[Cite as *State v. Sexton*, 2015-Ohio-934.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 14-13-25**

v.

JOHNNIE LEE SEXTON,
AKA JOHNNIE L. SEXTON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Union County Common Pleas Court
Trial Court No. 12-CR-0181

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Alison Boggs **for Appellant**

Melissa A. Chase **for Appellee**

WILLAMOWSKI, J.

{¶1} Defendant-appellant, Johnnie Lee Sexton ("Sexton"), brings this appeal from the judgment of the Common Pleas Court of Union County, Ohio, which entered his conviction after a jury found him guilty of theft, safecracking, and burglary, and sentenced him to two consecutive prison terms of seven years and seventeen months upon a finding that theft and burglary were allied offenses of similar import, subject to merger, and the State's election that Sexton be sentenced on the burglary count. Sexton challenges his convictions on the grounds of the sufficiency and manifest weight of the evidence. He further alleges that at sentencing, the trial court erroneously relied on inaccurate information in the presentence investigation report. Additionally, Sexton argues that his trial counsel was ineffective. For the reasons that follow, we affirm the trial court's judgment.

A. Statement of Facts and Procedural History

{¶2} Sexton was an employee of MJR International, Inc. ("MJR"), which is a discount clothing business, involved in warehouse retail, pop-up sales, and wholesale. The business was located in a large building, which consisted of three main areas. In one part of the building, MJR operated a retail store, which was open Tuesday through Saturday from 9:00 a.m. until 7 p.m. By the retail store, were MJR's business offices. The remainder of the building was occupied by the

warehouse operations. Sexton was the manager of the warehouse and worked Monday through Friday, between the hours of 8:00 a.m. and 5:00 p.m.

{¶3} On the evening of Friday, March 16, 2012, at the end of the business day, an assistant store manager, Miriam Renner ("Ms. Renner"), closed the retail store. She collected cash, checks, and credit card receipts from the store's registers and put them in blue zippered bank bags. She then took the bags into a so-called sample room, or an exercise room, in the office area, where the safe was located, and placed the bags in the safe. Ms. Renner then left the store.

{¶4} On Saturday, March 17, 2012, Sexton came to MJR, even though he did not work on Saturdays. The warehouse was closed, but the retail store was operating that day. He was seen by the store's manager, Crystal Roberts ("Ms. Roberts").

{¶5} On Monday morning, March 19, 2012, the safe was found open and money was missing from the safe. Additionally, wet checks from the Friday's sales were found lying on a counter in the retail store area. Surveillance cameras were located throughout the building and a review of the video surveillance disclosed that MJR's janitor, Jose Machado ("Mr. Machado"), was the person who placed the wet checks on the counter. The video showed that Mr. Machado went to clean the restrooms on Monday morning and at one point, appeared coming out of the men's restroom with the wet checks in his hand, and then placed them on

the counter. When asked about the checks, Mr. Machado explained that he had found them in a toilet bowl in the men's restroom.

{¶6} Further review of the video surveillance also showed that Sexton entered the men's restroom between the evening of Friday, March 16, 2012, when Ms. Renner put the checks into the safe, and the morning of Monday, March 18, 2012, when the checks were found in the toilet by Mr. Machado. The video also showed that prior to entering the restroom area, Sexton went into the warehouse area, where his desk was located, even though the warehouse was not operating and Sexton was not working that day. He was seen putting his baseball hat on his head and going toward the office area of the building. There were no surveillance cameras in the office area. Sexton was seen on the video surveillance again as he was walking toward the men's restroom. After leaving the restroom, Sexton wandered through the retail store area for a while and then, left the facility. Throughout all this time, Sexton carried something white in his hand.

{¶7} After a police investigation, Sexton was charged in connection with the missing money and the destroyed checks. He was indicted on August 13, 2012, on one count of theft, a felony of the fifth degree in violation of R.C. 2913.02(A)(1), (B)(2); one count of safecracking, a felony of the fourth degree in violation of R.C. 2911.31(A), (B); one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1), (D); and one count of identity fraud, a felony of the fifth degree in violation of R.C. 2913.49(B)(2), (I)(2). (R. at 1.) The

first three charges related to the events of March 17, 2012. As to the fourth charge, the State alleged that Sexton used a false Social Security number on his employment paperwork with MJR. (*Id.*)

{¶8} Sexton entered a plea of not guilty and attorney Clifton G. Valentine Jr. ("Mr. Valentine"), was appointed to represent him in further proceedings. (R. at 8, 12.) The State decided not to prosecute Sexton on the offense of identity fraud (*see* R. at 62-63), and the case proceeded to trial on the remaining three counts: theft, safecracking, and burglary. Sexton's rejection of plea agreement was filed with the trial court on the first day of the trial, which took place on October 23, and October 24, 2013. (R. at 64.)

-The Trial-

Jury Voir Dire

{¶9} During the jury voir dire, it became apparent that a mother and a son were in the jury pool. The State's attorney asked Mrs. Patterson, the mother, whether this situation was problematic to her, and Mrs. Patterson answered in the negative. (Tr.1[1] at 65.) Similarly, her son, Mr. Patterson, stated that he was comfortable being on the jury with his mother.

[1] The trial took place on October 23 and October 24, 2013, and the transcript of the proceedings spreads over three volumes. The first two volumes of transcript, with pages 1-290, encompass proceedings from October 23, 2013, and we refer to them as Tr.1. The third volume of transcript, with pages 1-143, encompasses proceedings from October 24, 2013, and we refer to it as Tr.2.

Testimony at Trial

{¶10} The State offered the testimony of ten witnesses. Sexton did not present any evidence. The relevant testimony is summarized below.

{¶11} Jeffrey Bradshaw ("Mr. Bradshaw"), the president and owner of MJR testified about the layout of the building and explained the spatial relationship of the office area, the retail store, and the warehouse. (Tr.1 at 130-136.) He testified that the building had an alarm system and sixteen motion-activated surveillance cameras. (Tr.1 at 141-142.) The surveillance cameras focused on the store and the warehouse; there were no surveillance cameras in the office area. (Tr.1 at 142.) Six people had keys to the building: Mr. Bradshaw, Mark Laufersweiler ("Mr. Laufersweiler"), Deborah Raines ("Ms. Raines"), Ms. Roberts, Ms. Renner, and the IT manager, Raul Zendejas ("Mr. Zendejas"). (Tr.1 at 144.)

{¶12} Mr. Bradshaw explained that the company safe, which was used to make night deposits from the store sales, was located in the office part of the building, near the restroom area, in a room called "exercise room or the safe room." (Tr.1 at 140, 156; Ex. 1.) The safe had a combination and an arm lock. (Tr.1 at 141.) There were five people who were authorized to access the safe: Mr. Bradshaw; his partner, Mr. Laufersweiler; their accountant, Cathy Testa ("Ms. Testa"); the retail store manager, Ms. Roberts; and the assistant store manager, Ms. Renner. (Tr.1 at 141.) After the theft incident at issue, Mr. Bradshaw learned

that the safe did not work properly all the time and that his employees left it unlocked for the night. (Tr.1 at 168-170.)

{¶13} Mr. Bradshaw explained that the office area was accessible to the employees during working hours, "if they had an issue, to come in and speak with someone in the office." (Tr.1 at 143-144.) He stated that the offices were "physically accessible" after hours but "you weren't supposed to be in areas where you weren't supposed to be." (Tr.1 at 144.) Some doors in the building required an access code, so that unauthorized people did not enter the offices. (Tr.1 at 134-136.) In particular, the warehouse staff could not get into the office area unless they knew the access code. (Tr.1 at 135.) Mr. Bradshaw testified that "any employee who needed to go through the doors to reach into the office area would get the code." (Tr.1 at 146.)

{¶14} Mr. Bradshaw testified that Sexton's work hours were Monday through Friday, 8:00 a.m. until 4:45 p.m. (Tr.1 at 139.) Mr. Bradshaw admitted that Sexton had "free rein to go about the entire premises," and could possibly enter the office areas to meet with his supervisor, Ms. Raines. (Tr.1 at 167-168.) There was no written employee policy regarding office access and Sexton had never been told that he was not allowed in the office area. (Tr.1 at 170.)

{¶15} Mr. Bradshaw learned about the theft on Monday, March 19, 2012. (Tr.1 at 159.) He testified that before reporting the incident to law enforcement, an internal investigation was conducted to determine the amount of missing

money and to review the video surveillance recordings. (Tr.1 at 160-161.) He testified that the amount missing was "$3,141 and some change." (Tr.1 at 161.)

{¶16} Mr. Bradshaw testified that he was not aware of any prior incidents when money would be missing in his company. (Tr.1 at 170-171.) He testified that he had been informed about a prior issue with Sexton's job performance, where he might have been involved in some cash transactions without reporting them to the company's management. (Tr.1 at 171-172.)

{¶17} Mr. Bradshaw was asked about the accuracy of Sexton's Social Security number, as it was written on his W-4 form. (Tr.1 at 162.) Defense counsel objected to this question and to Mr. Bradshaw's testimony that it was not Sexton's correct Social Security number. (Tr.1 at 162-164.) This testimony was stricken from the record and the trial court instructed the jury to disregard it. (Tr.1 at 164.)

{¶18} Ms. Renner testified that she had worked as the assistant manager for MJR's retail store in March 2012. (Tr.1 at 175.) She was responsible for closing out the registers at the end of the day. (*Id.*) The other person authorized to do that was Ms. Roberts, who was the store manager. (Tr.1 at 191.) Ms. Renner testified that all doors that accessed the office area required a key code. (Tr.1 at 178-179.) She stated that "[a]nyone that worked there knew the key codes to get to the office," and that the bathroom located there was accessible to employees, but nobody except for her should have been in the far hallway where the safe was

kept after hours. (Tr.1 at 187-188.) Ms. Renner stated that although it had never been expressed that other people were not allowed to access the offices, "[t]here just was no reason to be back -- I didn't even go back there except to put the money in the safe." (Tr.1 at 188.) She further testified, "there was just nobody usually -- the accountant was back in that hallway, so if we had to speak with her about payroll or something; but other than that, we just -- there was just no reason to be back there." (*Id.*)

{¶19} Ms. Renner worked on the evening of Friday, March 16, 2012. While describing the recording of the video surveillance from that time, Ms. Renner testified that before leaving the store, she emptied the registers, put the money, checks, and credit card receipts in three bank bags, and carried the bank bags into the office area to place them in the company safe. (Tr.1 at 188-192.) No one else was back in the safe room with her. (Tr.1 at 201.) The video showed another employee, identified as Donna, go through the door leading from the office area. (Tr.1 at 192-193.) Ms. Renner was unable to specify where Donna was coming from, but she explained that this door was used to access the employee restroom. (Tr.1 at 193.) When all employees were ready to leave, they gathered in the lobby to perform a bag check before they left the building. (Tr.1 at 192.) The bag check was a loss prevention practice, where the employees "checked each other's bags" before leaving the building to assure that there was no store merchandise in anybody's bag. (Tr.1 at 192-193.) Everyone left the

building at the same time. (*Id.*) Ms. Renner testified that nothing unusual occurred on the evening of March 16, 2012. (Tr.1 at 194.)

{¶20} On cross-examination, Ms. Renner admitted that performing the bag check at the end of the day did not include checking coat pockets, or pants pockets, to see whether anybody was taking money out from the store. (Tr.1 at 196.) She confirmed that all employees who left the store with her that evening had the access code to the office and none of them was searched to see whether they had the store's money with them that evening. (Tr.1 at 198.) She also explained that in March 2012, the safe was malfunctioning and therefore, they "would place the monies in the safe, but [they] didn't lock it." (Tr.1 at 197.) She admitted that the safe was left unlocked for the night on March 16, 2012. (Tr.1 at 197.)

{¶21} Ms. Renner testified that she had no personal knowledge of who took the money from the safe after she had put it in there on March 16, 2012. (Tr.1 at 200-201.) She was not aware of any incidents prior to March 16, 2012, when any funds would be missing at MJR. (Tr.1 at 199.) The defense counsel elicited testimony indicating that Ms. Renner stopped working for MJR a week following the theft incident, upon securing employment at another place. (Tr.1 at 200.) She had put in her two weeks' notice the week before the theft incident. (*Id.*)

{¶22} When asked about Sexton, Ms. Renner explained that she had limited contact with him, but she would see him periodically when he shopped in the retail store. (Tr.1 at 175.)

{¶23} Ms. Roberts, who was the retail store manager at MJR, testified that she was responsible for overseeing employees and collecting money at the end of the night. (Tr.1 at 204-205.) She testified that she had worked with Ms. Renner and never had any problems with her. (Tr.1 at 205-206.) She also testified that Sexton "was really nice and he seemed like a good employee." (Tr.1 at 210.)

{¶24} Ms. Roberts confirmed Ms. Renner's testimony about the bag checks, which did not include checking coat pockets or pants pockets. (Tr.1 at 207, 212.) She testified about the safe, which was located in the coffee room and verified Ms. Renner's testimony about the safe not working properly in March 2012, admitting that they would put money in the safe without locking it. (Tr.1 at 208.) Ms. Roberts confirmed that most of the employees had the keypad number to access the office area. (Tr.1 at 206.) She testified that it was the management's position that no employee was to go back into the office area after hours except the manager, who could only go there to put the money in the safe. (Tr.1 at 206-207.) When asked about how that policy was expressed, Ms. Roberts stated, "It was just kind of something that they came up with. It was something that I always followed and all the management followed." (Tr.1 at 207.)

{¶25} On March 16, 2012, Ms. Roberts worked during the day, but she did not close the store. (Tr.1 at 206.) She worked the next day, on Saturday, March 17, 2012. (Tr.1 at 208.) That day, she saw Sexton in the store, at the entrance to the warehouse area, "kind of over by the bathrooms." (Tr.1 at 209.) Although she wanted to say "Hi," she was unable to do so because of a long line of customers at her register. When she looked a few seconds later, Sexton was not there anymore. (Tr.1 at 209.) Ms. Roberts testified that she "was kind of shocked because he wasn't scheduled to work that day." (Tr.1 at 210.) She did not see him later that day. (Tr.1 at 210.) Ms. Roberts stated that warehouse employees were not working on Saturdays very often. (Tr.1 at 210.)

{¶26} Mr. Machado testified next. He worked for MJR on Monday, March 19, 2012; his job involved cleaning. (Tr.1 at 217-218.) That morning, he performed his routine, which included cleaning the men's bathroom. (Tr.1 at 218.) When he was about to clean the toilet in the men's bathroom, which was used by the customers, he saw a package stuck inside. (Tr.1 at 218.) He realized that it "could cause a problem to the toilet," so he removed it with his hand. (Tr.1 at 218-219.) What he retrieved was four checks. (Tr.1 at 219.) The checks did not say "void"; therefore, he thought that those checks were good. (*Id.*) Because he did not know the manager or the owner, he put the checks on the counter beside a cash register "so that the person would know -- would say if they were good or not." (Tr.1 at 219.)

{¶27} Ms. Testa, who was an accountant at MJR, testified that she had a key to the building, the access code for the door keypads, as well as the combination to the safe. (Tr.1 at 227.) She verified prior testimony about the safe malfunctioning in March 2012. (Tr.1 at 227-228.) She also confirmed the prior witnesses' testimony about the practice known as the "bag check," which did not include searching people's pockets or looking into anything other than their purses. (Tr.1 at 239-240.) Ms. Testa testified that the retail store managers were the people who were allowed to have access to the office area after the warehouse closed. (Tr.1 at 229.)

{¶28} Ms. Testa knew Ms. Renner as a coworker, but the two had no closer personal relationship. (Tr.1 at 240.) She was aware that Ms. Renner had given her two weeks' notice and stopped working at MJR approximately a week after the incident. (Tr.1 at 240-241.) Ms. Testa was also familiar with Sexton; she had seen him at MJR, but she did not know him well. (Tr.1 at 241.)

{¶29} Ms. Testa testified that it was her practice on Monday mornings to go to the safe, get out the bank bags, run daily reports, and do "reconciliation." (Tr.1 at 228.) On Monday morning, March 19, 2012, she was informed that the safe was found "open ajar a little bit." (Tr.1 at 230, 237.) When she went to get the bags out of the safe, she noticed that there was no cash in any of the three bags that were there. (Tr.1 at 230.) She informed Mr. Laufersweiler about the missing money and they "called the store managers to verify that they had put cash in the

safe." (Tr.1 at 232.) She explained, "We didn't know who had closed, so we called both store managers." (*Id.*) After that, she went into the store to print out the reports for Friday and Saturday. (*Id.*) That was when she found the wet checks on the counter next to one of the registers. (*Id.*) The checks had the date of Friday, March 16, 2012, and they should have been in the blue bags in the safe. (*Id.*) Ms. Testa informed Mr. Laufersweiler about the discovery and they attempted to find out who had put the checks on the counter by talking to other employees. (Tr.1 at 233.)

{¶30} Ms. Testa testified that Sexton came to her office that day, when the checks were drying on her desk. (Tr.1 at 236.) At the time of the March 2012 incident, she was not aware of any prior situations when money had been missing at MJR. (Tr.1 at 238.)

{¶31} Mr. Laufersweiler, co-owner of MJR, and Mr. Bradshaw's business partner, testified about security procedures at MJR. He explained that all employees entered and exited through the main entrance, where the bag check was performed. (Tr.1 at 249.) There was also a public entrance for the store. (Tr.1 at 249.) His testimony about the bag check procedure was similar to the testimony of the previous witnesses, with the additional information that "people would open up coats; but looking in pockets, no. We don't go to that extent." (Tr.1 at 254-255.) Mr. Laufersweiler did not know of prior thefts involving MJR's employees before March 17, 2012. (Tr.1 at 246.)

{¶32} Mr. Laufersweiler was not aware that in March 2012, the company's safe was being left unlocked at the end of the day. (Tr.1 at 252.) On Monday morning, March 17, 2012, when he arrived to his office at MJR, he went to the room where the safe was located to make coffee and noticed that the safe was open, which was unusual. (Tr.1 at 247.) Mr. Laufersweiler testified that he would go to that room every day and had never seen the safe open before. (Tr.1 at 247, 253.) The company's CFO was in that room with him and the two looked into the safe determining that "things seemed to be in order" because "[t]he envelopes were in the safe." (Tr.1 at 248.) They did not take any action until Ms. Testa arrived that morning and discovered that there was a shortage of money in the envelopes. (*Id.*) This prompted them to review the security camera tapes and they "kind of tried to piece things together." (Tr.1 at 249.) Mr. Laufersweiler testified that based on what he saw on the tapes, Sexton did not "go through any kind of a bag check on Saturday, March 17th," when he was in the store. (Tr.1 at 250.)

{¶33} Mr. Laufersweiler explained that although there was occasional overtime work when they were busy, "that particular Saturday was not a work overtime day for the warehouse employees." (Tr.1 at 250.) With respect to the employees' access to the office area, Mr. Laufersweiler stated:

> Generally on Saturdays, weekends, other than normal business hours when we're in the office, it is generally off-limits in the office area. There's really no reason for a warehouse employee to be in the office. 8:00 to 5:00 when we're there, it's okay; but if it's after-

> hours or on Saturday, there's really no reason for that. And that's kind of a well-known policy with everybody.
>
> We also have -- kind of to emphasize that, we have a keypad door opener for doors that are going to the warehouse into the office, so you would enter a code and then the door would unlock and you could go in and out. Really, that's just to prohibit anybody from going in and out of the office area.

(Tr.1 at 250-251.) On cross-examination, Mr. Laufersweiler confirmed that there was no written policy regarding office access, although he stated, "everybody knows that." (Tr.1 at 255.) He did not recall ever telling Sexton that he was not allowed in the office area on weekends. (Tr.1 at 256.) He restated that most of his employees had the code for the door to the office area and they "had access to get into the office area if they wanted to get in there." (Tr.1 at 256.)

{¶34} Mr. Zendejas, who was the person responsible for managing the security cameras at MJR, testified about the location of the sixteen cameras within the building. (Tr.1 at 259-260.) He explained that the cameras are located "on the entrances of the building," over the four registers, over the store, and throughout the warehouse area. (Tr.1 at 259-260.)

{¶35} Mr. Zendejas testified that on Monday, March 19, 2012, he was asked to review videos from the security cameras to find out who placed the wet checks on the counter by the registers. (Tr.1 at 260-261.) He first reviewed the videos from the morning of Monday, March 19, 2012, paying attention to who would have access to the back office area, where the safe was located. (Tr.1 at

261.) The only person who was in early that day was Ms. Raines. (Tr.1 at 262.) Mr. Zendejas continued "to kind of work [his] way back through Saturday and that's when [he] saw Jonnie [Sexton]." (Tr.1 at 262.) This was remarkable to Mr. Zendejas because Sexton worked at the e-commerce shipping department, Monday through Friday, 9:00 a.m. until 5:00 p.m., so "coming in on the weekends from that department was -- it would be kind of weird, unless they were coming there to shop." (Tr.1 at 262.) As Mr. Zendejas looked at the security videos in more detail, he "saw [Sexton] pass straight through the store, go to his desk, go towards the back, and then he entered into the rest rooms." (Tr.1 at 262-263.) He testified that Sexton was in the store less than forty-five minutes that day. (Tr.1 at 264.)

{¶36} Mr. Zendejas testified, "after I saw what had happened, I started to, you know, download them to give them to, you know, law enforcement and to kind of get -- piece together a little bit better a timeline of things that were happening so I could, you know, put it together a little bit easier." (Tr.1 at 264.) Mr. Zendejas described the video footage as it was being played to the jury. The first video clip was from the afternoon of Saturday, March 17, 2012, at 1:50 p.m. (Tr.1 at 265.-266.) It showed the store door entrance and Sexton walking into the store with something white, looking like a rag, in his hand. (Tr.1 at 265-266, 268-269.) Mr. Zendejas described further footage as it was showing Sexton inside the store, heading toward the warehouse area. (Tr.1 at 267.) Once Sexton was in the warehouse area, he could be seen heading to his desk, which was situated in the

back, by the warehouse's dock doors. (Tr.1 at 268.) Sexton was then shown returning from his desk, but instead of going back through the store area, he headed back toward the main offices where the safe was kept. (Tr.1 at 269.) He was then off the camera "for quite a while," which the video showed to be slightly over three minutes, and could be seen again walking toward the store area and going to the men's restroom. (Tr.1 at 269-270; State's Ex. 37.) The video showed Sexton leaving the restroom a couple of minutes later and walking back into the store area, making a loop around the store, away from the registers, and exiting the store through the customer access door at 1:59 p.m. (Tr.1 at 270-271; State's Ex. 37.)

{¶37} Mr. Zendejas testified that he had reviewed all of the surveillance video for March 17, 2012. (Tr.1 at 271.) He explained that the cameras at MJR were motion activated and only recorded when there was movement in front of them. (Tr.1 at 272.) There were no cameras in the actual office area where the safe was. (Tr.1 at 273.)

{¶38} Deputy Aaron McKinnon ("Deputy McKinnon"), testified that he had responded to a theft complaint from MJR on Wednesday, March 21, 2012. (R. at 275.) When he arrived at MJR, the owner of the business told him that some money had been stolen from a money bag. (Tr.1 at 276.) Deputy McKinnon "took statements from people on the scene, obtained some information, and completed a report." (Tr.1 at 276.) He was told that Sexton was a suspect in the

theft incident. (Tr.1 at 276-277.) He ran Sexton's Social Security number through the system but was unable to find any information about him. (Tr.1 at 277.) He did not have any further involvement with the case. (Tr.1 at 276.)

{¶39} Detective Jeff Stiers ("Detective Stiers"), from the Union County Sheriff's Office, conducted an investigation about the theft incident at MJR in March 2012. (Tr.2 at 12-13.) He spoke with Mr. Bradshaw first and was informed that Sexton was a potential suspect. (Tr.2 at 13.) Detective Stiers spoke to Sexton and asked him to describe his days of Friday, March 16, 2012, and Saturday, March 17, 2012, and then asked whether Sexton knew anything about the theft of the cash. (Tr.2 at 14-15.) Detective Stiers testified that Sexton had denied taking the money and explained that his reason for being at MJR on March 17, 2012, was the need to pick up his wallet, which he had left on Ms. Raines's desk in her office. (Tr.2 at 16.) Sexton told Detective Stiers that after he had picked up his wallet, "he went into the bathroom because he was feeling sick from what he had eaten the night before." (Tr.2 at 16.) An audio recording of that interview was played for the jury. (Tr.2 at 17.) Sexton also explained that the item he had in his hand on Saturday, March 17, 2012, when he came to MJR was a tank top. (Tr.2 at 18-19.) Detective Stiers then explored the story Sexton gave him with respect to picking up his wallet from Ms. Raines's office. (Tr.2 at 19.)

{¶40} Detective Stiers testified that he had asked Mr. Zendejas for all the videos showing anyone who entered the men's restroom from the time when Ms.

Renner placed the money in the safe until the time when Mr. Machado found the checks in the toilet. (Tr.2 at 20-21.) The videos he received showed only Sexton going into the restroom during that time frame. (Tr.2 at 21.) Detective Stiers remarked that the video cameras were motion activated. (Tr.2 at 20.) On cross-examination Detective Stiers clarified that he viewed only the videos that were given to him by Mr. Zendejas. (Tr.2 at 21.) He emphasized, however, that he specifically asked for videos showing "anybody going into the rest room from the time that Miriam put the money into the safe until Jose found the checks in the toilet." (Tr.2 at 21-22.)

{¶41} During his investigation, Detective Stiers was advised that MJR's safe was not being kept locked. (Tr.2 at 23.) He knew that almost all MJR's employees had the key code for the office area and that multiple employees had access to the safe room, where a coffee pot was located. (Tr.2 at 24.) He admitted that since there were no video cameras in the office area, no surveillance video actually showed Sexton around the safe or in Ms. Raines's office. (Tr.2 at 22-23.) Detective Stiers testified that fingerprints were not taken off of the safe. (Tr.2 at 23.) He explained, "I was not called down there until March 22nd. From that point we have chain of custody issues * * *." (Tr.2 at 23.)

{¶42} Detective Stiers testified that there was another individual suspected of the theft, Ms. Renner. (Tr.2 at 19, 22.) It was Sexton who brought Ms. Renner to his attention as a potential suspect in the case. (Tr.2 at 24.) The investigation

led Detective Stiers to believe that Ms. Renner was not a viable suspect. (Tr.2 at 19.)

{¶43} Ms. Raines testified that she had worked at MJR as a manager of the distribution center and was responsible for managing and scheduling employees for receiving, processing, and transportation. (Tr.2 at 26.) Her office was located in the office area of MJR, across from the room in which the safe was located. (Tr.2 at 27, 34.) When at MJR, Ms. Raines worked Monday through Friday, from 6:00 or 6:30 a.m. until 4:30 or 5:00 p.m. (Tr.2 at 30.) She had a key to the building and an access to the security lock, so that she could open the building for the employees in the morning. (Tr.2 at 30.) She testified that a total of five people had keys and access to get in and out of the building, which included herself, the two owners, Mr. Zendejas, and an individual named John Bumm. (Tr.2 at 30-31, 37-38.) She never gave Sexton access to open the building. (Tr.2 at 38.)

{¶44} Ms. Raines testified that she was instrumental in hiring Sexton at MJR, as she had known him from prior jobs. (Tr.2 at 28-29.) Sexton had called her saying that he needed employment and she suggested him to Mr. Bradshaw and Mr. Laufersweiler, who made the decision to hire him. (Tr.2 at 28-29.) She was also his supervisor and testified that she did not have any problems with his work performance. (Tr.2 at 36.) Ms. Raines testified about Sexton's job responsibilities and his daily routine. Sexton's office was "[o]n the floor in the warehouse," but he would typically come to her office "just to kind of see what

was going on for the day" and to "catch up" on anything that was in process. (Tr.2 at 31-32.) Sometimes they met throughout the day as well, as Sexton would come in if there was an issue. (Tr.2 at 41.) Those meetings lasted "anywhere from 15 minutes to half an hour." (Tr.2 at 24.)

{¶45} Ms. Raines met with Sexton on Friday, March 16, 2012, but she did not recall meeting with him "near the close of business or at the end of the day." (Tr.2 at 36, 41.) She did not recall seeing Sexton's wallet on her desk following the meeting on March 16, 2012. (Tr.2 at 36.) Ms. Raines could not confirm Sexton's version of events, which he gave to Detective Stiers, in which he claimed that he "would always take his cell phone and his wallet out when he came to meet with [her.]" (Tr.2 at 35.) Ms. Raines stated, "I never remember his wallet. I remember his cell phone because he would check his cell phone. I remember that, but I don't -- I mean, I couldn't tell you what his wallet even looks like or looked like." (Tr.2 at 35.) She later added, "I have definite recollection that I never saw him place his wallet on my desk, never." (Tr.2 at 43.) She denied a possibility that the wallet could have been there unnoticed by her and testified that she "would straighten up [her] office every day at the end of the day." (*See* Tr.2 at 43-45, 47.) Further explaining, Ms. Raines stated that although she remembered Sexton putting his cell phone on her desk, right in front of him, she never saw his wallet there. (Tr.2 at 46, 50-51.) He never forgot to take the cell phone with him after the meeting. (Tr.2 at 46.)

{¶46} Ms. Raines did not work on Saturday, March 17, and did not have any personal knowledge of what might have happened that day. (Tr.2 at 47.) She admitted, however, that on the following Monday, Sexton told her that he had left his wallet in her office. (Tr.2 at 45.) This was before he was being questioned as a suspect in the theft incident. (Tr.2 at 45.)

{¶47} Ms. Raines confirmed that all employees had access to the offices through the keypad doors. (Tr.2at 32.) She explained, however, that not all employees came into the office area. (Tr.2 at 38-39.) Apart from the "office people, which were five or six people," the only other people who came to the office area included Sexton, and "maybe a couple of other people in the warehouse." (Tr.2 at 39.) Ms. Raines testified that typically, people were not "in and out of the office area from the warehouse." (Tr.2 at 39.) She could not remember whether the assistant store manager, Ms. Renner, was normally in the office area, although she had access to it. (Tr.2 at 39.) Ms. Raines never actually saw Ms. Renner in the safe room. (Tr.2 at 39.)

{¶48} Ms. Raines testified that Sexton did not have "special access" to the office area "for after-hours or Saturdays or anything like that." (Tr.2 at 33.) He did not have keys to the building. (Tr.2 at 33.) According to Ms. Raines, Sexton worked overtime very infrequently and it would be on weekdays, only if his supervisor was there. (Tr.2 at 33.) There was no need for Sexton to access the business offices after work hours, even if he was working overtime. (Tr.2 at 34.)

Ms. Raines would see Sexton in the safe room "almost on a daily basis," as that was the room where the coffee machine used to be. (Tr.2 at 34.) In fact, she remembered one time prior to the theft incident when Sexton reported to her that he had found the safe open. (Tr.2 at 40.) She reported it to Mr. Bradshaw and did not have any further information as to what was done about it. (Tr.2 at 40.) She was not aware of the fact that the safe was not being locked at the end of each evening. (Tr.2 at 40.)

Conclusion of Trial

{¶49} Following Ms. Raines's testimony, the State rested and the defense made a Crim.R. 29 motion for acquittal, asserting that the evidence was insufficient to show any type of trespass in this case and that the evidence of intent to commit a criminal act inside was missing. (Tr.2 at 55, 56-57.) With respect to the theft and safecracking charges, the defense argued that the evidence was insufficient because it did not show that Sexton was in the safe area or that he broke into the safe and took anything from it. (Tr.2 at 57-58.) The trial court denied the motion, commenting that the evidence that the employees were not supposed to be in the office outside of normal business hours sufficiently showed trespass. (Tr.2 at 64.)

{¶50} The defense did not present any evidence, but it renewed its motion for acquittal, which was again denied. (Tr.2 at 64-65, 69.) After the closing arguments and jury instructions, the case was submitted to the jury. The jury

found Sexton guilty of all three charges. (Tr.2 at 140-141.) The trial court ordered a pre-sentence investigation report and scheduled the case for sentencing at a later date. (Tr.2 at 142.)

Sentencing and Appeal

{¶51} At sentencing, the trial court relied on the presentence investigation report ("PSI"), which disclosed that Sexton had "a rather substantial traffic record," as well as several prior convictions. (Sentencing Tr. at 8, Nov. 26, 2013.) No objections were raised to the PSI at sentencing by either Sexton or his counsel. The trial court found that theft and burglary were allied offenses subject to merger. Therefore, upon the State's election, the trial court sentenced Sexton to prison for seven years on count three, burglary and seventeen months on count two, safecracking. (R. at 73.) The trial court ordered the sentences to run consecutively to each other. (*Id.*)

{¶52} The case is now before us on review of the following assignments of error:

> **I. THE JURY LOST ITS WAY WHEN REVIEWING THE EVIDENCE, RESULTING IN A VERDICT THAT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE SUFFICIENCY OF THE EVIDENCE.**
>
> **II. THE TRIAL COURT ERRED WHEN IT RELIED ON INACCURATE INFORMATION IN THE PRE-SENTENCE INVESTIGATION REPORT TO FASHION APPELLANT'S SENTENCE.**

III. APPELLANT WAS DEPRIVED EFFECTIVE ASSISTANCE OF COUNSEL RESULTING IN APPELLANT NOT RECEIVING A FAIR TRIAL.

B. Law and Analysis

First Assignment of Error—Sufficiency and Manifest Weight of the Evidence

{¶53} In this assignment of error, Sexton alleges that his conviction for burglary is against the sufficiency and the manifest weight of the evidence because there is no evidence of trespass, which is an element of burglary. He further asserts that his convictions for theft and safecracking cannot stand because there is no direct evidence of Sexton entering the office area where the safe was kept, opening the safe, and removing money from it. We first review the sufficiency of the evidence for each of the counts on which Sexton was found guilty.

1. Sufficiency of the Evidence

{¶54} When reviewing a criminal case for the sufficiency of the evidence, "our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence submitted at trial, if believed, could reasonably support a finding of guilt beyond a reasonable doubt." *In re Willcox*, 3d Dist. Hancock No. 5-11-08, 2011-Ohio-3896, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). We look at the evidence in the light "most favorable to the prosecution" and will affirm the conviction if "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."

State v. Hunter, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. Importantly, this test raises a question of law and does not allow us to weigh the evidence. *In re Willcox* at ¶ 10.

a. Burglary

{¶55} Under the indictment filed by the State, the burglary conviction required evidence that Sexton (1) "by force, stealth, or deception"; (2) trespassed "in an occupied structure or in a separately secured or separately occupied portion of an occupied structure"; (3) "when another person other than an accomplice of the offender [was] present"; (4) "with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense." R.C. 2911.12(A)(1). Sexton challenges the second element above. Because no arguments are made with respect to the other elements of burglary (*see* App't Br. at 4-5),[2] we express no opinion on the sufficiency of the evidence as to those other elements. Instead, we focus on reviewing whether the State sufficiently established that Sexton trespassed "in an occupied structure or in a separately secured or separately occupied portion of an occupied structure." R.C. 2911.12(A)(1).

{¶56} There is no dispute that the MJR building was an occupied structure. *See* R.C. 2909.01(C)(4) (defining an occupied structure as "any house, building,

[2] In support of his motion for acquittal at trial, Sexton also argued that he "had no intent to commit any criminal act within the confines of MJR that day." (Tr.2 at 57.) This argument is not repeated on appeal and we do not address it. No other challenges were made as to sufficiency of evidence in support of the burglary charge. (*See* Tr.2 at 56-57, 69.)

outbuilding, * * * to which any of the following applies: * * * At the time, any person is present or likely to be present in it"). Although trespass might not have occurred at the moment when Sexton entered the MJR building, when he showed up in the retail store on Saturday, March 17, 2012, the allegations of trespass and burglary are more specifically limited to the area of MJR's business offices. The State established that the business office area was a "separately secured or separately occupied portion of" the MJR building, as multiple witnesses testified that it was separately secured by access doors, which required a key code to enter. (*See, e.g.*, Tr. at 134-136 (Mr. Bradshaw), 178-179 (Ms. Renner), 250-251 (Mr. Laufersweiler).)

{¶57} Sexton's argument focuses on the actual act of trespassing in that separately secured business office area of MJR. He argues that the evidence was insufficient to support a finding of trespass because the testimony at trial established that Sexton "had never been told he was not permitted to be in the office area when he was in the building, including times he may not have been working and the building was open to the public." (App't Br. at 5.) Yet, in a criminal trespassing prosecution, "[n]o requirement exists that 'no trespassing' signs be posted on property, or that the person in control or possession of property notify everyone in the world that they are not welcome to come onto the property." *State v. Janson*, 183 Ohio App.3d 377, 2009-Ohio-3256, 917 N.E.2d 296, ¶ 16 (1st Dist.).

{¶58} Trespass, as used in the burglary statute, is defined under R.C. 2911.21. *See State v. Lilly*, 87 Ohio St.3d 97, 102, 1999-Ohio-251, 717 N.E.2d 322 (1999) (using the criminal trespass definition of R.C. 2911.21 to sustain a burglary conviction); *State v. Cooper*, 3d Dist. Defiance No. 4-78-13, 1979 WL 207920, *5 (Apr. 18, 1979) (concluding that "the word 'trespass' as used in Section 2911.12 R.C. means criminal trespass as defined in Section 2911.21 R.C. and that the use of that term carries with it all of the elements of that offense as it is therein defined"). Accordingly, a person commits trespass when he or she does one of the following acts "*without privilege to do so*":

> (1) Knowingly enter or remain on the land or premises of another;
>
> (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;
>
> (3) Recklessly enter or remain on the land or premises of another, as to which *notice against unauthorized access or presence is given by actual communication to the offender*, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access.
>
> (4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either.

(Emphasis added.) R.C. 2911.21(A). "Any of these acts are encompassed by the single word 'trespass' as that term is used in Section 2911.12 and are therefore

embowed in the indictment by the use of that term." *Cooper* at *5. Therefore, the State had to provide evidence that Sexton committed one of the enumerated acts (1), (2), (3), or (4) of R.C. 2911.21(A), and that he had no privilege to do so.

{¶59} It is clear and not disputed that Sexton "[k]nowingly enter[ed] or remain[ed] on the land or premises of another," when he entered the business offices area of MJR on March 17, 2012. R.C. 2911.21(A)(1). Accordingly, the State sufficiently proved that Sexton committed, at minimum, one of the acts encompassed in R.C. 2911.21(A).

{¶60} The only remaining issue for the sufficiency of the evidence to support the trespass element is lack of privilege. " 'Privilege' means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(12). Although multiple witnesses testified that Sexton had general access to the office area during office hours for the legitimate purposes of talking to his supervisor or getting coffee, no testimony indicated that he was privileged to be there on Saturday, March 17, 2012. On the contrary, Mr. Bradshaw testified that the office area was accessible to his employees only during working hours, Monday through Friday, and only if they had a legitimate need to enter it, such as talking to someone who worked in one of the offices. (Tr.1 at 143-144.) He indicated that the employees were not supposed to be in the office area after hours. (Tr.1 at 146.) Ms. Renner testified that nobody except for her should have been in

the office area by the safe after regular office hours. (Tr.1 at 187-188.) Ms. Roberts testified that it was the management's position that no employee, other than the manager who put the money in the safe, was to go back into the office area after the regular office hours. (Tr.1 at 206-207.) According to Mr. Lauersweiler, the office area was "off-limits" outside of the normal business hours, which were Monday through Friday, 8:00 a.m. to 5:00 p.m. (Tr.1 at 250-251.) He testified that it was a well-known policy and "everybody kn[ew] that." (*Id.*) Even Mr. Zendejas found it suspicious that Sexton was around the business area on Saturday. (Tr.1 at 262.)

{¶61} Sexton would imply that as an employee with the access code to the door, he was privileged to enter the office area on Saturday, March 17, 2012. This argument is not supported by relevant case law. In *State v. Risner*, 3d Dist. Hardin No. 6-91-21, 1992 WL 195311 (Aug. 4, 1992), we found the trespass element satisfied under R.C. 2911.21(A)(1), based on the testimony that the defendant did not have "an open invitation" to enter the victims' home at any time, nor was he invited to their home on the day of the crime. We found the privilege lacking, in spite of the testimony that the defendant had visited the victims' home on prior occasions. *Id.* at *1, 3. Similarly, Sexton did not have an open invitation to enter the business office area at any time.

{¶62} The Eighth District Court of Appeals sustained four burglary convictions challenged for the sufficiency of the evidence as to the trespass

element, even though the evidence showed that the defendant's presence in the four houses was privileged because he was validly admitted as a painting contractor. *State v. Sparent*, 8th Dist. Cuyahoga No. 96710, 2012-Ohio-586. The court held that Sparent, had a "limited privilege to enter [the] houses for the specific purpose of painting certain areas within the homes." *Id.* at ¶ 9. The court held that it was reasonable for the trier of fact to find that Sparent "exceeded the scope of the privilege to enter by stealing from the homeowners." *Id.* By analogy, although Sexton was validly admitted to the retail store area on Saturday, March 17, 2012, it was reasonable to find that he exceeded the scope of that privilege by going into the restricted office area that day. Likewise, although Sexton was privileged to enter the restricted office area only when he was working, during regular office hours, he was beyond the scope of this limited privilege on Saturday, March 17, 2012.

{¶63} In *State v. Cooper*, 168 Ohio App.3d 378, 2006-Ohio-4004, 860 N.E.2d 135 (2nd Dist.), the defendant argued that the facts negated the trespass element of the burglary conviction. Cooper walked into a store during the store's business hours. *Id.* at ¶ 9. Inside the store, he walked through a door, which was closed, but not locked, and which bore a sign reading, " 'Employees Only.' " *Id.* The Court of Appeals agreed that no trespass occurred when Cooper remained in the store's public area because he had a privilege to be there. *Id.* at ¶ 14. But when Cooper entered the area marked as " 'Employees Only,' " he committed

trespass in "a separately secured or separately occupied portion of an occupied structure," even though entry into the structure itself was lawful. *Id.* at ¶ 15. In that case, the court reasoned that trespass occurred under R.C. 2911.21(A)(2). It thus required the state to prove "that the defendant knew or should have known that by entering that portion of the occupied structure, he was in violation of rules limiting or prohibiting his access to or use of the space concerned" *Id.* Here, Sexton similarly entered the retail store area with a privilege. But when he entered the office area, which was restricted to certain hours and purposes, he exceeded that privilege. Moreover, the State provided testimony of multiple witnesses who testified about the well-known MJR's policy regarding prohibition on access to the office area after the business office hours. Thus, even under R.C. 2911.21(A)(2), the State submitted sufficient evidence for the jury to conclude that Sexton knew or should have known that he was in violation of rules limiting his access to the business office area when he entered it on Saturday, March 17, 2012.

{¶64} In *State v. Flak*, 5th Dist. Ashland No. 2004-COA-038, 2005-Ohio-1474, the defendant attempted to challenge his burglary conviction on the same basis. The evidence showed that Flak entered a medical office building while the employees were in a lunch room. *Id.* at ¶ 3. The office was described as consisting "of a large waiting room with a sliding glass window at the reception desk and a door which leads to the nurses' station, exam rooms, doctors' offices and the employee break/lunch room." *Id.* There was a sign on the closed sliding

glass window, which read, " 'CHPA Ashland. We are currently having lunch in the break room. Please come on back, the door is open.' " *Id.* A witness testified that "the intent of the sign is to direct people to open the door and announce his or her presence so that the staff could assist the individual." *Id.* Flak was accused and found guilty of entering the restricted area and stealing a purse from the office. *See id.* at ¶ 5-9. He argued that he could not have been convicted of burglary because "he was entitled to open the door and enter what is normally a restricted area due to the posting of the sign in the sliding glass window at the reception area workstation." *Id.* at ¶ 22. Analyzing the argument, the Court of Appeals held that Flak, who was not a patient, had no legitimate reason to visit the medical office or enter the "normally restricted" area of the office. *Id.* at ¶ 26. "Thus a reasonable person could find that appellant's entry into the area normally restricted and closed both to the general public and, also to the patients of the pediatric office during normal working hours, exceeded the scope of the invitation and therefore appellant ceased to be a business invitee and became a trespasser." *Id.*

{¶65} In the instant case, the State provided evidence showing that Sexton had no reason to enter the normally restricted office area, which was closed both to the general public and to MJR's employees outside of the normal office hours. Therefore, a reasonable jury could find that Sexton exceeded the scope of his privilege, which allowed him to be in MJR's *retail store* on Saturdays and in the

business office area Monday through Friday 8:00 a.m. to 5:00 p.m., if he had a legitimate need to be there.

{¶66} The Fourth District Court of Appeals found evidence sufficient to support a finding that the defendant lacked privilege in a case where the defendant "had stayed at the residence on two or three occasions and had entered the house and waited for [the victim] to come back from work on one or two occasions." *State v. Clelland*, 83 Ohio App.3d 474, 490, 615 N.E.2d 276 (4th Dist.1992). The court held that the "privilege to enter the premises was not unqualified, but was restricted to times when [the victim] was present or expected back shortly." *Id.* Because the situation at issue did not involve the time when the victim was present or expected back shortly, it was reasonable to conclude that the defendant lacked privilege to enter the premises. *Id.* By analogy, Sexton's privilege to enter the business office area "was not unqualified," but was restricted to times when the business office area was operating, Monday through Friday, between 8 a.m. and 5 p.m. Therefore, the jury could reasonably conclude that he exceeded that limited privilege when he entered the business office area on Saturday, March 17, 2012.

{¶67} The overview of Ohio cases and the application of the law to the facts before us dictates a conclusion that the evidence, viewed in the light most favorable to the prosecution, was sufficient to support a finding beyond a reasonable doubt that Sexton was not privileged to be in the business offices area on Saturday, March 17, 2012.

b. Theft and Safecracking

{¶68} Since Sexton challenges convictions as to theft and safecracking on the same bases, we analyze these two counts together. In order to sustain the convictions for theft, as charged in the Indictment, the State had to prove that Sexton "knowingly obtain[ed] or exert[ed] control over either the property or services"; "with purpose to deprive the owner of property or services"; "[w]ithout the consent of the owner or person authorized to give consent." R.C. 2913.02(A)(1). The conviction of safecracking required a proof that Sexton "knowingly enter[ed], force[ed] an entrance into, or tamper[ed] with any vault, safe, or strongbox," "with purpose to commit an offense." R.C. 2911.31(A). Sexton demands reversal due to the lack of direct evidence that he "ever went into the room where the safe was kept, that he opened the safe and removed money from the three money bags." (App't Br. at 5.)

{¶69} We start with recognizing the well-settled law that circumstantial evidence has the same probative value as direct evidence. *State v. Treesh*, 90 Ohio St.3d 460, 485, 2001-Ohio-4, 739 N.E.2d 749 (2001); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus; *State v. Howard*, 3d Dist. Marion No. 9-10-50, 2011-Ohio-3524, ¶ 73, quoting *Treesh* at 485. We have previously recognized that circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence." *State v. Fisher*, 3d Dist. Auglaize No. 2-10-09, 2010-Ohio-5192, ¶ 27, quoting *State v. Lott*, 51 Ohio St.3d 160, 167,

555 N.E.2d 293 (1990). For example, in *State v. Tusing*, 3d Dist. Seneca No. 13–12–24, 2012-Ohio-5945, ¶ 23-24, we found that circumstantial evidence was sufficient to prove criminal trespass beyond a reasonable doubt, even though there was no eye-witness testimony or any physical evidence that placed the defendant or his truck on the victim's property.

{¶70} The Tenth District Court of Appeals upheld safecracking, theft, and breaking and entering convictions, which were based on circumstantial evidence only. *State v. Abdul-Rahman*, 10th Dist. Franklin Nos. 06AP-783, 06AP-784, 2007-Ohio-2386. In that case, three ProCare stores were burglarized and money was taken from the safes located in each store, on or about October 27, 2005. *Id.* at ¶ 12. The defendant, Abdul-Rahman, was an employee of ProCare as a manager-in-training and had access to the stores and the safes. *Id.* He was terminated on October 27, 2005. *Id.* Later that evening, he was seen at two out of the three locations. *Id.* The investigation indicated that Abdul-Rahman was the only person with keys to all three locations and that the stores did not show any signs of forced entry. *Id.* at ¶ 12, 14-15. The court held that the circumstantial evidence was sufficient to sustain convictions for theft, safecracking, and breaking and entering. Sexton's case is very similar to Abdul-Rahman's. As a warehouse manager, he had means of access to the office area and the safe room. He was seen entering the office area before the money was discovered missing and he was

the only person seen on the motion-activated video cameras in the vicinity of both the office area and the men's restroom.

{¶71} The Eleventh District Court of Appeals sustained a conviction for theft based on circumstantial evidence. *State v. Pistillo*, 11th Dist. Lake No. 2003–L–183, 2004-Ohio-6333. Pistillo was a former employee of a company that provided personal aides to disabled individuals. *Id.* at ¶ 9. Through her employment, she had a "swipe key card," as well as a key to access the victims' apartment, which she had not returned upon her termination from the company four days earlier. *Id.* at ¶ 9, 23. The building manager's report indicated that the key card assigned to Pistillo was used to enter the building on the morning of the discovered theft. *Id.* Furthermore, since she had worked with the victims before her termination, she knew their schedule and was familiar with their apartment. *Id*. at ¶ 23. The court held that all of the above circumstantial evidence was sufficient to infer that the defendant took the money that was missing from the victims' residence. *Id.* at ¶ 29. Like the defendant in *Pistillo*, Sexton had access to the office area and was reported entering the area on Saturday, March 17, 2012. Additionally, he knew the layout of the office and was aware of the safe lock malfunctioning in March 2012. He also knew that no one would be in the office on Saturday, which was a day when no employees were supposed to be there.

{¶72} The State showed that Sexton was the only person who entered the business office area at the relevant times between Friday evening, March 16, 2012,

and Monday morning, March 19, 2012. The State then showed that money and checks were found missing from the area on Monday morning, March 19, 2012. Sexton was also the only person who entered the men's restroom on Saturday, March 17, 2012, where the checks were later found by Mr. Machado. Although no direct evidence placed Sexton in the safe room, the circumstantial evidence, when viewed in the light most favorable to the prosecution, could reasonably support a finding that Sexton was the person who took the money and the checks from the safe and left the checks in the men's restroom.

{¶73} For all of the above reasons, we reject Sexton's allegations that his convictions for burglary, theft, and safecracking were not supported by sufficient evidence.

2. Manifest Weight of the Evidence

{¶74} In addition to arguing that his convictions were not supported by sufficient evidence, Sexton alleges that they were against the manifest weight of the evidence. The question of manifest weight of the evidence concerns an "effect in inducing belief." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Therefore, it is not subject to a mathematical analysis. *Id.* When reviewing a conviction challenged as being against the manifest weight of the evidence, an appellate court acts as a "thirteenth juror" and may disagree with the jury's resolution of the conflicting testimony. *Id.*, quoting *Tibbs v. Florida*, 457

U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). But the appellate court must give due deference to the findings of the jury, because

> [t]he fact-finder occupies a superior position in determining credibility. The fact-finder can hear and see as well as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

(Alteration omitted.) *State v. Dailey*, 3d Dist. Crawford, No. 3-07-23, 2008-Ohio-274, ¶ 7, quoting *State v. Thompson*, 127 Ohio App.3d 511, 529, 713 N.E.2d 456 (8th Dist.1998). Therefore, an argument that a conviction is against the manifest weight of the evidence will only succeed if the appellate court finds that "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶75} There were no significant conflicts in the evidence presented in this case, as Sexton did not offer any witnesses. Many of his allegations concerning the manifest weight argument are the same as the ones challenging sufficiency of the evidence, which we have already analyzed above.[3] He additionally argues that the evidence used against him could have as easily implicated Mr. Machado in the

[3] Sexton's brief addresses the sufficiency and manifest weight arguments together.

same crimes. Sexton further suggests that the video surveillance evidence was not credible because it was selected after an internal investigation conducted by "untrained amateurs." (App't Br. at 6.) He points out that no testimony was provided as to whether the safe was seen open at the close of the day on Saturday, March 17, 2012. (*Id.* at 7.)

{¶76} With respect to Mr. Machado, no evidence indicated that he had ever entered the business office area or that he had ever been seen in the vicinity of the safe room. In fact, there was no specific testimony that Mr. Machado knew the key code to access the office area. There was no testimony that Mr. Machado was present at MJR on a day when he was not assigned to work there. Moreover, Sexton had an opportunity to question Mr. Machado and develop the theory that Mr. Machado committed the crimes, but he did not do that. Therefore, his suggestions that the evidence would implicate Mr. Machado are mere speculations.

{¶77} As to the credibility of the video surveillance evidence, Mr. Zendejas was, likewise, subject to cross-examination about how he selected videos to provide to the law enforcement officers. The jury had an opportunity to assess Mr. Zendejas's testimony for its credibility. Detective Stiers testified that he had asked Mr. Zendejas for video evidence showing *anyone* entering the men's restroom during the relevant times. There was nothing provided at trial to show that parts of the video surveillance, which could implicate another person, were

missing from the evidence. Furthermore, Sexton was provided with discovery in this case and made no allegations that it was incomplete or that MJR withheld any evidence in this case.

{¶78} The suggestions of "holes" in the State's case, or of other people being involved in the theft, are not supported by the evidence in the record. Conversely, many additional facts cast doubt on Sexton's asserted innocence. Sexton walked around the warehouse area on a day when he was not scheduled to work and when no one else was there. He walked into the business office when no one was there, in violation of the well-known policy that access to this area was limited to business hours, Monday through Friday, between 8 a.m. and 5 p.m., and to legitimate business reasons only. His assertions of going to the office to retrieve his wallet were contradicted by the testimony of Ms. Raines, who repeatedly stated that he never took his wallet out of his pocket in her office. She repeatedly denied a possibility of Sexton's wallet being left in her office on Friday, March 16, 2012. The video evidence showed Sexton walking around the retail store, away from the registers by which Ms. Roberts and other employees could see him. He did not look at merchandise, which the jury could reasonably interpret as an indication that he did not come to the retail store to shop. Furthermore, his use of the retail store entrance instead of the employee entrance, which would subject him to the standard bag search, could likewise have been used by the jury to weigh against credibility of his version of events.

{¶79} Considering all the facts discussed in our analysis of the sufficiency of the evidence argument, the additional facts mentioned here, and the lack of conflicting evidence presented at trial, we cannot determine that the jury lost its way in finding Sexton guilty.

{¶80} For all of the foregoing reasons, we overrule the first assignment of error, which challenges the sufficiency and the weight of the evidence.

Second Assignment of Error—Inaccurate Information in the Presentence Investigation Report

{¶81} In this assignment of error Sexton alleges that he was prejudiced by the inaccurate PSI, on which the trial court relied in fashioning his sentence. Sexton points to two "factual mistakes." (App't Br. at 10.) Both concern Sexton's criminal record.

{¶82} The first problem discussed by Sexton relates to a 1998 conviction from Marion County. On page 8 of the report, the PSI investigator noted that on June 11, 1998, Sexton was convicted of two counts of forgery, one count of receiving stolen property, and one count of theft, in case number 1998-CR-0149. (PSI Report, Nov. 12, 2013.) Then, on page 13 of the same report, the section entitled "supervision adjustment" included the following statement:

> On 6-9-98, the defendant was convicted in the Marion County Common Pleas Court case number 98-CR-0149 of count 1 Theft, F5, count 2 Safecracking, F4, count 3 Burglary, F2, and count 4 Identity Fraud, F5.

(*Id.*) Both statements apparently related to the same case number, although they differed in the dates of the offenses and the counts charged. It seems that, during the sentencing hearing, the trial court referred to page 13 of the report when it commented:

> Presentence investigation in this case reveals the following about your past criminal history in addition to a rather substantial traffic record: 6/9 of '98, you were convicted in the Marion County Common Pleas Court, case number 98-CR-0149 of Count one, theft; count two, safecracking; count three, burglary; and count four, identity fraud.

(Sentencing Tr. at 8.)

{¶83} The second mistake to which Sexton refers in this assignment of error concerns a Licking County case. On page 11 of the PSI report there is record of a charge from April 27, 2012, in case number 2012-CR-00220, for receiving stolen property. (PSI Report, Nov. 12, 2013.) The charge was scheduled for a jury trial on December 20, 2012, and it was dismissed on December 21, 2012. (*Id.*) On page 12, another Licking County case is listed, from October 24, 2013, number 2013-CR-00646. This case included two charges: (1) burglary with firearm specification, and (2) receiving stolen property. (*Id.*) The case is listed as pending as of the date of the report. (*Id.*) At the sentencing hearing, the trial court stated, "ODRC gateway portal shows that you were convicted of receiving stolen property on 12/3 of '12 in Licking County." (Sentencing Tr. at 9.) The PSI report does not show a conviction in Licking County from December 3, 2012, and

neither of the two Licking county cases listed in the PSI matches the trial court's comments.

{¶84} Referencing the two mistakes read by the trial court into the record, Sexton calls into question the entire PSI report. We cannot conclude that the PSI report was entirely incorrect, however, as only one mistake is properly pointed out by Sexton, the one referring to the Marion County case. The other alleged mistake does not appear in the PSI report and we cannot speculate as to whether the trial court misspoke at sentencing, or it relied on another document, which is not before us. We limit our review of the issue to the record properly before us, which includes the PSI report and the sentencing transcript.

{¶85} R.C. 2951.03 allows the trial court to review or disregard an alleged factual inaccuracy in a presentence investigation report *if the defendant alleges at sentencing that the report is inaccurate.* R.C. 2951.03(B)(5). Yet, Sexton did not object to the alleged mistakes in the PSI report or to the trial court's mistaken statements at sentencing.

> As a general rule an appellate court will not consider an alleged error that the complaining party did not bring to the trial court's attention at the time the alleged error is said to have occurred. This rule is a product of our adversarial system of justice. "Its purpose is practical: to prevent the defensive trial tactic of remaining silent on a fatal error during trial with the expectation of demanding a reversal on appeal if the verdict is guilty." *State v. Craft* (1977), 52 Ohio App.2d 1, 4–5, 6 O.O.3d 1, 3, 367 N.E.2d 1221, 1224. The rule is also consistent with the structure of our court system. An appellate court is not to be the first court to decide an issue; it is to review decisions made by the trial court after the lower court has had an opportunity

> to hear the arguments of the parties. "The traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decision-maker." Carrington, Meador & Rosenberg, Justice on Appeal (1976) 2.

State v. Slagle, 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992); *accord State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 15 (2014) (recognizing the "well-established rule" that failure to call an error to the attention of the trial court results in forfeiture of that error on appeal). This general rule is subject to Crim.R. 52, which gives the appellate court discretion to review the trial court's decision for plain error. *Quarterman* at ¶ 16.

{¶86} The standard of review under plain error "is a strict one." *State v. Murphy*, 91 Ohio St.3d 516, 532, 747 N.E.2d 765 (2001).

> "[A]n alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.' " We have warned that the plain error rule is not to be invoked lightly. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."

Id., quoting *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), *and State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraphs two and three of the syllabus. Under the plain error standard, "the *defendant* bears the burden of demonstrating that a plain error affected his substantial rights" and "[e]ven if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to 'prevent a manifest miscarriage of justice.' "

(Emphasis sic.) *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E .2d 643, ¶ 14, quoting *State v. Barnes,* 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002), and *Long,* 53 Ohio St.2d 91, at paragraph three of the syllabus. "Even constitutional rights 'may be lost as finally as any others by a failure to assert them at the proper time.' " *Murphy* at 532, quoting *State v. Childs*, 14 Ohio St.2d 56, 62, 236 N.E.2d 545 (1968).

{¶87} In *Campbell* at 41-43, the Ohio Supreme Court held that where a defendant failed to object to the use of the PSI report in the trial court, the issue was forfeited on appeal absent plain error. In another case, the Ohio Supreme Court refused to apply the plain error analysis to reverse the trial court's sentencing decision, where a defendant on appeal argued that information included in his PSI report "would not have been admissible if offered independently as evidence," but failed to object to its admission in the trial court. *State v. Bradley*, 42 Ohio St.3d 136, 140, 538 N.E.2d 373 (1989).

{¶88} Here, Sexton does not even allege that a plain error occurred or that his substantial rights have been affected in any way. The Ohio Supreme Court has recently refused to engage in a plain error review where the defendant did not make any attempt to demonstrate plain error on appeal. *See Quarterman* at ¶ 20-21. Therefore, under the benchmark provided by the Ohio Supreme Court that "[n]otice of plain error * * * is to be taken with the utmost caution," *Murphy* at 532, and that the defendant carries the burden "of demonstrating that a plain error

affected his substantial rights," *Perry* at ¶ 14, we choose not to proceed on plain error analysis. We note, however, that no manifest miscarriage of justice is apparent from the record. As the State correctly points out, Sexton's sentences fall within the applicable statutory limit[4]; they are not "for the maximum period of time available pursuant to the statute"; and they were appropriate based on Sexton's extensive criminal record. (App'ee Br. at 18.) Additionally, factual inaccuracies in the PSI are not necessarily grounds for reversal as R.C. 2951.03 allows the trial court to disregard *an alleged* factual inaccuracy in a presentence investigation report. *See* R.C. 2951.03(B)(5); *State v. Mayor*, 7th Dist. Mahoning No. 07 MA 177, 2008-Ohio-7011, ¶ 33.

{¶89} For all of the foregoing reasons, we hold that Sexton's allegations do not warrant reversal of his sentence and we overrule the second assignment of error.

Third Assignment of Error—
Ineffective Assistance of Counsel

{¶90} In his last assignment of error Sexton alleges multiple grounds for a claim that his trial counsel was ineffective. In order to prevail on a claim of ineffective assistance of counsel, a criminal defendant must first show that the counsel's performance was deficient in that it fell "below an objective standard of

[4] R.C. 2929.14 states that: "[f]or a felony of the second degree, the prison term shall be two, three, four, five, six, seven, or eight years"; and "[f]or a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months."

reasonable representation." *State v. Keith*, 79 Ohio St.3d 514, 534, 684 N.E.2d 47 (1997). Second, the defendant must show "that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.*, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to demonstrate prejudice, the defendant must prove a reasonable probability that the result of the trial would have been different but for his or her counsel's errors. *Id.* In applying these standards, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 108, quoting *Strickland* at 669. Therefore, the court must be highly deferential in its scrutiny of counsel's performance. *State v. Walker*, 90 Ohio App.3d 352, 359, 629 N.E.2d 471 (3d Dist.1993), quoting *Strickland* at 689.

{¶91} With this standard in mind we address Sexton's particular assertions about his counsel's ineffectiveness.

1. Social Security Number Evidence

{¶92} As mentioned in the introductory part of this opinion, Sexton was initially charged with identity fraud. This claim was dismissed prior to trial. During the trial, however, the State asked Mr. Bradshaw about accuracy of Sexton's Social Security number. Sexton's counsel objected to this questioning and the trial court ordered it stricken from the record. The jury was instructed to

disregard it. (Tr.1 at 162-164.) Later, the following exchange occurred during the examination of deputy McKinnon by the State:

> Q: And what did your investigation consist of with respect to Mr. Sexton?
>
> A: I ran him through the LEADS system, which is a computer system that we use to look people up, by the Social Security number that they provided for me for him.
>
> Q: And were you able to find out any information about Mr. Sexton?
>
> A: Not off that Social Security number, no.
>
> Q: All right. Deputy, that's all I have. Thank you very much.

(Tr. at 277.)

{¶93} Sexton alleges that his trial counsel was ineffective in connection with the Social Security number evidence for two reasons. The first is failure to object to Deputy McKinnon's testimony. The second is failure to request a mistrial after Mr. Bradshaw's testimony and again, after Deputy McKinnon's testimony. Sexton argues that prejudicial evidence was presented to the jury through those two witnesses and because the evidence against him was "so flimsy and circumstantial * * *, every prejudicial remark tipped the scale toward a conviction." (App't Br. at 17.)

{¶94} We do not agree that Mr. Valentine's failure to request a mistrial after Mr. Bradshaw's testimony would amount to a performance that falls "below an objective standard of reasonable representation" under *Keith*, 79 Ohio St.3d at

534, 684 N.E.2d 47. The Ohio Supreme Court held that where curative instructions were given to the jury, it was reasonable for the trial counsel not to request a mistrial for improper admission of evidence of prior bad acts. *State v. Nields*, 93 Ohio St.3d 6, 33, 2001-Ohio-1291, 752 N.E.2d 859 (2001). "It is presumed that a jury follows the instructions given to it. For purposes of mistrial analysis, there is a presumption of the efficacy of curative instructions with regard to improper comments made by a witness or prosecutor." *State v. Winston*, 2d Dist. No. 16760, 2000 WL 1369946, *3 (Sept. 22, 2000), citing *State v. Mason*, 82 Ohio St.3d 144, 157, 1998-Ohio-370, 694 N.E.2d 932 (1998), and *State v. Nichols*, 85 Ohio App.3d 65, 69, 619 N.E.2d 80 (4th Dist.1993).

{¶95} Likewise, failure to object to Deputy McKinnon's statement and to request a mistrial after his testimony that he was unable to obtain any information about Sexton based on his social security number, does not amount to ineffective assistance. We have previously recognized that "failure to object to error, alone, is not enough to sustain a claim of ineffective assistance." *State v. Daley*, 3d Dist. Seneca No. 13-13-26, 2014-Ohio-2128, ¶ 63, quoting *Campbell*, 69 Ohio St.3d at 52-53, 1994-Ohio-492, 630 N.E.2d 339. "Because 'objections tend to disrupt the flow of a trial, and are considered technical and bothersome by the fact-finder,' competent counsel may reasonably hesitate to object in the jury's presence." (Alterations omitted.) *Campbell* at 53, quoting Jacobs, Ohio Evidence (1989), at iii-iv. Therefore, it could have well been Mr. Valentine's reasonable trial strategy

to avoid an objection to the statement made by Deputy McKinnon, who never testified that Sexton's Social Security number was fraudulent. Additionally, Sexton did not establish that the result of his trial would have been different had Mr. Valentine objected to Deputy McKinnon's testimony.

{¶96} Similarly, Sexton failed to establish that a mistrial would have been granted had it been requested upon Deputy McKinnon's statement about lack of information on Sexton's Social Security number. "Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991); *accord State v. Brewster*, 157 Ohio App.3d 342, 2004-Ohio-2722, 811 N.E.2d 162, ¶ 39 (1st Dist.) ("A trial court should not order a mistrial merely because an error or irregularity has occurred, unless it affects the defendant's substantial rights."). There are no indications that Sexton's trial was unfair.

{¶97} Accordingly, Sexton failed to establish that his trial counsel was ineffective in his handling of the Social Security number evidence.

2. Plea Agreement

{¶98} Sexton refers to a document filed with the court on the morning of the trial, October 23, 2013, captioned "Rejection of Plea Agreement." (R. at 64.) He acknowledges that he discussed the plea offer with his counsel and that he signed the rejection. He alleges, however, that this is not what he "really wanted

to do." (App't Br. at 18.) Sexton complains that he was "unduly convinced by counsel that he should proceed with the trial." (*Id.*)

{¶99} A claim of ineffective assistance based on the trial counsel's advice to reject a plea bargain requires a criminal defendant to "prove both deficient performance on the part of his counsel and that, but for his counsel's advice, there is a reasonable probability that he would have pleaded guilty." *Magana v. Hofbauer*, 263 F.3d 542, 547-48 (6th Cir.2001), citing *Turner v. State of Tenn.*, 858 F.2d 1201 (6th Cir.1988), *judgment vacated on other grounds sub nom. Tennessee v. Turner*, 492 U.S. 902, 109 S.Ct. 3208, 106 L.Ed.2d 559 (1989), and *Paters v. United States*, 159 F.3d 1043, 1047 (7th Cir.1998). The United States Supreme Court established the following standard for satisfying the prejudice requirement in such circumstances:

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 132 S.Ct. 1376, 1385, 182 L.Ed.2d 398 (2012); *accord Missouri v. Frye*, 132 S.Ct. 1399, 1409, 182 L.Ed.2d 379 (2012); *see also State v. Knapp*, 11th Dist. Ashtabula No. 2012-A-0035, 2013-Ohio-870, ¶ 56 (applying the above standard). Additionally, the Seventh Circuit Court of Appeals required a criminal

defendant to show "objective evidence," which would prove that there is a reasonable probability that he would have accepted the proposed plea agreement absent defense counsel's advice. *Paters*, 159 F.3d at 1047.

{¶100} Although an argument such as Sexton's does not come before the courts often, our review of pertinent case law indicates that courts do not find ineffective assistance for advising the defendant not to take a plea bargain absent evidence that the counsel's advice fell below the standard of reasonable professional assistance and that it resulted in prejudice. *See, e.g.*, *State v. Fry*, 9th Dist. Summit No. 26121, 2012-Ohio-2602, ¶ 12-21 (affirming denial of a petition for post-conviction relief where "[n]either the record nor the post-conviction relief exhibits support[ed] Fry's argument that he was constructively denied counsel at the plea bargaining stage" or that he would have accepted the plea); *State v. Lei*, 10th Dist. Franklin No. 05AP-288, 2006-Ohio-2608, ¶ 32 (holding that the defendant was not entitled to a new trial based on her claim of ineffective assistance that resulted in her decision not to plead guilty where the evidence showed that the defendant " 'was adamant about not taking a negotiated plea' and that she was determined to proceed to trial"); *United States v. Carry*, 204 Fed.Appx. 216, 216-217 (4th Cir.2006) (rejecting a claim of ineffective assistance after "thoroughly reviewing the record," which did not "conclusively demonstrate that Carry's counsel was ineffective" in advising the defendant not to plead guilty); *cf. State v. Walker*, 6th Dist. Lucas No. L-99-1383, 2000 WL 1878954

(Dec. 29, 2000) (reversing the trial court's decision to deny a petition for postconviction relief without a hearing where the evidence supported a claim that the appellant's "trial counsel incorrectly advised him as to the applicable law regarding the consequences of accepting a plea bargain" and that the appellant "would have accepted the offered plea bargain").

{¶101} A United States District Court in Mississippi reviewed allegations very factually similar to the ones made by Sexton, where the criminal defendant argued that his trial counsel was ineffective by advising him "that he should not plead guilty but proceed to trial," and "that the case against him was weak." *Williams v. United States*, N.D.Mississippi Nos. Civ. A. 3:97CV60–D, Crim. 4:93CR021–D, 1998 WL 378374, *2 (May 5, 1998), *aff'd*, 204 F.3d 1115 (5th Cir.1999). The court held that no objective deficiency existed where no evidence showed that the trial counsel "failed to conduct a substantial investigation before offering the advice he did." *Id.* Therefore, the "[c]ounsel's determinations and advice to proceed to trial were strategic choices." *Id.*

{¶102} Nothing in the record indicates that Mr. Valentine gave Sexton any improper advice or that he misrepresented any facts or the law to him. Sexton does not allege that his decision not to plead guilty was anything else but his knowing, intelligent, and voluntary choice based on his trial counsel's belief that "it was going so well." (App't Br. at 18.) He merely contends that he "wanted to take the deal," but decided not to do so. Not only are these allegations

unsupported by the record but they do not amount to deficient performance that fell "below an objective standard of reasonable representation" or deprived Sexton of a fair trial. *Keith*, 79 Ohio St.3d at 534. Furthermore, nothing in the record before us indicates that Sexton would have pled guilty but for his counsel's alleged advice,[5] or that the trial court would have accepted the terms of the plea agreement. *See Lafler*, 132 S.Ct. at 1385; *Frye*, 132 S.Ct. at 1409.

{¶103} Accordingly, Sexton failed to satisfy a claim of ineffective assistance of counsel based on the alleged improper advice to reject the plea offer.

c. Failure to Put on a Meaningful Defense

{¶104} Sexton makes multiple allegations regarding conversations and facts outside of the record, claiming that his counsel possessed knowledge of additional evidence that could bolster his defense, but failed to use it at trial. For example, he claims that Mr. Valentine failed to address the fact that there was another entrance to the office area, which could be accessed by the general public. This claim is contradicted by the record. Specifically, multiple witnesses testified that the office area was only accessible through secure doors, which required an access code that was not available to the general public. (*See, e.g.*, Tr. at 134-136 (Mr. Bradshaw), 178-179 (Ms. Renner), 250-251 (Mr. Laufersweiler).)

[5] Sexton attached some affidavits to his brief on appeal. These affidavits are not properly before us and we do not consider them in arriving at our decision.

{¶105} Next, Sexton asserts that there was additional evidence available to show that there were prior incidents of missing money at MJR. We cannot consider any potential evidence that was not in the record at trial, but we note that Sexton fails to provide a link between prior incidents of possible thefts and his innocence. Therefore, we cannot infer that the result of the trial would have been different if Mr. Valentine provided evidence of prior incidents of missing money at MJR.

{¶106} Sexton also claims that there was evidence proving that he worked on Saturdays "more frequently that [sic] was testified to by the witnesses." (App't Br. at 21.) Yet, it was established at trial that Sexton did not work on Saturday, March 17, 2012, when the alleged crimes occurred. Therefore, the fact that he had worked on Saturdays in the past had no relevance to his defense.

{¶107} Accordingly, we reject Sexton's claim that his trial counsel was ineffective for failure to use additional evidence and put on a meaningful defense.

d. Failure to Remove Certain Individuals from the Jury

{¶108} As his last contention in this assignment of error, Sexton challenges his counsel's decision to allow certain individuals to serve on the jury. In particular, Sexton complains that "Juror number 8 said she knew Miriam Renner"; "Juror number 10 is the mother of Juror number 6"; and "Juror number 10 is also a clerk for the Union County juvenile court." (App't Br. at 21.) As his only support for a claim that those individuals should have been removed "for cause," Sexton

claims that he "was not comfortable with these individuals being permitted to stay on the jury." (*Id.*) Yet, the defendant's discomfort is not one of the proper grounds for juror challenges under R.C. 2313.17 and Crim.R. 24.[6]

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[6] R.C. 2313.17 states,

> (B) The following are good causes for challenge to any person called as a juror:
> (1) That the person has been convicted of a crime that by law renders the person disqualified to serve on a jury;
> (2) That the person has an interest in the cause;
> (3) That the person has an action pending between the person and either party;
> (4) That the person formerly was a juror in the same cause;
> (5) That the person is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
> (6) That the person is subpoenaed in good faith as a witness in the cause;
> (7) That the person is akin by consanguinity or affinity within the fourth degree to either party or to the attorney of either party;
> (8) That the person or the person's spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against any such party to another such action;
> (9) That the person discloses by the person's answers that the person cannot be a fair and impartial juror or will not follow the law as given to the person by the court.
> (C) Each challenge listed in division (B) of this section shall be considered as a principal challenge, and its validity tried by the court.
> (D) In addition to the causes listed in division (B) of this section, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render the juror at the time an unsuitable juror. The validity of the challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

Crim.R. 24(C) states that a "person called as a juror may be challenged for the following causes:"

> (1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.
> (2) That the juror is a chronic alcoholic, or drug dependent person.
> (3) That the juror was a member of the grand jury that found the indictment in the case.
> (4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.
> (5) That the juror served as a juror in a civil case brought against the defendant for the same act.
> (6) That the juror has an action pending between him or her and the State of Ohio or the defendant.
> (7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.
> (8) That the juror has been subpoenaed in good faith as a witness in the case.
> (9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of

{¶109} Sexton does not assert that any of the proper grounds to challenge a juror for cause existed in his case. He does not assert that any of the jurors was biased against him or that the three jurors' relationships or history of employment affected their decisions in his trial. He acknowledges that "each of these jurors indicated that they could be fair and impartial." (App't Br. at 22.) We note that the trial court gave multiple admonitions to the jury that they were not to talk to one another about the case during any breaks. (*See, e.g.*, Tr.1 at 182-183, 244; 286 (specific admonition against talking to family members), 288; Tr.2 at 55, 68.) We have recently held that a clerk of courts or a state employee is not automatically "an unfit juror," and we rejected a claim of ineffective assistance of counsel based on the trial counsel's failure to request the juror's removal. *State v. Phillips*, 3d Dist. Wyandot No. 16-13-09, 2014-Ohio-3670, ¶ 78-89. Furthermore, no prejudice is alleged or shown from Mr. Valentine's failure to request removal of

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the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.
(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.
(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.
(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (C)(11) of this rule.
(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.
(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

those jurors for cause. Therefore, we reject Sexton's contention that his trial counsel was ineffective for failure to request removal of the three jury members.

{¶110} For all of the foregoing reasons, Sexton's claims of ineffective assistance of counsel are rejected and his third assignment of error is overruled.

C. Conclusion

{¶111} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars assigned and argued. The judgment of the Common Pleas Court of Union County, Ohio is therefore affirmed.

Judgment Affirmed

SHAW and PRESTON, J.J., concur.

/jlr