant is in Ohio and arrested under an Ohio charge); see, also, *State v. Ash* (Sept. 3, 1998), 8th Dist. No. 73344, 1998 Ohio App. LEXIS 4093, *12; *State v. Bass,* 5th Dist. No. 1995 CA 00347, 1997 Ohio App. LEXIS 1006, *5-*6.

{¶116} Of course, tolling under circumstances such as these is not absolute. Rather, it is triggered only if the prosecution exercises reasonable diligence in securing the defendant's availability. See R.C. 2945.71(A). We hold the prosecution in this case met this standard. Portage County received notice that Mr. Olcese was available to be returned on May 20, 2008. Mr. Olcese was subsequently retrieved and transported to Ohio on June 3, 2008. Mr. Olcese therefore experienced a 13-day delay. Given the requisitions that would be necessary to transport him from Georgia to Ohio, we hold the 13-day delay was reasonable and does not indicate a lack of diligence on behalf of the state.

{¶117} Accordingly, the speedy trial clock tolled until June 3, 2008. As Mr. Olcese's trial commenced on August 29, 2008, it began 88 days after his arrival in Ohio,

within the 90-day statutory window. For these reasons, we hold Mr. Olcese suffered no violation of his right to a speedy trial.

{¶118} Mr. Olcese's final assignment of error is overruled.

{¶119} Pursuant to this opinion, Mr. Olcese's five assignments of error are overruled and the judgment of the Portage County Court of Common Pleas is hereby affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶120} I respectfully dissent.

{¶121} With respect to appellant's fourth assignment of error, the majority contends that it is reasonable and proper to measure the corpus delicti of the theft from July of 2001, when the Rohal's did not receive their quarterly checks. I disagree.

{¶122} R.C. 2901.13(A)(1)(a) provides: "[e]xcept as provided in division (A)(2) or (3) of this section or as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed: *** [f]or a felony, six years[.]"

{¶123} R.C. 2901.13(F) states: "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered."

{¶124} In the instant matter, appellant maintains that he is not guilty of any theft. However, if he could have committed a theft offense against the Rohals, he could have only done so during a very brief period of time between June and the end of July of 1997. The record establishes that during that time period, the Rohals wrote to Davey Tree requesting that their stock in the company be donated to the Foundation; the Rohals' stock was transferred into the name of the Foundation; Davey Tree redeemed the stock; and Davey Tree issued a check payable to the Foundation. Appellant, holding powers of attorney granted by the Rohals and Alba Management, took possession of the check and deposited it into the Foundation's account with Banco Disa on July 28, 1997.

{¶125} During the hearing on appellant's motion to dismiss, Mr. Rohal testified that he told appellant, when the two met on December 12, 1998, that he was going to contact the FBI. Thus, I agree with appellant that December 12, 1998 was the latest possible time for the statute of limitations clock to begin running. See R.C. 2901.13(F). The Rohals were self-admittedly aware of alleged wrongdoing by expressly stating that they would contact federal law enforcement authorities.

{¶126} Thus, this writer believes that with the statute of limitations period beginning on December 12, 1998, the time for filing charges within six years was exceeded by the time of the February 25, 2005 indictment. I believe that the trial court erred by denying appellant's motion to dismiss for a violation of the statute of limitations.

{¶127} Based on the foregoing, I dissent.