[Cite as *State v. Turner*, 2010-Ohio-5420.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-0016
JODIE JAQUAN TURNER	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2009-CR-682H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 4, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN PSCHOLKA-GARTNER Assistant Prosecutor 38 South Park Street Mansfield, OH 44902	DALE M. MUSILLI 105 Sturges Avenue Mansfield, OH 44903

Gwin, P.J.

{¶1} Defendant-appellant Jodie Jaquan Turner appeals his appeals convictions and sentences entered by the Richland County Court of Common Pleas on one count of aiding and abetting illegal conveyance onto the grounds of a detention facility in violation of R.C. 2921.36(A) (2), a felony of the third degree.

STATEMENT OF THE FACTS AND CASE

{¶2} On November 7, 2008, two packages addressed to Inmate Matthew Spataro were received in the mailroom at the Richland Correctional Institution in Mansfield, Ohio. The packages immediately aroused suspicions because of the strong odor of marijuana emitting from them. As a result, Prison Investigator Raymond Bowman was contacted to examine the packages.

{¶3} When the packages were opened, they were found to contain Steven King books. It appeared that someone tampered with the bindings of those books. When Investigator Bowman sliced open the bindings of both books, he discovered five packages of marijuana, which weighed a total of 24.59 grams. Receipts for the purchase of the books were also located inside the packages. These receipts were vital in tracking down the individual who purchased the books, placed the marijuana inside, and shipped them into the institution.

{¶4} Once the marijuana was discovered inside the books, Investigator Bowman questioned Inmate Spataro, who was the addressee listed on the packages. Inmate Spataro indicated that he had agreed to let another inmate, appellant, use his name and P.O. Box number for the shipment of the books. Inmate Spataro denied any knowledge of the drugs inside the books.

{¶5} Prison officials began listening to appellant's recorded phone calls for coded language concerning the books and their content. In a series of calls from October 28 to November 12, appellant and a female who identified herself as the mother of appellant's son discussed the purchase and shipping of books and another item that cost $130 (the street value of an ounce of marijuana). The couple also discussed the appearance of the bindings, the smell of the package, and how long it should take to be delivered. From these calls, the investigators determined that appellant and this female had conspired to ship marijuana into the institution on November 7, 2008, and that they had successfully done so on at least one previous occasion.

{¶6} Investigator Bret Perdue then went through appellant's visitation list and obtained the name Tiffany Motley as the second suspect in the illegal conveyance. Ms. Motley was listed as the mother of appellant's child. Trooper John Werner verified that Ms. Motley was the female voice on the phone calls by calling the same number dialed by appellant on the recorded phone calls and asking to speak to Tiffany Motley.

{¶7} Ms. Motley was also tied to the illegal conveyance through the receipts that were located in the packages with the books containing marijuana. The receipts indicated that the books had been purchased at the Borders Books and Music store in Cuyahoga Falls, Ohio. Investigator Brett Perdue contacted the store and spoke to the General Manager, Steve Smith. From the information on the receipts, Mr. Smith was able to determine that the Borders Rewards card used to purchase the books was registered to an individual named T. Motley.

{¶8} Ms. Motley was contacted by phone and in person when she came to the prison to visit appellant; however, she refused to make any statements regarding the illegal conveyance. Appellant also refused to talk with investigators when he was questioned about the books containing marijuana.

{¶9} On September 3, 2009, appellant was indicted by the Richland County Grand Jury for one count of aiding and abetting illegal conveyance onto the grounds of a detention facility in violation of R.C. 2921.36(A) (2), a felony of the third degree, for his role in the plan to convey marijuana into the Richland Correctional Institution.

{¶10} Appellant's case was tried before a jury. After hearing all of the evidence, the jury deliberated and found appellant guilty of the charge of aiding and abetting illegal conveyance onto the grounds of a detention facility. The trial court immediately proceeded to sentencing. The prosecution requested a maximum sentence of five years in prison, citing appellant's extensive criminal record, which included numerous felony convictions for drug possession and trafficking, theft and having weapons under disability, as well as the fact that appellant continued to engage in criminal behavior inside the institution and involved the mother of his child in that behavior. The trial court considered those factors, but ultimately decided to impose a three-year prison sentence, to run consecutive to the sentence he was already serving. The trial court also imposed three years of post release control.

{¶11} Appellant timely appeals raising the following five assignments of error,

{¶12} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY COMMENTS LEADING THE JURY TO BELIEVE THEY WERE EXTENSIONS OF

THE EXECUTIVE ARM OF GOVERNMENT, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS.

{¶13} "II. THE TRIAL COURT ERRED BY COMMENTS TO THE JURY THAT PRECLUDED THE USE OF A VIABLE DEFENSE BY APPELLANT, VIOLATING APPELLANT'S CONSTITUTIONAL RIGHTS OF DUE PROCESS.

{¶14} "III. THE PROSECUTION PRESENTED INSUFFICIENCY [SIC.] OF EVIDENCE UPON WHICH TO BASE A CONVICTION.

{¶15} "IV. THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶16} "V. APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶17} In his first assignment of error, appellant contends that the trial court's comment to E.L.,[1] a potential juror with a past criminal conviction, about the prosecutor being on the "other side" was prejudicial because it would lead that juror to conclude that she was now on the same side as the prosecutor. We disagree.

{¶18} At the outset, we note that appellant's trial counsel did not object to the trial court's comments to potential juror. As the United States Supreme Court recently observed in *Puckett v. United States* (2009), 129 S.Ct. 1423, 1428, 173 L.Ed.2d 266, "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; 'anyone familiar with the work of courts understands that

[1] See, Rule 45(D) of the Rules of Supt. for Courts of Ohio concerning disclosure of personal identifiers.

errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.'" (Citation omitted).

{¶19} "[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus* (May 24, 2010), 560 U.S. __, 130 S.Ct. 2159, 2010 WL 2025203 at 4. (Internal quotation marks and citations omitted).

{¶20} "We have previously held that if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional[l] errors that may have occurred are subject to harmless-error analysis. *State v. Hill* (2001), 92 Ohio St.3d 191, 197, 749 N.E.2d 274, quoting *Rose v. Clark* (1986), 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460. Moreover, as we stated in *State v. Perry,* 101 Ohio St.3d 118, 2004- Ohio-297, 802 N.E.2d 643, [c]onsistent with the presumption that errors are not structural, the United States Supreme Court ha[s] found an error to be structural, and thus subject to automatic reversal, only in a very limited class of cases. *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254,

106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31(1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction). *Wamsley*, supra 117 Ohio St.3d at 391-392, 884 N.E.2d at 48-49, 2008-Ohio-1195 at ¶ 16. [Citations and internal quotation marks omitted].

{¶21} A "structural error" analysis only supplies an automatic finding of prejudice for preserved errors thereby avoiding harmless error analysis. It does not supply an automatic finding of plain error for unpreserved errors. Id. (Citing *State v. Rector*, Carroll App. No. 01AP-758, 2003-Ohio-5438). The Ohio Supreme Court pertinently addressed when structural error analysis should be used in *State v. Perry*, supra:

{¶22} "We emphasize that both this court and the United States Supreme Court have cautioned against applying a structural-error analysis where, as here, the case would be otherwise governed by Crim.R. 52(B) because the defendant did not raise the error in the trial court. See *Hill*, 92 Ohio St.3d at 199, 749 N.E.2d 274; *Johnson*, 520 U.S. at 466, 117 S.Ct. 1544, 137 L.Ed.2d 718. This caution is born of sound policy. For to hold that an error is structural even when the defendant does not bring the error to the attention of the trial court would be to encourage defendants to remain silent at trial only later to raise the error on appeal where the conviction would be automatically reversed. We believe that our holdings should foster rather than thwart judicial economy by providing incentives (and not disincentives) for the defendant to

raise all errors in the trial court-where, in many cases, such errors can be easily corrected." 101 Ohio St.3d at 124, 802 N.E.2d at 649, 2004-Ohio-297 at ¶23.

{¶23} Thus, the defendant bears the burden of demonstrating that a plain error affected his substantial rights and, in addition that the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus; *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶24} The condition that "the error affect the appellant's substantial rights," requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial's outcome, not that there is "*any possibility,*" however remote, that the jury could have convicted based exclusively on the trial judge's comments. Further, to be reversible as plain error, the comments made by the trial judge must meet the criterion that "the error seriously affect[t] the fairness, integrity or public reputation of judicial proceedings." *Puckett, supra,* at ----, 129 S.Ct. 1423 (internal quotation marks omitted).

{¶25} In the case at bar, the juror responded to the Court's inquiry concerning whether anyone had ever been accused or convicted of a crime. Follow-up questions by the judge to the potential juror established that the juror had not been in trouble for approximately the last twenty years. The crux of appellant's argument on this appeal center upon the following exchange,

{¶26} "[Court]: And you have now been - - you are back, as I say, a regular citizen.

{¶27} "[E. L.]: I've not been in no trouble since.

{¶28} "[Court]: And have been participating as a citizen. When you were accused and convicted, the prosecuting attorney was on the *other* side. [Emphasis added.]

{¶29} "[E.L.]: Yes.

{¶30} Appellant argues, "This expression by the court, that a person who in the past was prosecuted and convicted was on the opposite side of the prosecutor leads naturally to the conclusion that as a juror, she is now not on the other side, but on the same side as the prosecutor. The prosecutor is a part of the executive branch, the juror a part of the judicial branch of government. By this comment, the court planted the idea that there was no separation between the two functions of government, showing the court's own bias and inculcating that bias in the particular juror and the jury pool." [Appellant's Brief at 10].

{¶31} The Ohio Supreme Court has noted that juries are highly sensitive to every utterance by the trial judge and that some comments may be so highly prejudicial that even a strong admonition by the judge to the jury, that they are not bound by the judge's views, will not cure the error. *State v. Thomas* (1973), 36 Ohio St. 2d 68, 303 N.E. 2d 882. *State v. Wade* (1978), 53 Ohio St. 2d 182, 188, 373 N.E. 2d 1244, vacated in part, *Wade v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157, the Court set forth five factors to be considered in determining whether a trial court's comments were prejudicial, "(1)The burden of proof is placed upon the defendant to

demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the re-marks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect on the jury, and (5) to their possible impairment of the effectiveness of counsel."

{¶32} Upon review of the judge's comments in light of the evidence presented to the jury in this matter, we are not persuaded that the outcome of the trial clearly would have gone the other way but for the alleged error. Immediately following the portion of the exchange cited above, the trial court asked the juror, "The question is, can you give the State of Ohio and the prosecuting attorney a fair trial in this case?" (T. at 14). When the juror replied that she could do so, the trial court asked "And the fact that you were charged and convicted and the prosecuting attorney was active in that event, are you – will that have any effect on your judgment when it comes time to decide this case?" (T. at 14). The juror responded "No." (T. at 14).

{¶33} The judge's comment did not concern the appellant's guilt or innocence but, rather, noted the state was entitled to a fair trial, just as is the accused. Thus, the remark at issue, when analyzed in light of the circumstances under which it was made, did not cast an aspersion upon appellant's innocence, the burden of proof or any other fundamental constitutional right of the parties.

{¶34} We cannot conclude that the outcome of the trial clearly would have been different but for the comment. Under the circumstances of this case, we find that no plain error was committed.

{¶35} Appellant's first assignment of error is overruled.

II.

{¶36} In his second assignment of error, appellant argues he was denied a right to present a viable defense by the comments of the trial judge. We disagree.

{¶37} Appellant contends that he was precluded from a defense when the court addressed the jury on voir dire and said the following,

{¶38} "Take a look at the Defendant. He is of a different race than all or at least most of you. Do you understand I read the indictment and is doesn't say anything in there about race? Nothing. Can you leave outside the courtroom sympathy and prejudice? Because you're required to do so. Nobody's going to play the race card in this courtroom, not without going to jail. It's not going to happen. But I'm telling you right now, when it comes time to consider the case, you can't consider for any degree the Defendant's race or his age or anything else. Anybody have a problem with that?" (T. at 20).

{¶39} As in appellant's first assignment of error, we must review this claim under the plain error doctrine because no objection was made to the comments.

{¶40} Appellant has not pointed anywhere in the record or in his brief before this Court to a specific defense that he was prohibited from making by the trial court.

{¶41} App.R. 16(A)(7) states that an appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citations to the authorities, statutes and parts of the record on which appellant relies." In this case, appellant has wholly failed to present any specific argument concerning what defense he was precluded from raising as a result of the trial judge's comments.

It is the duty of the appellant, not this court, to demonstrate [his] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶42} Every criminal defendant has a constitutional right to present a meaningful defense. *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142. However, this right does not engender an unfettered entitlement to the admission of any and all evidence. *United States v. Scheffer* (1998), 523 U.S. 303, 308, 118 S.Ct. 1261.

{¶43} While the Constitution thus prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. See, e.g., Fed. Rule Evid. 403; Uniform Rule of Evid. 45 (1953); ALI, Model Code of Evidence Rule 303 (1942); 3 J. Wigmore, Evidence § § 1863, 1904 (1904). Plainly referring to rules of this type, we have stated that the Constitution permits judges 'to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.' *Crane*, supra, at 689-690, 106 S.Ct. 2142 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); ellipsis and brackets in original). See also *Montana v. Egelhoff*,

518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion) (terming such rules "familiar and unquestionably constitutional").

{¶44} In the case at bar, appellant has failed to establish that the trial court's statement deprived him of a viable defense that affected the outcome of his trial.

{¶45} Appellant has not demonstrated that the comments of the trial judge affected his substantial rights and, in addition that the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

{¶46} Appellant's second assignment of error is overruled.

III & IV

{¶47} In his third assignment of error appellant contends that his conviction was based upon insufficient evidence. In his fourth assignment of error appellant contends that his conviction is against the manifest weight of the evidence. Appellant's third and fourth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶48} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492, superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668..

{¶49} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶50} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, 678 N.E.2d 541, 1997-Ohio-52, superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, supra, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶51} In *Thompkins*, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498

{¶52} Employing the above standard, we believe that the state presented sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that appellant committed the offenses of aiding and abetting illegal conveyance onto the grounds of a detention facility.

{¶53} R.C. 2921.36 states in relevant part:

(A) No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution that is under the control of the department of mental health or the department of mental retardation and developmental disabilities, any of the following items:

{¶54} " * * *

{¶55} "(2) Any drug of abuse, as defined in section 3719.011 * * * of the Revised Code [.]"

{¶56} "Whether a person acts knowingly can only be determined, absent a defendant's admission, from all the surrounding facts and circumstances, including the doing of the act itself." *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d

695. (Footnote omitted.) Thus, "[t]he test for whether a defendant acted knowingly is a subjective one, but it is decided on objective criteria." *State v. McDaniel* (May 1, 1998), Montgomery App. No. 16221, (citing *State v. Elliott* (1995), 104 Ohio App.3d 812, 663 N.E.2d 412).

{¶57} R.C. 2901.21 provides the requirements for criminal liability and provides that possession is a "voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession." R.C. 2901.21(D) (1).

{¶58} There is no dispute in the case sub judice, that the Richland Correctional Institution is a "detention facility." It is also undisputed in this case that marijuana is a drug of abuse as defined by R.C. 3719.011.

{¶59} Appellant argues that the state failed to produce evidence confirming the identity of the person it claimed was Tiffany Motley who was supposed to have arranged the purchase and shipping of the books containing the marijuana. Since the theory of the crime hinged on the conspiracy between the two, appellant argues that the state needed to prove beyond a reasonable doubt that Motley indeed was the one and only person who sent books to appellant, and that the books she sent were loaded with contraband.

{¶60} "[To] support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal ." *State v. Johnson* (2001), 93 Ohio St.3d 240, 754 N.E.2d 796, syllabus.

{¶61} Although the state need not establish the principal's identity, it must, at the very least, prove that a principal committed the offense. *State v. Perryman* (1976), 49 Ohio St.2d 14, 358 N.E.2d 1040, paragraph four of the syllabus; *State v. Hill* (1994), 70 Ohio St.3d 25, 28, 635 N.E.2d 1248, 1251. However, the state does not need to prove that the accomplice and principal had a specific plan to commit a crime. *Johnson*, 93 Ohio St.3d at 245, 754 N.E.2d 796. The fact that the defendant shares the criminal intent of the principal may be inferred from the circumstances surrounding the crime, which may include the defendant's presence, companionship, and conduct before and after the offense is committed. Id. at 245-246, 754 N.E.2d 796. This is a situation where "[c]ircumstantial evidence and direct evidence inherently possess the same probative value," *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus, because "[t]he intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be." *In re: Washington*, 81 Ohio St. 3d 337, 340, 1998-Ohio-627, quoting *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E. 2d 313, paragraph four of the syllabus.

{¶62} Investigator Bowman identified State's Exhibit 1, a brown bag containing the two packages that he was called to the mailroom to investigate on November 7, 2008. Those packages had a return address for the Borders Book and Music Store located at 335 Howe Avenue in Cuyahoga Falls, Ohio. (T. at 85-86). The postage label on each of the packages indicated that they were sent via priority mail with postage prepaid from Akron, Ohio. (T. at 86). Both were addressed to inmate Matt Spataro. (T. at 86). Investigator Bowman further identified State's Exhibit 3 as the two

Stephen King books that were found inside the packages. He testified that he had cut the bindings open in order to remove the marijuana concealed inside. (T. at 86-88; 90).

{¶63} Additionally, Investigator Bowman identified State's Exhibit 5, receipts from Borders Books and Music that were contained within the packages. (T. at 88). He testified that inmates are not allowed to receive books or other items that are sent in by friends or family. They must be sent directly from the store. Investigator Bowman indicated that from the packaging in this case, it was made to appear as if the books containing the marijuana were sent in from the store. (T. at 89).

{¶64} Steve Smith, the manager of the Borders store that sold the books in question, testified that the packages could not have been shipped from the store. Mr. Smith testified that anything shipped by Borders requires a shipping fee of five dollars, which is shown on the receipts in State's Exhibit 5. (T. at 117; 119-120). Furthermore, when items are shipped from the store, the receipt is printed on a shipping document, which is a triplicate form. The top copy is white. That copy is used for the shipping label. It has a box to check for whether the items is going to a residence, business, or correctional facility, and a place for the customer to fill out the address information. The second copy is yellow. That copy is saved in the store's shipping logbook. The third copy is pink. That copy is either given to the customer making the purchase or put into the package with the item being shipped. (T. at 117-118). Such a document was not present in this case. (T. at 117). Finally, Mr. Smith testified that the packaging for the books in question was different from the packaging used by Borders to ship items to correctional facilities. Although such items are shipped via U.S. Postal

Service, they are not placed in U.S. Postal Service packaging like the items in question. Instead, Borders places the items in a padded manila envelope sealed with packaging tape. (T. at 118-119).

{¶65} After discovering the marijuana inside the books, Investigator Bowman interviewed inmate Matthew Spataro regarding the packages. (T. at 91). Mr. Spataro indicated that sometime near the end of October or early November of 2008, appellant approached him about having books sent in under his name. (T. at 92; 98-100). Appellant told Mr. Spataro that he had already had too many books sent in under his own name, and the prison would not let him receive any more. In exchange for having the books sent in under Mr. Spataro's name, appellant promised Mr. Spataro that he would "look out for [him] a little bit." Mr. Spataro took this to mean that he would give him some money or commissary if he needed anything. (T. at 103-104). Mr. Spataro testified that appellant did not tell him that the books would contain marijuana, and he never spoke to Tiffany Motley on the phone. (T. at 99-100). He further testified that he never actually received the books, and did not know what happened until he was called down to the visitor's office and told that they had been confiscated because they had marijuana hidden in them. (T. at 100).

{¶66} Investigator Bowman and Trooper John Werner listened to recordings of appellant's telephone calls.[2] In several of those calls, they found statements that indicated that he was conspiring with a woman, later identified as Tiffany Motley, to send marijuana into the institution. (T. at 92-93; 132-134).

[2] State's Exhibit 14, a CD containing those recorded phone calls was played at appellant's trial and was admitted into evidence.

{¶67} In a phone call from October 28, 2008, appellant and the woman talked about their son and her visit to the institution earlier that day. Appellant then asked the woman whether she went to the bank and whether or not she grabbed it already. He told her he wanted one hundred thirty and asked her whether she has the difference. (T. at 134). Trooper Werner testified that based on his knowledge and experience, the street value of one ounce of marijuana (30 grams) would be between $130 and $135. (T. at 134-135). The total weight of the marijuana found in the books was 24.59 grams, nearly

{¶68} In that same conversation, the woman indicated that one hundred thirty dollars would be like her not paying her car note; however, appellant assured her that he would wire the money back to her by next week. (T. at 135). Trooper Werner testified that although certain inmates do have jobs within the institution, they typically pay around twelve dollars per month. (T. at 135-136).

{¶69} In a phone call from October 29, 2008, the same woman again refers to fact that the one hundred thirty dollars is for her car note. She told appellant that she already bought it the night before, and that he had better get her money back. Appellant again told her that he would get it right back and asked her how much it cost. She told him one hundred thirty dollars. Appellant told her that he would give the first couple hundred (dollars) to her. They also discussed her buying two items and sending them in separate boxes with a receipt in each box. (T. at 137); Trooper Werner testified that the date of this call corresponds to the date on the Border's receipts found in the packages with the books containing marijuana. (T. at 137).

{¶70} The next call was October 31, 2008. In that call, the woman told appellant that the stuff should get there tomorrow. Appellant asked her if she sent it overnight or something, to which she replied "priority." (T. at 137). Trooper Werner testified that this conversation corresponds to the postmark date on the packages containing the marijuana, which were shipped by priority mail. (T. at 137).

{¶71} In that same phone call, appellant asks her if it was hard or easy for her, and how it looks. She told him it was the same as last time. Appellant told her that the last time was a little light in weight, and that it had a tear in the bind. They also discussed the size of the books she bought. (T. at 138). In a call from November 4, 2008, the woman asked why it was taking so long for the packages to arrive.

{¶72} Appellant talked about how long it took last time, referencing their discussion in the previous call. The woman told appellant that it would "probably smell bad," to which appellant asked "strong?" She said "yeah." (T. at 138). Trooper Werner testified that the mailroom became suspicious of the packages because of the smell. (T. at 137). He further testified that the packages actually had a stamp on them from the U.S. Postal Service indicating that the contents were "spoiled." (T. at 137-138).

{¶73} In that same phone call, appellant told the woman that he would send her two hundred dollars. He told her that she should pay fifty of the first hundred on her phone and the other fifty on a card. (T. at 135-136).

{¶74} In a phone call on November 7, 2008, appellant mentioned that his "people's gone" because he was pulled out and sent to the hole. Appellant speculated that he got a "knock" because when that happens the prison officials call the inmate

down and open the package in the inmate's presence. The woman tells appellant not to get nervous because he may have been sent to the hole for other tickets. They also discuss whether she would be able to go and get the packages if they were sent back to Borders because his person is in the hole. She indicated that she would not be willing to do that. (T. at 138-139).

{¶75} Trooper Werner explained that when the Appellant said "people's gone" he meant that the inmate went to segregation; when he said tickets he meant institutional infractions; and when he said "knock" he meant got caught with drugs. (T. at 138-139). This is significant in terms of the investigation because the drugs were discovered in the mailroom and Mr. Spataro was sent to segregation on the same day that the call was made. (T. at 139). Trooper Werner further explained that if an inmate were in segregation, any packages they receive would be returned to the sender. (T. at 139-140).

{¶76} In that same call, the woman indicated that she was worried. Appellant told her he would call if he were around. Trooper Werner interpreted this statement to mean that appellant thought there was a strong possibility he would also be sent to segregation when Matthew Spataro identified him as the intended recipient of the books containing the marijuana. (T. at 140). He explained that inmates could not make phone calls while they are in segregation. (T. at 140).

{¶77} Finally, in a call from November 12, 2008, appellant said that they just came and told him to go to the investigator's office. Trooper Werner testified that this conversation corresponds to the date that Investigators Bowman and Perdue

attempted to speak with appellant about the marijuana that was sent into the institution. Appellant was sent to segregation on that date. (T. at 141-142).

{¶78} After appellant was identified as being involved in the illegal conveyance, the investigators were able to determine the identity of the female voice on the phone calls. Investigator Brett Perdue contacted the manager of the Borders store where the books were purchased and asked him to trace the Borders Rewards card number that appeared on the receipts. That number traced back to an individual named T. Motley. (T. at 113). From there, Investigator Perdue looked at appellant's visitation list and found Tiffany Motley listed as the mother of the Appellant's child. (T. at 113-114).

{¶79} After Tiffany Motley was identified as the appellant's co-conspirator, Trooper Werner called the same number that appellant had dialed in the recorded phone calls. (T. at 142-143). When a female came on the line, Trooper Werner asked to speak to Tiffany Motley. The female replied that he was speaking with her. (T. at 143). From that phone conversation, Trooper Werner was able to identify Ms. Motley's voice as the female voice on the recorded phone calls discussed above. (T. at 143). Additionally, Investigator Perdue actually had physical contact with Ms. Motley when she came into the institution to visit the Appellant. He attempted to obtain a statement from her regarding the illegal conveyance; however, she was not cooperative. (T. at 114-115).

{¶80} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of aiding and abetting illegal conveyance onto the grounds of a detention facility.

{¶81} We hold, therefore, that the state met its burden of production regarding each element of the crime and, accordingly, there was sufficient evidence to support appellant's conviction.

{¶82} "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)". *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶83} Although appellant cross-examined the witnesses and argued that the state failed to prove either his participation or the identity of the female co-conspirator the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶84} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not

believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, Franklin App. No. 02AP-604, 2003- Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶85} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the conviction. The jury did not create a manifest injustice by concluding that appellant was guilty of the crime of aiding and abetting illegal conveyance onto the grounds of a detention facility.

{¶86} We conclude the trier of fact, in resolving the conflicts in the evidence, did not create a manifest injustice to require a new trial. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶87} Accordingly, appellant’s third and fourth assignments of error are denied.

V.

{¶88} In his fifth assignment of error, appellant claims that his trial counsel was ineffective for failing to object to or ask for the recusal of the trial judge due to the comments complained of in his first and second assignments of error. He also contends that his trial attorney was ineffective for failing to object to Trooper Werner’s testimony that appellant was “speculating there’s a strong possibility that he’ll be going to segregation as well” based on his comment that he would call Ms. Motley if “he’s

around." Finally, appellant contends that his trial attorney was ineffective for failing to raise facts which appellant wanted raised in his defense. We disagree.

{¶89} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶90} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251.

{¶91} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2064. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington* 466 U.S. at 687, 104 S.Ct. at 2064. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington* 466 U.S. at 688, 104 S.Ct. 2052 at 2065.

{¶92} "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case,

viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064

{¶93} In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶94} Appellant must further demonstrate that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U. S., at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. To prevail on his ineffective-assistance claim, appellant must show, therefore, that there is a "reasonable probability" that the trier of fact would not have found him guilty.

{¶95} None of the instances raised by appellant rise to the level of prejudicial error necessary to find that he was deprived of a fair trial. Having reviewed the record that appellant cites in support of his claim that he was denied effective assistance of counsel, we find appellant was not prejudiced by defense counsel's representation of him. The result of the trial was not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel. Appellant has failed to demonstrate that there exists a reasonable probability that the result of his case would have been different.

{¶96} Because we have found no instances of error in this case, we find appellant has not demonstrated that he was prejudiced by trial counsel's performance.

{¶97} Appellant's fifth assignment of error is overruled.

{¶98} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER

WSG:clw 1029

[Cite as *State v. Turner*, 2010-Ohio-5420.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JODIE JAQUAN TURNER	:	
Defendant-Appellant	:	CASE NO. 2010-CA-0016

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. SHEILA G. FARMER