[Cite as *State v. Jazdzewski*, 2015-Ohio-2416.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 14CA15
v.	:	DECISION AND
MICHAEL E. JAZDZEWSKI,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 06/12/2015

APPEARANCES:

Robert W. Bright, Middleport, Ohio, for Appellant.

James E. Schneider, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Defendant-appellant, Michael E. Jazdzewski, appeals his convictions in the Washington County Common Pleas Court after a jury found him guilty of nine counts of breaking and entering, each a felony of the fifth degree in violation of R.C. 2911.13(A), four counts of theft, each a first degree misdemeanor in violation of R.C. 2913.02(A)(1)&(B)(1)(2), two counts of theft, each a fifth degree felony in violation of R.C. 2913.02(A)(1)&(B)(1)(2), and one count of engaging in a pattern of corrupt activity, a second degree felony in violation of R.C. 2923.32(A)(1)&(B). On appeal, Jazdzewski contends that (1) the trial court committed plain error by providing an improper jury instruction on the charge of engaging in a pattern of corrupt activity; (2) his convictions were against the manifest weight of the evidence, or alternatively, were supported by insufficient evidence; (3) his conviction for engaging in a pattern of corrupt

activity was improper inasmuch as it rests completely on the testimony of an accomplice; and (4) he received ineffective assistance of counsel. Having found no plain error in the trial court's jury instruction, Jazdzewski's first assignment of error is overruled. Further, having determined that Jazdzewski's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence, Jazdzewski's second assignment of error is overruled. Likewise, because relevant law permits a conviction to be supported solely by the testimony of an accomplice, we overrule Jazdzewski's third assignment of error. Finally, based upon our determination that Jazdzewski did not receive ineffective assistance of counsel, Jazdzewski's fourth assignment of error is overruled. Accordingly, we affirm the judgment of the trial court.

I. FACTS

{¶ 2} On November 21, 2013, Jazdzewski was indicted by the Washington County Grand Jury on twenty-six counts, including eleven counts of felony and misdemeanor theft, fourteen counts of breaking and entering, and one count of engaging in a pattern of corrupt activity. The indictment arose from a string of break-ins and thefts that occurred between December 2011 and August 2012. Twenty-three of the offenses occurred in Washington County, Ohio. Two offenses occurred in adjacent Noble County, Ohio. With one exception, all the counts involved break-ins and thefts from local businesses. The break-ins always occurred in the late evening or early morning hours when the businesses were closed and unoccupied. The other offense occurred in the parking lot of a business when a generator was stolen out of the bed of a pick-up truck.

{¶ 3} Jazdzewski pleaded not guilty to the charges and the matter proceeded to a jury trial on February 25 and 26, 2014.[1] At trial, the State's primary witness was Ashley McKnight – Jazdzewski's ex-girlfriend and accomplice in many of the charged counts. The record reveals that McKnight was offered plea deals and immunity from three separate county prosecutors in

[1] Five counts were dismissed prior to trial, including two counts of breaking and entering and three counts of theft.

exchange for testifying against Jazdzewski at trial. The State also introduced multiple other witnesses, including the owners and employees of the businesses that were broken into, the victim of the generator theft, and law enforcement officers who were involved in the investigation of the crimes.

{¶ 4} The jury found Jazdzewski guilty of nine counts of breaking and entering, four counts of misdemeanor theft, two counts of felony theft, and one count of engaging in a pattern of corrupt activity. Jazdzewski was found not guilty of five other counts. The trial court sentenced Jazdzewski to an aggregate prison term of ten years and seven months. It is from this conviction and sentence that Jazdzewski now brings his timely appeal.

II. ASSIGNMENTS OF ERROR

{¶ 5} Jazdzewski assigns the following errors for our review:

First Assignment of Error:

> ONE OR MORE OF THE APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THEY ARE PLAINLY IN ERROR.

Second Assignment of Error:

> ONE OR MORE OF THE APPELLANT'S CONVICTIONS SHOULD BE REVERSED BECAUSE THEY ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND/OR THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION.

Third Assignment of Error:

> THE APPELLANT SHOULD NOT HAVE BEEN CONVICTED OF PARTICIPATING IN A PATTERN OF CORRUPT ACTIVITY BECAUSE THE ONLY IDENTIFICATION EVIDENCE PRESENTED AT TRIAL WAS BY THE TESTIMONY OF A CO-CONSPIRATOR.

Fourth Assignment of Error:

> THE APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE TRIAL COURT LEVEL WHICH REQUIRES THE REVERSAL OF ONE OR MORE OF THE DEFENDANT'S CONVICTIONS.

III. LAW AND ANALYSIS

A. Assignment of Error I

{¶ 6} In his first assignment of error, Jazdzewski contends that the trial court committed plain error by incorrectly including, in its jury instruction, "recklessness" as the culpable mental state needed to establish the charge of engaging in a pattern of corrupt activity.

{¶ 7} R.C. 2923.32(A)(1) provides:

> No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt.

{¶ 8} At the jury trial, jurors were provided the following instruction with regard to the R.C. 2923.32(A)(1) engaging in a pattern of corrupt activity charge:

> The Defendant is charged with the offense of engaging in a pattern of corrupt activity. Before you can find the Defendant guilty of the offense of engaging in a pattern of corrupt activity, you must find that on or about the date specified in this count of the indictment that the Defendant, one, *recklessly*; two, being a person employed by or associated with any enterprise; three, conducted or participated in directly or indirectly, the affairs of the enterprise; four, through a pattern of corrupt activity or the collection of an unlawful debt; * * *. (Emphasis added.)

[Tr. at 478-479.] The trial court continued by providing definitions for certain terms used in the above instruction; including two separate definitions for the term "recklessly" and "reckless". [*See* Tr. at 479.]

{¶ 9} Thus, the instructions added a "recklessness" mens rea requirement to the elements of R.C. 2923.32(A)(1), even though the offense is a strict liability offense. *See State v. Schlosser*,

79 Ohio St.3d 329, 335, 681 N.E.2d 911 (1997) (expressly rejecting the notion that a reckless mental state is required for a conviction under R.C. 2923.32(A)(1) and holding instead that the statute imposes strict liability for commission of the prohibited acts). However, neither the State nor Jazdzewski's attorney objected to the instruction.

{¶ 10} When a defendant fails to object to erroneous jury instructions, our review is limited to whether the instructions amounted to plain error. *State v. Steele,* 138 Ohio St.3d 1, 2013–Ohio–2470, 3 N.E.3d 135, ¶ 29; *State v. Mockbee,* 2013–Ohio–5504, 5 N.E.3d 50, ¶ 24 (4th Dist.); Crim.R. 52(B). "To constitute plain error, a reviewing court must find (1) an error in the proceedings, (2) the error must be a plain, obvious or clear defect in the trial proceedings, and (3) the error must have affected 'substantial rights' (i.e., the trial court's error must have affected the trial's outcome)." *State v. Dickess,* 174 Ohio App.3d 658, 2008–Ohio–39, 884 N.E.2d 92, ¶ 31 (4th Dist.), citing *State v. Hill,* 92 Ohio St.3d 191, 749 N.E.2d 274 (2001), and *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002–Ohio–68, 759 N.E .2d 1240. "Furthermore, notice of plain error must be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Id.,* citing *State v. Landrum,* 53 Ohio St.3d 107, 111, 559 N.E.2d 710 (1990), and *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "A reviewing court should notice plain error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

{¶ 11} We further note that "[a] defective jury instruction does not rise to the level of plain error unless the defendant shows that the outcome of the trial clearly would have been different but for the alleged erroneous instruction." *Id*. at ¶ 32, citing *State v. Campbell,* 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), and *Cleveland v. Buckley,* 67 Ohio App.3d 799, 805, 588 N.E.2d 912 (8th Dist.1990).

{¶ 12} Here, the first and second prongs of the three-prong test for plain error are met, as there was an error in the jury instruction and the error was obvious. The error, however, does not meet the standard set forth in the third prong of the test, because it was not so prejudicial that the result of the case would have been different had the error not occurred. In fact, the jury instruction required the jury to find Jazdzewski culpable for the engaging in a pattern of corrupt activity charge at a mental state, "recklessly", which is more difficult to prove than the strict liability standard actually required by the statute. Because the jury convicted Jazdzewski at a heightened mental state, it would have convicted him under the strict liability standard. Accordingly, because the error in the jury instruction would not have changed the outcome of the case, and thus does not amount to plain error, we overrule Jazdzewski's first assignment of error.

B. Assignment of Error II

{¶ 13} In his second assignment of error, Jazdzewski contends that his convictions were against the manifest weight of the evidence, or alternatively, that the State failed to produce sufficient evidence to sustain his convictions.

{¶ 14} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt." *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013–Ohio–1504, ¶ 12. "The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.*, citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979). Therefore, when we review a sufficiency of the evidence claim in a criminal case, we review the evidence in a light most favorable to the prosecution. *State v. Hill,* 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant,* 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did. *State v. Tibbetts,* 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh,* 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶ 15} " 'Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence.' " *State v. Topping,* 4th Dist. Lawrence No. 11CA6, 2012–Ohio–5617, ¶ 60, quoting *Thompkins* at 387. "When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses." *Id.* "The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve." *Id.*, citing *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001), and *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. This is so because "[t]he trier of fact 'is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *State v. Pippen,* 4th Dist. Scioto No. 11CA3412, 2012–Ohio–4692, ¶ 31, quoting *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 16} "Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, clearly lost its way and created such a manifest miscarriage of justice that the

conviction must be reversed and a new trial ordered." (Quotations omitted.) *Davis* at ¶ 14.

{¶ 17} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 16 (4th Dist.). A reviewing court should find a conviction against the manifest weight of the evidence " 'only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins*, 78 Ohio St.3d 380 at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *see also State v. Lindsey*, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 18} Jazdzewski was convicted of nine counts of breaking and entering under R.C. 2911.13(A). R.C. 2911.13(A) provides as follows:

> No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.

Jazdzewski was also convicted of six counts of theft in violation of R.C. 2913.02(A)(1), which provides:

> No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services * * * [w]ithout the consent of the owner or person authorized to give consent[.]

Finally, Jazdzewski was also convicted of a single count of engaging in a pattern of corrupt activity under R.C. 2923.32(A)(1), which is quoted above in our discussion of assignment of error I.

{¶ 19} Here, the State presented several witnesses in support of its theory that Jazdzewski was responsible for the rash of break-ins and thefts from several local businesses that occurred between December 2011 and August 2012.[2] The State's key witness was undoubtedly Ashley McKnight. McKnight was Jazdzewski's girlfriend during most of the time period in which the crimes occurred, and in some instances McKnight was Jazdzewski's accomplice. The Washington County Prosecutor agreed not to seek any charges against McKnight in exchange for her testimony against Jazdzewski at trial. The Athens County Prosecutor, where McKnight was under community control, agreed not to seek a prison sentence in any revocation proceedings stemming from the break-ins and thefts in exchange for McKnight's testimony. Likewise, the Noble County Prosecutor also agreed to immunity and avoidance of prison in exchange for McKnight's testimony (McKnight had also been under community control in Noble County at the time of the offenses, and one of the alleged break-ins and thefts in which McKnight was an accomplice occurred in Noble County). McKnight's criminal history, which includes convictions for breaking and entering, safecracking, theft, and complicity, as well as her agreements with the county prosecutors, was made known to the jury during direct examination. In general terms, McKnight testified that she drove Jazdzewski to many area businesses and that Jazdzewski would then break-into the businesses and steal or attempt to steal money or safes from the businesses. On some occasions, McKnight did not participate in the alleged break-ins and thefts, but she testified that in those instances Jazdzewski told her that he was responsible for the crimes. McKnight also freely admitted that she indirectly benefitted from the crime spree, since she lived with Jazdzewski and Jazdzewski's mother at the time, and because Jazdzewski provided for the couple with the money he obtained through his illicit activities. McKnight also

[2] We will only discuss the evidence as it relates to the counts of the indictment in which Jazdzewski was found guilty.

admitted that she has a drug problem, and that she hoped her testimony would allow her to avoid a prison sentence so that she could care for her three young children, including a child she has with Jazdzewski.

{¶ 20} The breadth of Jazdzewski's argument under this assignment of error is premised on an assertion that McKnight's testimony was not credible or reliable, and thus should not have been believed by the jury. However, the weight to be afforded evidence and the credibility of testimony are issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 652 N.E.2d 1000 (1995), citing *Grant*, 67 Ohio St.3d at 477, 620 N.E.2d 50. As stated above, the fact finder "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co.*, 10 Ohio St.3d 77 at 80, 461 N.E.2d 1273. Here, both the State and defense counsel fully examined McKnight concerning her past criminal activity, her drug problem, her agreements with the county prosecutors, and any other bias she may have had in testifying at Jazdzewski's trial. Thus, the jury had before it sufficient facts to ascertain McKnight's credibility and to weigh it accordingly, and we will not substitute our judgment for that of the jury. Having reviewed McKnight's testimony and the other evidence adduced at trial, we do not believe that the jury clearly lost its way when it determined that McKnight's testimony was credible.

{¶ 21} Jazdzewski also argues that McKnight's testimony is unreliable because it lacks detail and specificity. Jazdzewski ignores, however, the testimony of the business owners, employees, and law enforcement officers, which in many instances corroborates McKnight's testimony.

{¶ 22} Kathy Ball, manger of the Family Dollar Store in Beverly, Ohio, testified in

regards to breaking and entering counts one and sixteen. Ball testified that the Family Dollar Store had been broken into twice, once in December 2011, and once in April 2012. The store has an alarm system that alerts the police department when the system is activated. In both instances, Ball was alerted by police of a possible break-in. In the first break-in, an attempt was made to bust open the safe but the perpetrator was unsuccessful. No money or merchandise was taken. In the second break-in, the perpetrator again tried to remove the safe but was unsuccessful. McKnight testified that she did not know Jazdzewski in December 2011, but that he later told her that he and his brother-in-law had broken into the Family Dollar Store in Beverly. McKnight also testified that she drove Jazdzewski to the store during the second break-in attempt. She indicated that she parked the car on a hill near the store and that Jazdzewski descended down the hill and broke into the Family Dollar Store. According to McKnight, Jazdzewski returned with no money and no safe and he told her that he could not crack the safe despite attempts to do so.

{¶ 23} William Samuel Skinner, owner of the Dough Boyz Pizzeria stores in Devola, Ohio, and Beverly, Ohio, testified in regards to breaking and entering counts ten and fourteen and theft counts eleven and fifteen. Skinner testified that his opening manager discovered the break-in at his Devola location. Skinner indicated that the front door and front window of the business had been busted out and that a dark-colored, double door safe had been removed from the property. According to Skinner, the safe contained a nightly deposit and opening money totaling $2,815. Skinner also indicated that the safe was eventually located in a creek and that he identified the safe for law enforcement. Skinner further testified that a friend discovered the break-in at his Beverly location. The front door to the Beverly store had been busted open, a cabinet broken, and $357 was taken from the store. McKnight testified that she drove Jazdzewski to the Devola Dough Boyz and that Jazdzewski broke into the store and returned with a safe.

McKnight and Jazdzewski then drove to a concrete slab near Duck Creek where Jazdzewski busted into the safe, retrieved money and papers from the safe, and then kicked the safe into the creek. McKnight further testified that she drove Jazdzewski to the Beverly Dough Boyz store and that Jazdzewski broke into the store and returned with a "kids pencil box." The box contained, according to McKnight, money and rolled-up coins totaling approximately $300.

{¶ 24} April Schaad, a former employee of the Valley Inn Bar in Beverly, Ohio, testified in regards to breaking and entering count twelve and theft count thirteen. Schaad testified that a dayshift manager that lives next to the bar heard an alarm and discovered the break-in at the bar. Schaad also indicated that the front door had been busted or pried open and that a metal lockbox kept underneath the cash register was missing. Schaad, who had closed the bar earlier in the evening/early morning, indicated that no money was inside of the lockbox. McKnight testified that on the night of the break-in she had dropped Jazdzewski off at a gas station in Beverly and then proceeded down the street to turn around and retrieve him. Despite not actually seeing the break-in, McKnight indicated that she knew Jazdzewski had broken into the Valley Inn Bar because she heard the bar's alarm going off. When she picked Jazdzewski up, he had a small box in his hand. The box had nothing in it, so Jazdzewski threw the box out of the car window and into a park.

{¶ 25} William Holschuh, owner of the Dairy Queen restaurant in Marietta, Ohio, testified in regards to breaking and entering count seventeen and theft count eighteen. Holschuh testified that someone had broken through glass in the drive-thru area of the restaurant, entered the restaurant through the broken glass, and then forced open an office door. Holschuh further testified that bank bags containing a little under $4,000 had been taken from the office. McKnight, meanwhile, testified that she had driven Jazdzewski to a Holiday Inn parking lot in

Marietta. While she waited in the parking lot, Jazdzewski entered Dairy Queen and returned with "bags of money". While McKnight did not actually see the break-in, she testified that it was understood that they were targeting the restaurant. McKnight also viewed surveillance video of the break-in and indicated that the perpetrator on the video was Jazdzewski.

{¶ 26} Lori Rummer, manager of the Dollar General Store in Lowell, Ohio, testified in regards to breaking and entering count nineteen. Rummer testified that one morning she received a telephone call from an alarm company indicating that the alarm at the store had been activated. The store is equipped with an audible alarm. According to Rummer, the glass entry door to the store had been shattered but nothing was taken from the business. McKnight testified that she drove Jazdzewski to the Dollar General Store in Lowell, and that he broke into the store but did not steal anything because an alarm had gone off.

{¶ 27} Dennis Kyle Gutberlet, owner of Gutberlet Automotive in Lowell, Ohio, testified in regards to breaking and entering count twenty. Gutberlet testified that he discovered a break-in at his car lot while opening the store one morning in July 2012. The back window of the business had been busted in and cabinets and other objects in the office had been overturned. According to Gutberlet, nothing was taken from the car lot. McKnight testified that Jazdzewski broke-into Gutberlet Automotive on the same night as the Dollar General Store but was unsuccessful in retrieving any money from the car lot.

{¶ 28} Randy Tompkins, a patron of the Valley Inn Bar in Beverly, Ohio, testified in regards to theft count twenty-one. According to Tompkins, a portable generator was stolen out of the back of his truck while it was parked at the Valley Inn parking lot. Tompkins estimated that the generator was worth $1,000. McKnight testified that she was not present when the theft of the generator occurred, but that Jazdzewski had told her about the theft later in the day.

McKnight further testified that Jazdzewski told her that he had sold the generator. McKnight also identified Jazdzewski as the perpetrator of the crime after watching surveillance footage of the incident.

{¶ 29} Kaley Peoples, owner of the Pizza Factory restaurant in Caldwell, Noble County, Ohio, testified in regards to breaking and entering count twenty-four and theft count twenty-five. Peoples testified that while the Pizza Factory restaurant was in the process of going out of business it was broken into and a safe was removed. The safe contained $5 to $10 dollars and paperwork related to Peoples's Pizza Factory business and Wally's Pizza business. Peoples also testified that the safe was recovered a few days later from a creek. McKnight testified that she drove Jazdzewski to Caldwell and parked uptown. According to McKnight, Jazdzewski then walked to the Pizza Factory restaurant where he broke into the restaurant and stole a safe. McKnight indicated that Jazdzewski placed the safe near the Caldwell Public Library, returned to the car, and that the pair then drove the car to the safe and retrieved it. Then the pair, according to McKnight, took the safe to Duck Creek (which is located in Washington County, Ohio), broke into the safe, retrieved $9, and disposed the safe into the creek.

{¶ 30} Several law enforcement officers also testified at trial, including Sergeant Bryan Reeder of the Washington County Sheriff's Office. Reeder testified that on August 14, 2012, the sheriff's office received a tip of a safe in Duck Creek. Reeder responded to the tip and retrieved the safe from the water. According to Reeder, the safe contained papers from Wally's Pizza in Caldwell, Ohio.

{¶ 31} Detective Lieutenant Mark Johnson of the Washington County Sheriff's Office also testified at trial. Johnson indicated that McKnight was arrested in August 2012, and that a couple of days after her arrest she told officers that a safe was located in Duck Creek near the

concrete fording. Officers traveled to the described location and were able to find the safe. According to Johnson it was eventually learned that the safe belonged to the Dough Boyz Pizzeria in Devola.

{¶ 32} Finally, several jailhouse letters were introduced and admitted into evidence at trial. The letters were authored by Jazdzewski and directed to McKnight. While there is no admission of guilt to any of the charged crimes in the letters, Jazdzewski did urge McKnight to refrain from talking with law enforcement. For example, in one instance Jazdzewski wrote "you just got to sit there keep mouth shut * * * [t]his type of crime they have it hard to prove unless you write or tell on me."

{¶ 33} In light of the above evidence, we cannot conclude that the jury lost its way and created a manifest miscarriage of justice by finding Jazdzewski guilty of the above crimes and the engaging in a pattern of corrupt activity charge. Any reliability issues relating to McKnight's testimony was lessened by the corroborating testimony of the other witnesses and the documentary evidence introduced at trial. Further, we conclude that there was substantial evidence upon which the jury could have reasonably concluded that all the essential elements of the crimes charged had been proved beyond a reasonable doubt.

{¶ 34} Jazdzewski also contends that all of his convictions should be overturned for insufficient evidence, or alternatively as against the manifest weight of the evidence, because McKnight could not recall the exact dates on which the alleged offenses occurred.

{¶ 35} " 'In a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential. It is sufficient to prove the alleged offense at or about the time charged.' " *State v. S.S.*, 10th Dist. Franklin No. 13AP-1060, 2014 WL 6851969, ¶ 39 (Dec. 4, 2014), quoting *Tesca v. State*, 108 Ohio St. 287, 140 N.E. 629 (1923), paragraph

one of the syllabus. "Where the precise date and time of a violation of the statute are not essential elements of the crime, an indictment need not allege a specific date of the offense." *Id*., citing *State v. Sellards,* 17 Ohio St.3d 169, 171–72, 478 N.E.2d 781 (1985). " 'The General Assembly, in declaring what shall be sufficient in an indictment, provided, among other things, that it shall be sufficient if it can be understood that the offense was committed at some time prior to the time of the filing of the indictment.' " *Id*., quoting *Sellards* at 171, citing R.C. 2941.03(E). "Proof of the offense on or about the alleged date is sufficient to support a conviction even where evidence as to the exact date of the offense is in conflict." *Id*., citing *State v. Cochran,* 10th Dist. Franklin No. 11AP–408, 2012–Ohio–5899, ¶ 82, citing *State v. Dingus,* 26 Ohio App.2d 131, 137, 269 N.E.2d 923 (4th Dist.1970). "The exact date is not essential to the validity of the conviction and the failure to prove that is of no consequence." *Id*., citing *Cochran* at ¶ 82. "The state's only responsibility is to present proof that the offenses alleged in the indictment occurred reasonably within the time frame alleged." *Id*., citing *Sellards* at 171; *Cochran* at ¶ 82; *State v. Barnhart,* 7th Dist. Jefferson No. 09JE15, 2010–Ohio–3282, ¶ 50.

{¶ 36} At trial, while McKnight could not testify to the exact dates of the offenses, she did testify that all of them, with the exception of first Family Dollar Store break-in, occurred between February 2012 and August 2012. This time range was also the time period in which McKnight resided with Jazdzewski. Moreover, in most instances the business owners and employees who testified at trial were able to provide details regarding the dates and times of the break-ins. Given these facts, the jury could infer that the incidents occurred reasonably within the time frame alleged in the indictment and Jazdzewski's argument is without merit. To the extent that Jazdzewski contends that McKnight's lack of knowledge of the exact dates of the offenses makes her testimony less reliable, we again reiterate that the trier of fact was in the best position

to judge McKnight's credibility and to weigh the evidence.

{¶ 37} Finally, Jazdzewski contends that the State never established venue in the Washington County Common Pleas Court for the break-in and theft that occurred at the Pizza Factory restaurant in Caldwell, Ohio. The State concedes that the Pizza Factory restaurant in Caldwell is located in Noble County, Ohio, but argues that venue was proper in Washington County under R.C. 2901.12.

{¶ 38} Although venue is not a material element of a charged offense, the prosecution must nevertheless prove it. *State v. Draggo*, 65 Ohio St.2d 88, 90, 418 N.E.2d 1343 (1981). However, venue need not be proved in express terms, so long as it is established by all the facts and circumstances in the case. *State v. Dickerson*, 77 Ohio St. 34, 82 N.E. 969 (1907), paragraph one of the syllabus.

{¶ 39} R.C. 2901.12 is the statute in Ohio that establishes venue. It states in relevant part as follows:

> When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:
>
> (1) The offenses involved the same victim, or victims of the same type or from the same group. * * *
>
> (3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

(4) The offenses were committed in furtherance of the same conspiracy.

(5) The offenses involved the same or a similar modus operandi. * * *

R.C. 2901.12(H).

{¶ 40} The majority of the crimes charged in the indictment occurred in Washington County, Ohio. All the crimes involved similar types of victims – small businesses. All the crimes were committed with the purpose of obtaining money from the businesses, as no merchandise was ever stolen. All businesses were targeted during closed hours and while the businesses were not occupied by patrons or employees. Furthermore, the crimes occurred over a relatively short period of time. In short, the break-in at the Caldwell business was committed as part of a course of criminal conduct. Accordingly, venue in Washington County was established pursuant to R.C. 2901.12(H).

{¶ 41} Having found no merit to any of Jazdzewski's arguments in his second assignment of error, it is overruled.

C. Assignment of Error III

{¶ 42} In his third assignment of error, Jazdzewski contends that his conviction for engaging in a pattern of corrupt activity was improper inasmuch as it rests completely on the testimony of McKnight, an accomplice to many of the charged offenses. In support of this assignment of error, Jazdzewski likens R.C. 2923.32, the engaging in a pattern of corrupt activity statute, to R.C. 2923.01, the conspiracy statute, and argues that he, like an accused in the conspiracy context, should not be convicted of engaging in a pattern of corrupt activity solely on the uncorroborated testimony of an accomplice. *See* R.C. 2923.01(H)(1) ("No person shall be convicted of conspiracy upon the testimony of a person with whom the defendant conspired, unsupported by other evidence.").

{¶ 43} We note, however, that McKnight was an accomplice, not a co-conspirator. This is an important distinction because R.C. 2923.03, the complicity statute, states as follows:

> If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:
>
> "The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.
>
> It is for you, as jurors, in the light of all the facts presented to you from the witness stand, to evaluate such testimony and to determine its quality and worth or its lack of quality and worth."

R.C. 2923.03(D)

{¶ 44} Thus, R.C. 2923.03(D) eliminates the need for corroboration of an accomplice's testimony, but requires that the trial court instruct the jury about its suspect credibility. *State v. Evans*, 63 Ohio St.3d 231, 240-41, 586 N.E.2d 1042 (1992); *see also State v. Owen*, 2nd Dist. Miami No. 98CA17, 1999 WL 76826, * 9 (Feb. 19, 1999) (rejecting appellant's argument that one cannot be convicted of engaging in a pattern of corrupt activity solely on the testimony of an accomplice unsupported by other evidence). Here, the trial court did give the required instruction. [Tr. at 472-473.] Moreover, McKnight was cross-examined at trial and the jury was fully aware of the agreements that McKnight received from the county prosecutors in exchange for her testimony. Additionally, the other testimony and documentary evidence that the State

presented corroborated McKnight's testimony. Accordingly, we overrule Jazdzewski's third assignment of error.

D. Assignment of Error IV

{¶ 45} In his fourth assignment of error, Jazdzewski contends that he received ineffective assistance of counsel from his trial attorney. Specifically, Jazdzewski contends that he received ineffective assistance of counsel because (1) his attorney conducted limited cross-examination of the State's witnesses, and in some instances, no cross-examination; (2) his attorney's opening statement "is less than one page long in the transcript" and the closing statement is "less than five and one half pages long in the transcript"; (3) his attorney did not present any witnesses or other evidence on his behalf at trial; and (4) his attorney failed to object to the venue issue discussed above.

{¶ 46} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14; *State v. Stout,* 4th Dist. Gallia No. 07CA5, 2008–Ohio–1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E .2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95. "Failure to

establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶ 14.

{¶ 47} "When considering whether trial counsel's representation amounts to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Walters*, 4th Dist. Washington Nos. 13CA33, 13CA36, 2014–Ohio–4966, ¶ 23, quoting *Strickland* at 689. "Thus, 'the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.' " *Id.*, quoting *Strickland* at 689. " 'A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.' " *Id*., quoting *State v. Taylor*, 4th Dist. Washington No. 07CA1, 2008–Ohio–482, ¶ 10. "Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment." *Id.*

{¶ 48} We must usually be deferential towards counsel's decisions regarding cross-examination of witnesses, opening and closing arguments, and the presentment of witnesses or other evidence. "The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard*, 104 Ohio St.3d 54, 2004–Ohio–6235, 818 N.E.2d 229, ¶ 146, citing *State v. Campbell*, 90 Ohio St.3d 320, 339, 738 N.E.2d 1178 (2000). Moreover, decisions about which witnesses to call involve matters committed to counsel's professional judgment. *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 127; *see also State v. Jackson*, 4th Dist. Lawrence No. 97CA2, 1997 WL 749480, * 2 (Dec. 5, 1997) ("Generally, decisions to call witnesses is within the purview of defense counsel's trial strategy and is not considered deficient performance absent a showing of prejudice."). Stated differently "counsel's decision whether to

call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Treesh,* 90 Ohio St.3d at 490, 739 N.E.2d 749.

{¶ 49} Trial counsel may have concluded that extensive cross-examination would be ineffective and only serve to reinforce the credibility of the witness testimony. Similarly, counsel's decision to not present a defense may have been sound trial strategy. Counsel may have legitimately determined that opening Jazdzewski or other potential witnesses to cross-examination would only serve to hinder Jazdzewski's version of events. After all, the State was presented with the burden of establishing guilt beyond a reasonable doubt.

{¶ 50} In any event, none of the alleged instances of ineffective assistance, either individually or collectively, were prejudicial. To maintain his ineffective assistance of counsel argument, Jazdzewski must demonstrate it was reasonably probable that, but for his trial counsel's errors, the jury's verdict would have been otherwise. Here, Jazdzewski's argument that more extensive cross-examination and more long-winded arguments would have aided his case is mere speculation. Moreover, Jazdzewski has not identified what witnesses were available to testify in his defense, or what their testimony would have been. Thus, he fails to explain how counsel's failure to call witnesses prejudiced him. We must also consider that the State's evidence weighs heavily against Jazdzewski. In light of the record, Jazdzewski has not shown that, but for his trial counsel's alleged errors, it was reasonably probable that the jury would have found him not guilty.

{¶ 51} Finally, Jazdzewski asserts that his counsel was ineffective for failing to object to venue in Washington County, for the offenses that were committed in Noble County. However, as we discussed in the resolution of Jazdzewski's second assignment of error, venue was proper under R.C. 2901.12(H). Therefore, an objection to venue would have been fruitless in this case.

As a result, trial counsel's failure to object to venue did not constitute ineffective assistance of counsel.

{¶ 52} Based on the foregoing, Jazdzewski's fourth assignment of error is overruled.

IV. CONCLUSION

{¶ 53} Having overruled each of Jazdzewski's assignments of error for the reasons stated above, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.