[Cite as *State v. Kozic*, 2014-Ohio-3807.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 11 MA 135
V.	)	
	)	OPINION
JAMIE KOZIC,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 10CR506A
JUDGMENT:	Affirmed in part Reversed in part
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St., 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant	Attorney Douglas A. King 91 West Taggart St., P.O. Box 85 East Palestine, Ohio 44413

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: August 27, 2014

[Cite as *State v. Kozic*, 2014-Ohio-3807.]
DONOFRIO, J.

{¶1} Defendant-appellant Jamie Kozic was convicted of seven counts of burglary, one count each of attempted burglary and possession of criminal tools, three counts of drug trafficking, and a single count of engaging in a pattern of corrupt activity following a jury trial in Mahoning County Common Pleas Court and sentenced to an aggregate term of imprisonment of twenty years. He appeals his conviction and sentence.

Main Market Road

{¶2} This case stems from a rash of burglaries that occurred in Columbiana, Mahoning, Trumbull, and Geauga Counties in late 2009 and early 2010. On November 24, 2009, Chris Natali returned from work to his home at 16663 Main Market Road in Parkman, Geauga County, Ohio, to find a knife collection box he kept near the fireplace had been thrown to the ground. Upstairs, he found dresser drawers pulled out and a coin collection and other items missing, including a credit card. Natali notified police and later was notified by the credit card issuer that the card was being used fraudulently. One of those fraudulent transactions occurred at a gas station. Video surveillance footage taken from the gas station when the card was used fraudulently showed Jennifer Kozic exiting a green Cadillac and a red Jeep was nearby which appellant was known to drive.

Mystic Rock Road

{¶3} On December 27, 2009, Jareth Gaudio and his wife left their home at 13831 Mystic Rock Road in Columbiana, Mahoning County, Ohio, to take one of their sons to the airport. They returned home to find their front door kicked in and medication, money, a television, and jewelry missing. Police responded and a canine unit picked up a scent that led to the nearby home of Orazio Merlo. A few weeks later Merlo found a cellular phone near her mailbox and turned it over to police. Through the phone's cellular service provider, the police determined that the phone belonged to appellant's wife, Heather Kozic who resided at 238 Wilson Street, Struthers, Ohio 44471.

McCoy Avenue

{¶4} On January 22, 2010, Cathy Applegate was returning from work to her home located next to an apartment building on McCoy Avenue in East Liverpool, Ohio. A driver sitting in a parked car nearby caught her attention as strange. She then observed two white males going from the front of an apartment building to the back. When she got home, she told her husband, Lawrence Applegate III, about what she had observed. She then headed back out with her daughter to take her to a school function. She observed double sliding glass doors open and the curtains blowing and told her husband to call the police. Lawrence observed two people coming from the back of the apartment building, put something they had been carrying into the trunk of a car parked nearby. He called the police after the car sped away.

{¶5} Brandy Ramirez, who lives across the street from the apartment building, observed two males coming from the back of the apartment building. She made eye contact with one of them before he drove away. She later identified that person from a photo array. He is Zoltan Kozic, appellant's brother and codefendant.

{¶6} Susan Williams returned to her home at the apartment building on McCoy Avenue to find the back sliding glass door to her kitchen open. She found money lying on her patio, pill bottles thrown, and her bedroom a mess. Three televisions, $300, and jewelry were missing from her apartment. A latent fingerprint taken from the scene matched appellant's right index finger.

New England Square

{¶7} On January 25, 2010, Ronald Sines returned from work to his home at 46014 New England Square in New Waterford, Columbiana County, Ohio. He noticed things out of place and thrown about and that the back sliding glass door had been pried open. A digital music player, $37.40 in change, and five rings were missing. Police processing the scene noticed that his neighbor's back door was also open.

{¶8} Mark Liber returned to his home at 46022 New England Square in New Waterford, Columbiana County, Ohio to find police investigating a burglary next door at his neighbor's home. Liber discovered his back door open and that his own home too had been burglarized. Missing were a computer, two televisions, purses, a camera, and some jewelry.

South Pointe

{¶9} Rebecca Ashbridge lives at a condominium, Unit 55-D, located in a condominium development known as South Pointe, at 9191 North Lima Road, in Poland Township, Mahoning County, Ohio. On January 30, 2010, she returned home to find the front door unlocked. Inside, the home had been ransacked and a television, gaming system, and various jewelry pieces were missing.

Shepherd of the Valley

{¶10} At a retirement community known as Shepherd of the Valley, William Wade lives in a condominium, Unit 306, located at 9111 Sharrott Road, Poland, in Beaver Township, Ohio. On February 3, 2010, he returned home to find the back door open. A handgun, cash, and watch were missing. Police took casts of pry marks left around the back door and submitted them to BCI for analysis.

Stone Gate

{¶11} On February 6, 2010, a condominium, Unit 202, located in the Stone Gate housing development at 9264 Sharrott Road was found broken into by Doug Dilullo. Dillulo was a construction manager for the development for which this unit was the model unit. It was fully furnished with utilities turned on and Dillulo checked on it once a week. He found that the front door jamb was broke and that the unit had been broken into, although there was nothing taken.

Ivy Hills

{¶12} On February 14, 2010, James Fedor discovered that his mother's condominium had been broken into. A side patio door was open and there were pry marks on a rear patio door which was also open. The condo was located at 8550 Ivy Hills, Unit 20 in Boardman, Ohio. The bedroom had been ransacked and a television

and jewelry were missing. The residence had been vacant since December 26, 2009, when his mother had passed away.

West Park Avenue

{¶13} On February 5, 2010, Michael Naughton, who lived in a triplex condominium at 840 West Park Avenue in Hubbard, Trumbull County, Ohio, heard a loud noise coming from his attached garage. When he went to check on the noise, he observed that a door to the garage had been pried and knocked partially off the door jamb. He then called the police.

{¶14} Meanwhile, a letter carrier for the United States Postal Service and a motorist passing by observed an individual in that area acting suspiciously. A description of the individual was broadcast to other police officers and, subsequently, Hubbard Officer Gerald Smith encountered appellant nearby and arrested him following a positive identification by the letter carrier and the motorist. A screwdriver was recovered from appellant's red Jeep Cherokee.

{¶15} Appellant was charged with burglary in violation of R.C. 2911.12(A)(1), a second-degree felony, and possession of criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony. He was released on February 12, 2010, after posting bond. The charges were no billed by the May 2010 Trumbull County Grand Jury, First Session (and would later become counts 11 and 12 of indictment returned later in Mahoning County).

{¶16} Following the rash of burglaries, law enforcement had conducted numerous controlled buys of oxycodone from appellant, Zoltan Kozic, and Jennifer Kozic.

{¶17} Appellant was arrested for a second time on April 16, 2010, on drug trafficking charges that eventually became counts 16, 17, 18, and 19 of the indictment returned later in Mahoning County. He was released on May 20, 2010.

{¶18} On May 20, 2010, a Mahoning County grand jury issued a twenty-two count indictment alleging a criminal enterprise among appellant, Zoltan Kozic, and Jennifer Kozic. Of those twenty-two counts, appellant was indicted on seventeen

counts: eight counts of burglary in violation of R.C. 2911.12(A)(2)(C) (second-degree felonies); two counts of attempted burglary in violation of R.C. 2911.12(A)(2)(C) and R.C. 2923.02 (third-degree felonies); one count of burglary in violation of R.C. 2911.12(A)(3)(C) (third-degree felony); one count of possessing criminal tools in violation R.C. 2923.24(A)(C) (fifth-degree felony); two counts of drug trafficking in violation of R.C. 2925.03(A)(1)(C)(1)(a) (fourth-degree felonies); one count of drug trafficking in violation of R.C. 2925.03(A)(1)(C)(1)(c) (second-degree felony); one count of drug trafficking in violation of R.C. 2925.03(A)(1)(C)(1)(b) (third-degree felony); and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1)(B) (first-degree felony).

{¶19} Appellant was arrested that same day and remained incarcerated until his trial. On May 25, 2010, appellant appeared in Mahoning County Common Pleas Court and pleaded not guilty. The trial court appointed him counsel and the case proceeded to discovery and other pretrial matters. On one day alone in August, following unsuccessful plea negotiations, appellant's appointed trial counsel filed eleven separate pretrial motions.

{¶20} On October 22, 2010, appellant filed a motion to suppress the screwdriver that police found in his vehicle when he was arrested on February 5, 2010, by Hubbard police following their response to the attempted burglary of Michael Naughton's home at 840 West Park Avenue, Hubbard, Ohio. He argued that it constituted an illegal, warrantless search and seizure. He filed a separate motion to suppress the one-on-one, show-up identification made by the letter carrier and the motorist passerby. The motions were heard and denied by the trial court on February 14, 2011.

{¶21} On August 1, 2011, the day set for trial and before the trial commenced, each of the defendants made renewed motions for severance of the trial as to defendants and as to counts in the indictment. Prior to trial, each of the defendants had filed formal written motions for severance which the trial court had earlier denied. This time, the trial court again denied the motions as to appellant and Zoltan Kozic,

but granted Jennifer Kozic's motion to sever her case for trial based on a perceived *Bruton* issue. (Trial Tr., Vol. I, 74-83.) Apparently, the state wanted to call a witness who was in the jail with Jennifer Kozic and heard her talking about her involvement in the crimes alleged in the indictment, including her brother's Zoltan Kozic's and appellant's roles in those crimes.

{¶22} In *Bruton v. United States*, 391 U.S. 123, 137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), Bruton was convicted of armed postal robbery after a joint trial with his co-defendant, Evans. At trial, a witness testified that Evans confessed to him that Evans and Bruton committed the robbery. Evans did not testify. The trial court instructed the jury that they were only to consider Evans' confession against Evans and were not permitted to consider it against Bruton. The Supreme Court reversed Bruton's conviction holding that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Bruton*, 391 U.S. at 125.

{¶23} Jennifer Kozic later pleaded guilty to each of the counts with which she was indicted, with the engaging in a pattern of corrupt activity count amended from a first-degree felony to second-degree felony. She was sentenced to community control sanctions, later violated those community control sanctions by testing positive for illegal drugs and was sentenced to four years in prison.

{¶24} Appellant's and codefendant Zoltan Kozic's trial proceeded before a jury. The state presented testimony from fifty-four witnesses and had sixty-seven exhibits admitted into evidence. The state's principal witness was Barry Stewart who, with the exception of the Main Market Road burglary in Geauga County and the West Park Avenue burglary in Trumbull County, had committed each of the burglaries with appellant and/or codefendant Zoltan Kozic, including all of the Columbiana and Mahoning County burglaries. He testified in detail how they committed each of those burglaries and where they sold the stolen items afterwards.

{¶25} Following presentation of the state's case, the trial court granted appellant's Crim.R. 29 motion to dismiss count 1 (burglary), involving the Main Market Road burglary in Geauga County. (Trial Tr., Vol. VIII, 1958, 1961.)

{¶26} On August 15, 2011, the jury found appellant guilty of seven counts of burglary (counts 3, 5, 6, 7, 8, 9, and 10), one count of attempted burglary (count 11), one count of possessing criminal tools (count 12), three counts of drug trafficking (counts 16, 17, and 19), and one count of engaging in a pattern of corrupt activity (count 22). The jury found appellant not guilty of one count of attempted burglary (count 4), one count of burglary (count 13), and one count of drug trafficking (count 18). The trial court sentenced him to an aggregate term of imprisonment of 20 years. This appeal followed.

Speedy Trial

{¶27} Appellant raises fifteen assignments of error. Appellant's first assignment of error states:

> DEFENDANT/APPELLANT'S CONVICTION MUST BE VACATED AND \THE [sic] CHARGES DISMISSED AS THE DEFENDANT/APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE VIOLATED[.]

{¶28} Given the trial date of August 1, 2011, and utilizing an arrest date of February 5, 2010, appellant offers the conclusory assertion that his trial occurred some 1,179 days (employing the triple-count provision for those days in which he was in jail) after his speedy trial clocked expired. Despite filing numerous motions below, appellate counsel who was also trial counsel below, makes no attempt to acknowledge periods of delay caused by him or address periods of delay that may have been attributable to the state.

{¶29} Ohio recognizes both a constitutional and a statutory right to a speedy trial. *State v. King*, 70 Ohio St.3d 158, 161, 637 N.E.2d 903 (1994); *see also* Sixth Amendment, United States Constitution; Section 10, Article I, Ohio Constitution. The

Sixth Amendment of the U.S. Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." The General Assembly has embodied this fundamental right in the provisions of R.C. 2945.71 to 2945.73. R.C. 2945.71; R.C. 2945.72; R.C. 2945.73. Thus, the Ohio Supreme Court has found the statutory speedy-trial provisions set forth in R.C. 2945.71 to be coextensive with constitutional speedy-trial provisions. *State v. O'Brien*, 34 Ohio St.3d 7, 9, 516 N.E.2d 218 (1987).

{¶30} R.C. 2945.71 provides the timeframe for a defendant's right to a speedy trial based on the level of offense. As indicated earlier, appellant was ultimately indicted on seventeen felony counts. According to the Ohio Revised Code, "a person against whom a charge of felony is pending shall be brought to trial within two hundred seventy days after his arrest." R.C. 2945.71(C)(2). However, each day the defendant spends in jail solely on the pending criminal charge counts as three days. R.C. 2945.71(E).

{¶31} R.C. 2945.72 lists a number of tolling events that may extend the period of time in which the prosecution must bring a defendant to trial. R.C. 2945.72(A)-(I). If the state fails to meet the statutory time limits, then the trial court must discharge the defendant. R.C. 2945.73. The Ohio Supreme Court has "imposed upon the prosecution and the trial courts the mandatory duty of complying" with the speedy-trial statutes. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977). As such, the speedy-trial provisions are strictly construed against the state. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996); *Singer* at 105, 362 N.E.2d 1216.

{¶32} Consequently, the role of the reviewing court is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set forth in the Revised Code. *State v. Hart*, 7th Dist. No. 06 CO 62, 2007-Ohio-3404, at ¶ 8-9, citing *State v. High*, 143 Ohio App.3d 232, 757 N.E.2d 1176 (7th Dist.2001). Moreover, this duty is not affected by whether the state raised certain filings as tolling events. *State v. Williams*, 7th Dist. No. 07 MA 162, 2008-Ohio-1532, at ¶ 38.

{¶33} Upon demonstrating that the statutory time limit has expired, the defendant has established a prima facie case for violation of his speedy-trial rights, thereby warranting dismissal. *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986). If the defendant can make this showing, the state then has the burden to establish any exceptions that may have suspended the speedy-trial clock. *Butcher* at 31, 500 N.E.2d 1368. As such, the resolution of appellant's assigned error requires scrutinizing the record to ascertain the tolling potential of each filing event.

{¶34} To begin, appellant argues that the speedy-trial clock began to run on February 5, 2010, the day he was arrested in Hubbard following the attempted burglary at 840 West Park Avenue. Appellant is incorrect.

{¶35} Appellant was arrested on February 5, 2010. However, he was released on February 12, 2010, after posting bond and the charges were no billed by the May 2010 Trumbull County Grand Jury, First Session (and would later become counts 11 and 12 of indictment returned later in Mahoning County).

{¶36} In *State v. Baker*, 78 Ohio St.3d 108, 676 N.E.2d 883 (1997), syllabus, the Ohio Supreme Court held, "In issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment."

{¶37} Additionally, in his motion for discharge filed below, appellant conceded that the speedy-trial clock began on May 20, 2010, when the superseding Mahoning County indictment was filed and he was arrested again. However, the speedy-trial clock does not technically begin to run until the day following the date of arrest or service of the summons or indictment. R.C. 2945.71(C)(2); *State v. Catlin,* 7th Dist. No. 06 BE 21, 2006-Ohio-6246, ¶ 12. Therefore, appellant's speedy-trial clock began to run on May 21, 2010. R.C. 2945.71(C)(2); *State v. Catlin,* 7th Dist. No. 06 BE 21, 2006-Ohio-6246, ¶ 12, citing *State v. Turner,* 7th Dist. No. 93 CA 91, 2004-Ohio-1545, ¶ 23.

{¶38} The first major tolling event occurred on July 1, 2010, at a pretrial hearing, where the parties agreed that the first available trial date was February 7, 2011. The entry specifically states, "Speedy trial tolled until this time." It is well established that any period of delay "made or joined in by appellant" may toll the speedy-trial clock. *State v. Barbour*, 10th Dist. No. 07AP-841, 2008-Ohio-2291, at ¶ 16-18. "When the parties agree to a continuance, even if it is not on the motion of the defendant, the continuance is presumptively reasonable and there is no need to explain the reason for the continuance on the record." *State v. Freeman*, 7th Dist. No. 08 MA 81, 2009-Ohio-3052, at ¶ 50 (overruled on other grounds); *see also State v. Rupp*, 7th Dist. No. 05MA166, 2007-Ohio-1561, at ¶ 108. Additionally, it is well-settled that a defendant's speedy-trial right may be waived by defense counsel for extensions to prepare for trial, as well as conflicts in defense counsel's schedule. *State v. McBreen*, 54 Ohio St.2d 315, 376 N.E.2d 593 (1978). That waiver applies even if it is made without the defendant's consent. *State v. Stanley*, 7th Dist. No. 03 MA 42, 2004-Ohio-6801, ¶ 30, citing *McBreen*, 54 Ohio St.2d at 320. Thus, as of the day before that pretrial hearing, June 30, 2010, the speedy-trial clock was tolled at 123 days (applying the triple-count provision to the 41 days that elapsed between May 21, 2010, and June 30, 2010).

{¶39} Meanwhile (before the scheduled trial date of February 7, 2011), appellant filed numerous motions which served as an additional basis to toll the speedy-trial clock. For example, on August 23, 2010, appellant filed eleven motions: motion to appoint an investigator and process server; motion to compel disclosure of specific requests for exculpatory evidence; motion for disclosure of due process material; motion to compel law enforcement officials to disclose information acquired during the investigation; motion to have objections on the record; motion to examine exculpatory evidence; motion for appellant to appear in civilian clothes; motion to prohibit display of evidentiary exhibits; motion for state to disclose any agreements with state's witnesses; motion for disclosure of exculpatory and/or impeachment

evidence; and a motion for bond reduction. Appellant also filed a motion to suppress on October 22, 2010.

{¶40} Following a motion filed by his codefendant, Jennifer Kozic, appellant agreed to a continuance of the trial from February 7, 2011, until February 28, 2011. Due to a deterioration in the relationship between appellant's codefendant, Zoltan Kozic, and his court-appointed counsel, the court appointed codefendant Zoltan Kozic new counsel which necessitated a further delay. At a March 4, 2011 status conference, the parties agreed to a continuance of the trial until August 1, 2011, the date on which the trial commenced. Therefore, appellant's speedy-trial clock was tolled from July 1, 2010 until August 1, 2011, the first day of trial. Since only 41 of the 90 days of the speedy-trial clock had elapsed, appellant was brought to trial within time.

{¶41} Accordingly, appellant's first assignment of error is without merit.

Search & Seizure

{¶42} Appellant's second assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT/APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE ILLEGALLY SEIZED FROM A VEHICLE DRIVEN BY THE DEFENDANT/APPELLANT[.]

{¶43} The screwdriver seized from appellant's vehicle following his arrest in Hubbard on February 5, 2010, resulted in him being charged with possessing criminal tools (count 12) and was used to implicate him in the attempted burglary of 840 West Park Avenue, Hubbard, Ohio (count 11) and four of the completed burglaries (counts 3, 5, 9, and 10). Appellant contends that the vehicle was parked in a privately owned parking lot and that the police searched the vehicle, not as part of an inventory search, but rather a search incident to arrest. Appellant argues that the search incident to arrest was unlawful because he was not in the vehicle, nor had even been seen in the vehicle.

{¶44} "Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19, 1 OBR 57, 437 N.E.2d 583. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara* (1997), 124 Ohio App.3d 706, 707 N.E.2d 539." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8.

{¶45} "Unreasonable searches and seizures are constitutionally prohibited. Ohio Const. Sec. 14, Art. I; U.S. Const. Amend. IV and XIV; *Maryland v. Buie* (1990), 494 U.S. 325, 331; *State v. Robinette* (1997), 80 Ohio St.3d 234, 238-239. For a search or seizure to be reasonable, it must be supported by a warrant or based upon an exception to the warrant requirement. *Katz v. United States* (1967), 389 U.S. 347, 357. Valid exceptions to the warrant requirement include: search of arrestee's immediate area incident to arrest; inventory search; consent; investigatory stop with protective search incident to arrest or incident to investigatory stop; hot pursuit; exigent circumstances; and plain view." *State v. Adams*, 7th Dist. No. 08 MA 246, 2011-Ohio-5361, ¶ 34.

{¶46} In this case, there was conflicting testimony on the nature of the search of appellant's vehicle. Hubbard police officer Gerald Smith stated that the vehicle was searched pursuant to the police department's inventory search policy before it was towed. However, on cross-examination, Officer Smith acknowledged that his police report on the matter indicated that appellant's vehicle was searched incident to his arrest.

{¶47} Therefore, we will examine the validity of the search under both exceptions. The search incident to arrest exception allows officers to conduct a

search of an arrestee's person and the area within the arrestee's immediate control. *State v. Smith,* 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, ¶ 11, citing *Chimel v. California*, 395 U.S. 752, 762-763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The purpose of the search is to ensure officer safety and to preserve evidence. *Id*., citing *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The area within an arrestee's immediate control means the area from within which he might gain possession of a weapon or destructible evidence or the area he might reach. *Chimel* at 763, 766.

{¶48} In this case, Officer Smith, the only police officer the state called to testify at the suppression hearing, stated that he never even saw appellant in the vehicle. (02/14/2013 Suppression Hearing Tr. 109, 117.) Officer Smith testified that he encountered appellant ten to fifteen yards from where appellant's vehicle was parked in a nearby parking lot. (02/14/2013 Suppression Hearing Tr. 109.) Consequently, the search of appellant's vehicle could not be justified under the search incident to arrest exception because the vehicle was not in an area within his immediate control. *State v. Collura*, 72 Ohio App.3d 364, 371, 594 N.E.2d 975 (8th Dist.1991) (finding that since appellant was not in or near his car, it could not be searched incident to his arrest).

{¶49} Turning to the inventory-search exception, such searches are a "well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v. Bertine,* 479 U.S. 367, 371, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987); *see also South Dakota v. Opperman,* 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976); *State v. Mesa,* 87 Ohio St.3d 105, 108-109, 717 N.E.2d 329 (1999), citing *Bertine* and *Opperman.* They are considered administrative searches "intended to (1) protect an individual's property while it is in police custody, (2) protect police against claims of lost, stolen or vandalized property, and (3) protect police from dangerous instrumentalities." *Mesa* at 109, citing *Opperman* at 369. They are permissible only where the automobile has been legally impounded. *State v. Collura,* 72 Ohio App.3d 364, 370, 594 N.E.2d 975 (8th Dist.1991), citing *Opperman.* Interpreting *Opperman,*

the Ohio Supreme Court has held that, to be reasonable, a valid warrantless inventory search must be performed pursuant to a standard police practice and not merely as a pretext for an evidentiary search. *State v. Robinson,* 58 Ohio St.2d 478, 480, 391 N.E.2d 317 (1979). Such a standard practice or policy can be established through an officer's testimony. *See State v. Bulls*, 7th Dist. No. 98 CA 173, 2000 WL 875328, at *5 (June 28, 2000).

{¶50} In this case, appellant was not stopped in his vehicle, he was not taken out of the vehicle, and the vehicle was not abandoned on the side of the road. Thus, in order to determine whether the inventory search was permissible, this court must first determine whether the vehicle was lawfully impounded. This case presents the question of what constitutes a lawful impoundment.

{¶51} In response to this question the Second District Court of Appeals in *State v. Taylor*, 114 Ohio App.3d 416, 683 N.E.2d 367 (2d Dist.1996), held that the police can impound a vehicle when (1) the occupant of the vehicle has been arrested or (2) impoundment is otherwise authorized by law. *Id.* at 422.

{¶52} Similarly, in *State v. Collura,* 72 Ohio App.3d 364, 371, 594 N.E.2d 975 (8th Dist.1991), the Eighth District found the impoundment and subsequent warrantless inventory search of appellant's vehicle illegal where the appellant was not arrested in the car on a public highway, the car was legally parked when it was searched, and there was no evidence that appellant's car had been abandoned. The court observed, "No pressing public concern existed to justify removal of appellant's car from its legal parking place." *Id*. at 371.

{¶53} Also, in *State v. Cole*, 93 Ohio App.3d 712, 639 N.E.2d 859 (9th Dist.1994), the Ninth District reversed the denial of a motion to suppress based on an inventory search finding that the state failed to offer any valid reason for the removal of the appellant's vehicle, appellant was not arrested while in his car or for a traffic offense, and there was no evidence that the car was not lawfully parked. The court added that the state had not presented any evidence that the officers made a good

faith effort to find a third party to secure its contents or drive the car if needed. *Id*. at 715.

{¶54} In this case, as in *Taylor*, *Collura*, and *Cole*, the state did not offer any evidence that appellant's vehicle was lawfully impounded and, at the trial court, the state merely contended that the vehicle was towed pursuant to the police department's policy of towing a vehicle when a suspect is placed under arrest. There was no evidence presented that appellant was arrested while in his vehicle or for a traffic offense. Indeed, there was testimony that appellant was never actually even seen in the vehicle. There was no evidence that his vehicle was illegally parked or had been abandoned. Therefore, appellant's vehicle was not a lawfully impounded vehicle, precluding a lawful inventory search.

{¶55} Even if there was a lawful basis by which the police could have impounded appellant's vehicle, it is questionable whether the inventory search was conducted pursuant to a standard practice and not merely as a pretext for an evidentiary search. Officer Smith did testify that it was the police department's policy to impound an arrestee's vehicle and conduct an inventory search. (02/14/2013 Suppression Hearing Tr. 105.) However, although the actual inventory list was not entered into evidence at the suppression hearing, upon questioning from the trial court, the assistant prosecutor handling the case indicated that the only item taken from the car was the screwdriver. (02/14/2013 Suppression Hearing Tr. 123.) This, along with Officer Smith's equivocation on the stand as to the basis for the search, suggests that the search of appellant's vehicle was conducted solely for investigative purposes.

{¶56} In sum, the police did not have a lawful basis upon which to impound appellant's vehicle. Therefore, the warrantless inventory search of the vehicle and the screwdriver it produced should have been suppressed. At trial, the state used testimony and physical evidence relating to the screwdriver to tie appellant to the West Park Avenue attempted burglary in Hubbard (count 11) and to the Shepherd of

the Valley burglary in Poland (count 9). And, the screwdriver constituted the possessing criminal tools count of the indictment (count 12).

{¶57} The question then becomes whether this was harmless error. Constitutional errors in the admission of evidence are non-prejudicial when harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Constitutional error in the admission of evidence is harmless beyond a reasonable doubt when "the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt." *State v. Williams,* 6 Ohio St.3d 281, 452 N.E.2d 1323 (1983), paragraph six of the syllabus.

{¶58} Regarding the West Park Avenue attempted burglary in Hubbard (count 11), Martin Lewis, a forensic scientist from BCI's trace evidence division, compared the screwdriver to the damaged door jamb. (Trial Tr., Vol. VIII, 1788.) He compared the door's paint to the paint found on the screwdriver, and concluded that the paints were the same color and chemical composition. (Trial Tr., Vol. VIII, 1789.) He testified only that "the paint on the screwdriver and the door jamb *could* have originated from the same source." (Emphasis added.) (Trial Tr., Vol. VIII, 1789.) And, he further explained that the white paint was not unique, but was of the same brand and color. (Trial Tr., Vol. VIII, 1791-1792.)

{¶59} The remaining evidence on that count included Lewis's testimony of footprints found in the snow nearby that could have been made from the shoes appellant was found to be wearing when he was apprehended nearby. (Trial Tr., Vol. VIII, 1780-1787; State's Exhibit No. 68.) Additionally, the owner of the residence testified that he heard a loud crash and noise coming from the area of the garage and discovered that the "man door" to the garage had been "jimmied" and partially knocked off the door jamb. (Trial Tr., Vol. VII, 1691.) Moreover, the state presented identification testimony from two witnesses. Don Haddon, a letter carrier who was delivering mail nearby, witnessed appellant attempting to hide from police responding to the burglary call and then attempt to flee. Gerald Lesnak, a motorist passerby, also saw appellant attempting to flee the area. All of this remaining evidence taken

together, but standing alone from the screwdriver evidence, constituted overwhelming proof of appellant's guilt on that count.

{¶60} Regarding the Shepherd of the Valley burglary in Poland (count 9), Michael Roberts, a forensic scientist from BCI's firearms section, testified only that concerning one of the two casts taken from the door jamb of that residence that the screwdriver had corresponding and similar blade widths, meaning that the screwdriver could not be excluded as a possible tool to have made the pry mark on the door. (Trial Tr., Vol. VIII, 1804.)

{¶61} The remaining evidence on that count included testimony from Barry Stewart who committed the burglary with appellant. (Trial Tr., Vol. VII, 1519, 1517, 1520-1521.) Stewart's eyewitness testimony, standing alone, constituted overwhelming proof of the appellant's guilt on that count.

{¶62} Turning lastly to the possessing criminal tools count of the indictment (count 12), the screwdriver itself constituted the main evidence of appellant's guilt on that count. Stewart did testify that appellant liked to use a screwdriver for the burglaries, but that alone would not constitute overwhelming proof of the appellant's guilt on that count. Therefore, appellant's conviction on count 12 is vacated.

{¶63} Accordingly, appellant's second assignment of error has merit.

Show-Up Identifications

{¶64} Appellant's third assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY OVERRULING THE DEFENDANT/APPELLANT'S MOTION TO SUPPRESS EYEWITNESS IDENTIFICATION TESTIMONY[.]

{¶65} On February 5, 2010, Michael Naughton, who lived at 840 West Park Avenue, in Hubbard, heard a noise coming from his garage. When he went to investigate, he found that a door to the garage had been pried partially open. He called police. Meanwhile, Don Haddon was delivering mail nearby. He spotted a person in a red cap, blue jeans, and dark jacket peer from behind a nearby

apartment building and watch the Hubbard Police Department's Chief of Police walking across the street. When the police chief left that person's field of view, Haddon observed him look both ways and take off running. Haddon then called 911.

{¶66} Gerald Lesnak, who was driving nearby, also observed a person in a red hat and dark coat running nearby. Haddon waived Lesnak down and told him to go tell police, who had responded to the call, that he thought that the person he had seen running was probably someone they were looking for. Lesnak drove over to police who were nearby and who were talking to a person who looked like the person he had seen running. Lesnak confirmed his identification and, at one of the officer's request, went in his vehicle to go get Haddon and bring him to see if he could also identify the person they were talking to as the person they had seen running nearby. Lesnak picked up Haddon and took him to the scene where he also identified the person as the person he had seen running. That person turned out to be appellant, who police had just moments earlier approached nearby.

{¶67} Appellant argues that the show-up identification was unreliable and suggestive. Appellant argues that the reliability of the identification was hampered because Haddon did not have a sufficient opportunity to view the suspect and Lesnak identified the suspect only by his clothing. Further, appellant argues that the identification was suggestive because the identification was made while he was standing with two police officers near two police vehicles.

{¶68} When determining whether an out-of-court identification is admissible, a trial court uses a two-step approach. *Neil v. Biggers*, 409 U.S. 188, 196-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The court first determines whether the identification procedure was impermissibly suggestive. *Id*. at 196-97. Then, if the procedure was impermissibly suggestive, the court must determine if the identification was reliable despite being suggestive. *Id*. at 199. In determining whether the identification was reliable, the court should consider (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the witness's level of

certainty at the confrontation, and (5) the length of time between the crime and the confrontation. *Id*.

{¶69} A "show up" is an identification procedure where the witness or victim, shortly after the incident, is shown only one person and is asked whether they can identify the perpetrator of the crime. *State v. Tanksley*, 10 Dist. No. 07AP-262, 2007-Ohio-6596, at ¶ 9. While this one-person show-up identification procedure is inherently suggestive, a witness's identification from such a show up is admissible if the identification is reliable. *State v. Sutton*, 10th Dist. No. 06AP-708, 2007-Ohio-3792, at ¶ 38.

{¶70} Because the identification procedure here was a one-person show-up, it was inherently suggestive. When Haddon and Lesnak arrived, appellant was standing with several police officers. This procedure suggested that he was the perpetrator. But simply because the show-up was suggestive does not mean that the identifications were unreliable. And, in this case, other facts surrounding the identifications of appellant established their reliability.

{¶71} As to the first two *Biggers* factors, Haddon saw appellant from between twenty-five to forty yards away and paid close attention to him as he was peering out from behind the apartment building waiting for the police chief to leave his field of view. (02/14/2011 Suppression Hearing Tr. 66, 71.) Haddon observed him for one to two minutes, watching him the entire time that he could see him, and was able to see his face for two to three seconds. (02/14/2011 Suppression Hearing Tr. 71-74.) Lesnak observed appellant running by him, so close that he almost hit him with his vehicle. (02/14/2011 Suppression Hearing Tr. 81.)

{¶72} As to the third factor, Haddon was able to observe that he was wearing a red ball cap, jeans, and dark jacket. (02/14/2011 Suppression Hearing Tr. 67.) Lesnak also saw that he was wearing a red hat, jeans, and dark jacket. (02/14/2011 Suppression Hearing Tr. 81, 83.)

{¶73} As to the fourth factor, both Haddon and Lesnak were certain at the show up that appellant was the man they had seen earlier. (02/14/2011 Suppression

Hearing Tr. 68, 83.) Haddon testified that he told the police, "Yep, that's him." (02/14/2011 Suppression Hearing Tr. 68.) While Lesnak was only able to identify appellant from the clothes he was wearing, he was "positive" appellant was the person who had ran by him. (02/14/2011 Suppression Hearing Tr. 83.)

{¶74} As to the final factor, Haddon and Lesnak both observed appellant in the area of the attempted burglary just as police were responding to the area. (02/14/2011 Suppression Hearing Tr. 65-66, 72, 83.) Each identified appellant shortly after he was found nearby.

{¶75} Considering the *Biggers* factors leads to the conclusion that the show-up was in fact reliable. Haddon and Lesnak gave fairly accurate and consistent descriptions of appellant. Their opportunity to observe the perpetrator was brief, but they were in close proximity to him. The elapsed time between when the incident occurred and the show up was only minutes. And both were certain that appellant was the man they had seen running. Given the reliability of the show up, the trial court did not abuse its discretion in denying appellant's motion to suppress the identifications.

{¶76} Accordingly, appellant's third assignment of error is without merit.

Joinder

{¶77} Appellant's fourth assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING DEFENDANT/APPELLANT'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER FOR SEPARATE TRIALS AS TO HIS CO-DEFENDANTS AND AS TO COUNTS OF THE INDICTMENT[.]

{¶78} Appellant argues that the joinder of all of the counts of the indictment (two of which he was not charged with) and the joinder with his codefendant (and brother), Zoltan Kozic, resulted in an unfair trial. He contends that the jury, given its "practical human limitations," was unable to segregate the sheer weight of the evidence as to the multiple defendants and as to the multiple charges.

{¶79} An appellate court will only reverse a trial court's denial of severance if the trial court abused its discretion. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 33.

{¶80} If it appears that a defendant is prejudiced by the joinder of offenses or defendants, the trial court may grant a severance. Crim.R. 14. But the burden is on the defendant to prove prejudice and to prove that the trial court abused its discretion in denying severance. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 29.

{¶81} "[J]oinder of defendants is proper so long as all defendants participated in the same series of transactions leading to the charges even though not all defendants participated in every act. * * * Not all defendants need be charged in each count * * * nor would differing levels of culpability among defendants necessarily justify severance." *State v. Bundy*, 7th Dist. No. 02 CA 211, 2005-Ohio-3310, ¶ 53, quoting *State v. Schiebel*, 55 Ohio St.3d 71, 88-89, 564 N.E.2d 54 (1990).

{¶82} "Joinder of defendants and the avoidance of multiple trials is favored in the law for many reasons. Joinder conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries." *State v. Thomas*, 61 Ohio St.2d 223, 225, 400 N.E.2d 401 (1980). "The test is 'whether a joint trial is so manifestly prejudicial that the trial judge is required to exercise his or her discretion in only one way – by severing the trial. * * * A defendant must show clear, manifest and undue prejudice and violation of a substantive right resulting from failure to sever.'" *Schiebel* at 89, 564 N.E.2d 54, quoting *United States v. Castro*, 887 F.2d 988, 996 (9th Cir.1989).

{¶83} The trial court did not abuse its discretion when it denied appellant's motion for severance of defendants. Six of the nine burglary counts involved both appellant and his codefendant Zoltan Kozic. But, as the Ohio Supreme Court has held, not all defendants need to be charged with each count to join defendants for trial. *Schiebel* at 89. Since each of the counts in the indictment arose from the same

series of transactions, the trial court did not abuse its discretion when it allowed a joint trial.

{¶84} Furthermore, the trial court instructed the jurors that they should consider the evidence against each of the defendants separately. And when discussing the law concerning each offense, it specified the defendants charged with those offenses. The jury is presumed to have followed the trial court's limiting instructions. *State v. Raglin,* 83 Ohio St.3d 253, 264, 699 N.E.2d 482 (1998). Also, appellant has not attempted to argue that he would have defended his case differently if the other defendants had not been joined. *See State v. Johnson,* 88 Ohio St.3d 95, 110, 723 N.E.2d 1054 (2000); *State v. Franklin*, 62 Ohio St.3d 118, 123, 580 N.E.2d 1 (1991); *State v. Stephens*, 4th Dist. No. 98CA41, 1999 WL 1285879 (Dec. 23, 1999).

{¶85} Turning to the joinder of offenses, Crim.R. 8(A) provides that two or more offenses may be charged in the same indictment if the offenses are (1) of the same or similar character, or (2) are based on the same act or transaction, or (3) are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or (4) are part of a course of criminal conduct. "The law favors joining multiple offenses in a single trial under Crim.R. 8(A) if the offenses charged 'are of the same or similar character.'" *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990), quoting *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981).

{¶86} When a defendant claims that he was prejudiced by the joinder of multiple offenses, a court must determine (1) whether evidence of the other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct. *State v. Schaim*, 65 Ohio St.3d 51, 59, 600 N.E.2d 661 (1992).

{¶87} When simple and distinct evidence exists, an accused is not prejudiced by the joinder of multiple offenses in a single trial, regardless of whether the evidence

is admissible as other-acts evidence. *State v. Coley*, 93 Ohio St.3d 253, 260, 754 N.E.2d 1129 (2001).

{¶88} In this case, the trial court did not abuse its discretion in denying severance of the offenses. Initially, it must be noted that appellant alleges that the joinder of the offenses in this case led the jury to convict him on *all* counts of the indictment. This is simply untrue. Appellant was not named in five of the counts listed in the indictment and was not named in two of those which were ultimately tried before the jury. Moreover, the jury found appellant not guilty of two counts of burglary (counts 1 and 13) and one count of drug trafficking (count 18).

{¶89} All of the offenses with which appellant was charged were not necessarily of a same or similar character. However, all of the burglaries and drug sales clearly constituted (1) two or more acts or transactions connected together or constituting parts of a common scheme or plan, or (2) were part of a course of criminal conduct. Crim.R. 8(A).

{¶90} Here, the evidence of the other crimes would likely not have been admissible if the counts were severed. The crimes each had their own distinct victim-witnesses and it seems unlikely that the victim-witnesses would testify in a case that did not have to do with the offense against them.

{¶91} Nonetheless, the evidence of each crime was simple and distinct. Each of the witnesses who had been a victim of one of the alleged burglaries simply testified regarding that particular offense. None of their testimonies were very long or involved.

{¶92} Moreover, the jury was able to separate the evidence as to each of the charged offenses. The jury found appellant guilty of two drug trafficking charges but acquitted him of another. Likewise, the jury found appellant guilty of seven of the burglary charges, but found him not guilty of two others. The jury's verdicts demonstrate that they were able to consider the evidence independently as it pertained to each individual charge and did not lump the charges together.

{¶93} Accordingly, appellant's fourth assignment of error is without merit.

Venue - Enterprise

{¶94} Appellant's next three assignments of error concern venue. Appellant's fifth assignment of error states:

> VENUE WAS NOT PROPER FOR THE PROSECUTION OF COUNTS 5, 6, 7, 11 AND 12 IN MAHONING COUNTY, OHIO[.]

{¶95} Appellant argues that Mahoning County, Ohio was not a proper venue for these counts (which involved offenses that took place outside of Mahoning County) because the state failed to present sufficient evidence of an "enterprise."

{¶96} This assignment of error involves the interplay between Ohio's Corrupt Activity Act, R.C. 2923.31 et seq. (patterned after the federal RICO Act), and its statute governing venue, R.C. 2901.12. Appellant and his codefendants were charged with engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). 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 * * *."

{¶97} A conviction for engaging in a pattern of corrupt activity is dependent upon the presence of predicate offenses. *See* R.C. 2923.31(E). In appellant's case, counts 5 (burglary), 6 (burglary), 7 (burglary), 11 (attempted burglary), and 12 (possessing criminal tools), were for offenses that occurred outside of Mahoning County (in Columbiana and Trumbull counties). Ohio's venue statute allows for all of the predicate offenses to be tried in any of the counties in which any one of them occurred:

> (H) 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.
>
> (2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.
>
> (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.
>
> (6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination.

R.C. 2901.12.

{¶98} Appellant acknowledges that "a prosecution for engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) is properly venued in any county in which a portion of the corrupt activity occurred or in which an organization formed for the purpose of engaging in corrupt activity is based." *State v. Haddix*, 93 Ohio App.3d 470, 479, 638 N.E.2d 1096 (12th Dist.1994), citing *State v. Giffin*, 62 Ohio App.3d 396, 401, 575 N.E.2d 887 (10th Dist.1991).

{¶99} Appellant argues, however, that because there was insufficient evidence of an "enterprise" in this case, thereby negating the offense of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1), counts 5 (burglary), 6 (burglary), 7 (burglary), 11 (attempted burglary), and 12 (possessing criminal tools), which were for offenses that occurred outside of Mahoning County, were improperly venued in Mahoning County. Appellant claims there was never sufficient evidence presented at trial to establish the existence of an enterprise because it was not demonstrated that there was an ongoing organization, formal or informal, that

operated as a continuing unit and had an organizational structure separate and apart from the pattern of corrupt activity. Appellant's argument implicitly urges us to adopt the requirements for finding an enterprise as they have developed under the federal RICO statute, citing *United States v. Riccobene*, 709 F.2d 214 (3rd Cir.1983), and *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.1982), when analyzing Ohio's engaging in a pattern of corrupt activity statute.

{¶100} *Riccobene* identified three elements that must be proven for finding that an enterprise exists: (1) an ongoing organization, (2) with associates that function as a continuing unit, (3) that has a structure separate and apart, or distinct, from the racketeering activity. *Riccobene* at 222-223. *See also Bledsoe* at 664 (holding "enterprise" element requires proof of a structure separate from the racketeering activity).

{¶101} Ohio's Corrupt Activity Act defines enterprise as follows:

> "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons *associated in fact* although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

(Emphasis added.) R.C. 2923.31(C).

{¶102} Both *Riccobene* and *Bledsoe* relied on *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), in which the United States Supreme Court explained enterprise as "an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct" that is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."

{¶103} In Ohio, the Tenth District adopted the *Riccobene* test in *State v. Teasley*, 10th Dist. Nos. 00AP-1322, 00AP1323, 2002 WL 977278 (May 14, 2002).

This Court has yet been required to define enterprise for purposes of Ohio's engaging in a pattern of corrupt activity statute.

{¶104} However, in 2009, it is important to note that the United States Supreme Court decided *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). The *Boyle* decision effectively eliminated the third factor set forth in *Riccobene*. The Third Circuit, which had decided *Riccobene*, acknowledged in *United State v. Bergrin*, 650 F.3d 257 (3rd Cir.2011), that *Riccobene* had been overruled by the United States Supreme Court's decision in *Boyle*.

{¶105} In *Boyle*, the Court explained that "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle* at 939. The Court effectively rejected the third factor of the *Riccobene* test and also listed a number of structural elements that the government need *not* prove to establish an "enterprise":

> We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in *Turkette,* an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse,

> complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Boyle, 556 U.S. at 948, 129 S.Ct. 2237, 173 L.Ed.2d 1265.

{¶106} Given that the definition provided by the Court in *Boyle* is more in agreement with Ohio's version of the federal RICO statute and effectively eliminates the third factor set forth in *Riccobene*, we decline to incorporate that factor into Ohio's definition of enterprise. Additionally, other Ohio appellate court districts which have had occasion to address the matter have adopted the definition provided by the Court in *Boyle*. *State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222; *State v. Perry*, 11th Dist. No. 2011-L-125, 2012-Ohio-4888.

{¶107} Applying the test outlined in *Boyle*, there was sufficient evidence presented to support the existence of an enterprise. There was testimony that appellant and his co-defendant, Zoltan Kozic, participated in numerous burglaries together. They rode together in the same vehicle to different homes. They broke into the homes together. They removed items from the home together and took them back to the same vehicles. They each later sold the items at the same pawn shop. And the burglaries occurred over the span of months from late 2009 to early 2010.

{¶108} In sum, the evidence presented five instances of the enterprise (appellant and his codefendant, Zoltan Kozic) engaging in distinct criminal acts (burglary) over a period of several months. Appellant was directly involved in every incident of that corrupt activity.

{¶109} Accordingly, appellant's fifth assignment of error is without merit.

Venue – Predicate Offenses (Counts 5, 6, 7, 11, & 12)

{¶110} Appellant's sixth assignment of error states:

> DEFENDANT/APPELLANT'S CONVICTIONS AS TO COUNTS 5, 6, 7, 11, AND 12 MUST BE REVERSED AS MAHONING COUNTY,

OHIO WAS NOT THE PROPER VENUE FOR THEIR PROSECUTION[.]

{¶111} Appellant argues that since counts 5 (burglary), 6 (burglary), and 7 (burglary) were alleged to have been committed in Columbiana County and counts 11 (attempted burglary) and 12 (possessing criminal tools) were alleged to have been committed in Trumbull County and the trial for those offenses was held in Mahoning County, venue was improper and appellant's convictions for those counts must be vacated.

{¶112} As stated under appellant's fifth assignment of error, a prosecution for engaging in a pattern of corrupt activity and its predicate offenses is properly venued in any county in which a portion of the corrupt activity or predicate offenses occurred or in which an organization formed for the purpose of engaging in corrupt activity is based. R.C. 2901.12; *State v. Haddix*, 93 Ohio App.3d 470, 479, 638 N.E.2d 1096 (12th Dist.1994), citing *State v. Giffin*, 62 Ohio App.3d 396, 401, 575 N.E.2d 887 (10th Dist.1991). Because counts 5, 6, 7, 11, and 12 were all predicate offenses, they could have been properly venued in any county in which any one of them had occurred, including, as in this case, Mahoning County.

{¶113} Even if appellant had not been indicted under Ohio's RICO, when the offense involves the unlawful taking or receiving of property, the offender may be tried in any jurisdiction from which or into which the property was taken or received. R.C. 2901.12(C). In this case, the unlawfully taken property stemming from counts 5, 6, and 7, was taken to and sold in Mahoning County. Therefore, Mahoning County was a proper venue as to those counts.

{¶114} Accordingly, appellant's sixth assignment of error is without merit.

Venue – Predicate Offenses (Counts 8, 9, & 10)

{¶115} Appellant's seventh assignment of error states:

DEFENDANT/APPELLANT'S CONVICTIONS IN COUNTS 8, 9 AND 10 MUST BE REVERSED BECAUSE THE STATE FAILED TO ESTABLISH PROPER VENUE[.]

{¶116} Counts 8 (burglary), 9 (burglary), and 10 (burglary) were alleged to have occurred in Mahoning County, but appellant argues that there was no evidence presented at trial to establish that they were, in fact, committed in Mahoning County.

{¶117} Count 8 concerned a home belonging to Rebecca Ashbridge at 9191 North Lima Road, Unit 55, in Poland, Ohio. She testified at trial that it was in Mahoning County, Ohio. (Trial Tr., Vol. VI, 1335.)

{¶118} Count 9 involved William Wade's home. He testified that his home was at 9111 Sharrott Road, Unit 306, in Beaver Township. (Trial Tr., Vol. VI, 1366, 1368.) He did not testify that this was in Mahoning County. However, Barry Stewart, who had dropped appellant off near the residence, testified that the items stolen from that residence were taken to and sold to Leslie's Precious Metals. (Trial Tr., Vol. VII, 1544.) Dominic Eckman, a precious metals dealer who works at Leslie's Precious Metals, testified that it is in Mahoning County, Ohio. (Trial Tr., Vol. VI, 1445.) Since the offense involved the unlawful taking of property, Ohio's venue statute allowed for appellant to be prosecuted in Mahoning County since that was a jurisdiction into which the stolen property was taken. R.C. 2901.12(C).

{¶119} Count 10 involved a model condominium unit at Stone Gate Condominiums belonging to Preferred Communities. (Trial Tr., Vol. VI, 1393-1395.) Doug DiLullo, who was a construction manager for Preferred Communities at the time, testified that one of its units had been broken into. (Trial Tr., Vol. VI, 1398.) It can be gleaned from his testimony that the address was 9264 Sharrott Road, Unit 202, in Beaver Township. (Trial Tr., Vol. VI, 1394-1398.) He did not testify that it was in Mahoning County. Barry Stewart testified that after he dropped appellant off there, appellant called him and indicated that the condominium unit was empty, implying that nothing was taken. (Trial Tr., Vol. VII, 1518-1519.) Indeed, DiLullo, who had noticed the break-in and notified police, testified that nothing had been taken. (Trial

Tr., Vol. VI, 1399.) However, since it was a predicate offense to the engaging in a pattern of corrupt activity offense charge, it was properly venued in Mahoning County. R.C. 2901.12; *State v. Haddix*, 93 Ohio App.3d 470, 479, 638 N.E.2d 1096 (12th Dist.1994), citing *State v. Giffin*, 62 Ohio App.3d 396, 401, 575 N.E.2d 887 (10th Dist.1991).

{¶120} Accordingly, appellant's seventh assignment of error is without merit.

Post-Arrest, Pre-*Miranda* Silence

{¶121} Appellant's eighth assignment of error states:

> THE PROSECUTOR COMMITTED REVERSIBLE ERROR BY IMPROPERLY COMMENTING UPON THE DEFENDANT/APPELLANT'S ASSERTION FO [sic] HIS FIFTH AMENDMENT RIGHTS[.]

{¶122} Citing a person's Fifth Amendment right to remain silent, appellant argues that the assistant prosecutor improperly commented during his closing argument on appellant's failure to claim his innocence when he was arrested in Hubbard, Ohio. Appellant also argues that the assistant prosecutor improperly suggested that the state's evidence was without dispute. In response, the state argues that the prosecutor's comments were not improper because appellant's unsolicited statements following his arrest effectively waived his right to remain silent.

{¶123} Appellant does not specifically quote what the assistant prosecutor said during closing arguments, but instead simply references pages 2109 and 2110 of the trial transcript. The relevant portions of the state's closing argument were as follows:

> MR. DESMOND [assistant prosecutor]: * * * What does he say when he's arrested? Not I didn't do anything; leave me alone.
>
> MR. KING [appellant's trial counsel]: Objection, Your Honor.
>
> THE COURT: Overruled. This is argument. This is not evidence.

> MR. DESMOND: He says what am I being charged with? What am I being charged with? * * *
>
> You know what happened here. You've heard the evidence. You have been diligent throughout listening to this. These aren't coincidences, ladies and gentlemen. These are facts. This is what happened. On the drug cases, without a dispute. They are guilty of all of these counts. I trust you. Use your common sense; use your reason, and I ask you to return guilty verdicts of all counts. Thank you.

(Tr. 2108-2110.)

{¶124} As for appellant's comments following his Hubbard arrest, the assistant prosecutor was likely referencing the following testimony regarding that arrest:

> MR. DESMOND: Now, as he's being arrested, what happens?
>
> SGT. THOMPSON: I advised him that he was under arrest, and he put his hands behind his back, put his head down, and asked me what he was being charged with.

(Tr. 1771.)

{¶125} The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." This provision applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

{¶126} As this court has observed, "[t]he general rule is that a defendant's post-arrest silence cannot be used against him." *State v. Lanier*, 7th Dist. No. 09 MA 97, 2010-Ohio-6382, ¶ 18, citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). This is because "post-arrest silence is inherently ambiguous since the silence may reflect only the defendant's exercise of his constitutional right to remain silent. * * * Any comment which infers that the defendant is guilty because he remained silent subverts the guarantees afforded him by the Fifth Amendment of the

Constitution of the United States." *State v. Williams*, 64 Ohio App.2d 271, 276, 413 N.E.2d 1212 (8th Dist.1979). Courts look upon any comment by a prosecutor on the post-arrest silence of a defendant with extreme disfavor because it raises an inference of guilt from the defendant's decision to remain silent. *State v. Thompson*, 33 Ohio St.3d 1, 4, 514 N.E.2d 407 (1987); *State v. Rogers*, 32 Ohio St.3d 70, 512 N.E.2d 581 (1987).

{¶127} While *Doyle* specifically prohibits comments on post-arrest silence during cross-examination, such comments have been held to be similarly damaging when made during closing arguments. *State v. McMillion,* 11th Dist. No. 2005-A-0016, 2006-Ohio-3229, ¶ 26. "If a court finds a *Doyle* violation, it must then determine if the error is harmless under the test set forth under *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. *State v. Contreras,* 8th Dist. No. 89728, 2008-Ohio-1413, ¶ 33. To determine whether a prosecutor's conduct was harmless, we shall consider the extent of the comments, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting appellant's guilt. *Id.* at ¶ 34." *Lanier* at ¶ 20.

{¶128} Here, the assistant prosecutor's statement, when taken in the context in which it was made, was not a comment on post-arrest silence. Additionally, that said, even if this court were to assume for the sake of argument that the statement was a reference to post-arrest silence, any error was harmless. Comments on post-arrest silence may not violate a defendant's Fifth Amendment rights when the defendant waived his *Miranda* rights. *State v. Davis,* 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2; *State v. Carter,* 7th Dist. No. 06-MA-187, 2009-Ohio-933; *State v. Kolb,* 7th Dist. No. 07 MA 80, 2008-Ohio-5048. Sgt. Thompson's testimony reveals that appellant waived his *Miranda* rights and talked to him. Nothing in the record discloses that appellant invoked or re-invoked his *Miranda* rights at any time. Consequently, even if the remark is construed as a comment on post-arrest silence, it did not amount to reversible error.

{¶129} As for the assistant prosecutor's comment that its evidence on the Hubbard burglary charges was "without dispute," this court has held that the state "is permitted to make reference to a defendant's failure to offer particular evidence in support of its case, and such a reference does not constitute an inquiry into a defendant's post-arrest silence." *State v. Chaney,* 7th Dist. No. 08 MA 171, 2010-Ohio-1312, ¶ 40, citing *State v. Davis,* 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, at ¶ 251; *State v. Collins,* 89 Ohio St.3d 524, 527-528, 733 N.E.2d 1118; *State v. Williams* (1986), 23 Ohio St.3d 16, 20, 490 N.E.2d 906.

{¶130} Accordingly, appellant's eighth assignment of error is without merit.

Prosecutorial Misconduct

{¶131} Appellant's ninth assignment of error states:

> DEFENDANT/APPELLANT'S CONVICTION MUST BE REVERSED DUE TO PROSECUTORIAL MISCONDUCT[.]

{¶132} Appellant argues that the assistant prosecutor suggested that his trial counsel was being dishonest and then, shortly thereafter, told the jury that the defense was lying, thereby denying him due process of law. In response, the state argues that the assistant prosecutor was simply responding to a misstatement of law made by trial counsel for appellant's co-defendant, Zoltan Kozic.

{¶133} The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial. *State v. Fears,* 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999). In reviewing a prosecutor's alleged misconduct, a court should look at whether the prosecutor's remarks were improper and whether the prosecutor's remarks affected the appellant's substantial rights. *State v. Smith,* 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "[T]he touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, ¶ 61, quoting *Smith v. Phillips,* 455 U.S. 209, 219, 102 S.Ct. 940 (1982). An appellate court should not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have

found the defendant guilty even without the improper comments. *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, ¶ 121.

{¶134} Appellant does not specifically quote the statements made by the assistant prosecutor that he is taking issue with, instead citing to two different pages of the trial transcript (pages 2166 and 2174). Upon review, the first instance appellant complains of occurred at the beginning of the assistant prosecutor's closing argument rebuttal:

> MR. DESMOND: Thank you.
>
> Members of the jury, make no mistake about it. Someone in this trial is being dishonest with you, but it isn't Barry Stewart. It's not the state. It's not the police officers. Let's talk about, first of all, [appellant's co-defendant's Zoltan Kozic's trial counsel] Attorney Limbian brought up that the engaging in a pattern of corrupt activity he has to show he's an entrepreneur, a businessman. Here's the elements (indicating). Where does it say that? Nowhere. That's not an element, okay. This is all that has to be proven to you. There is no requirement that he be a businessman or associated in this giant enterprise. Those are the elements. I've shown you what he has to prove.
>
> What else did he say? Well, he said the only evidence here is my client is guilty of receiving stolen property and he can be charged with that later on. That's an out-and-out misstatement of the law. There's a thing called double jeopardy. Once you're put in jeopardy, you can't go back again and charge them for other crimes.
>
> MR. LIMBIAN: Objection, Your Honor.
>
> THE COURT: The jury will recall the evidence. Objection overruled.
>
> MR. DESMOND: When you go back, we can not go back and charge them for something they haven't been charged with first. That

> was an out-an-out lie by the defense, ladies and gentlemen. It's an out-and-out misrepresentation of the law. * * *

(Tr. 2166-2168.)

{¶135} In this instance, the assistant prosecutor's comments clearly were provoked by remarks made by trial counsel for appellant's co-defendant, Zoltan Kozic, during his closing argument:

> The reason that there's a statute called receiving stolen property is because it's hard to prove a burglary. And so the state of Ohio and other states have come up with something called receiving stolen property because you've taken property that was stolen, and you're either caught with it, receive, retain, or dispose of property of another. But the prosecution, as we told you about early on, decided that that wasn't enough. That can still happen at another day. They're not foreclosed from that.
>
> MR. DESMOND: Objection.

(Tr. 1118.)

{¶136} In reviewing this first instance of alleged prosecutorial misconduct, it cannot be said that the remarks were improper. They were in direct response to the overzealousness of trial counsel for appellant's codefendant, Zoltan Kozic. Moreover, the assistant prosecutor's response was clearly directed at trial counsel for appellant's codefendant and not at appellant or his trial counsel. So even if they were improper, it cannot be said that the remarks in any way affected appellant's case or his substantial rights.

{¶137} The second instance of alleged prosecutorial misconduct occurred near the end of the state's rebuttal closing argument:

> What else did they allege we did? Well, they allege that we support perjury, that Detective Dattilo and the other officers all lie, that

> everyone in this case is lying, every single witness is lying. Well, let's think about this. If there's this gigantic conspiracy to get everyone, why wouldn't they say we had fingerprints in every place? I mean, really, if we're going to set someone up, if we're going to lie, let's go wall to wall and let's do everything we can. Let's say we went out to their house and arrested them and they confessed they did it. Let's plant evidence. Let's do all of these other things. There isn't any of that. Nobody is lying here except the defense.
>
> MR. KING: Objection.
>
> MR. LIMBIAN: Objection, Your Honor.
>
> THE COURT: Objection Sustained. The jury will disregard the last remark.
>
> MR. DESMOND: Apologies, Your Honor.

(Tr. 2173-2174.)

{¶138} In this second instance, while the assistant prosecutor's comment about the defense was improper, it cannot be said that it affected appellant's substantial rights. The trial court sustained appellant's trial counsel's objection and instructed the jury to disregard the remark. "Not every intemperate remark by counsel can be a basis for reversal." *State v. Landrum*, 53 Ohio St.3d 107, 112, 559 N.E.2d 710 (1990).

{¶139} Accordingly, appellant's ninth assignment of error is without merit.

Business Records Hearsay Exception

{¶140} Appellant's tenth assignment of error states:

> THE TRIAL COURT COMMITED REVERSIBLE ERROR BY ADMITTING STATE'S EXHIBIT NO. 80 TO IDENTIFY THE CELLULAR TELEPHONE AS BELONGING TO HEATHER KOZIC[.]

{¶141} A few weeks following the burglary on Mystic Rock Road, a neighbor found a cellular phone near her mailbox and turned it over to police. A custodian of

records and representative from the cellular phone's service provider, Jordan Kurtz of T-Mobile USA, testified that the phone belonged to Heather Kozic, who Detective Eric Datillo identified as appellant's wife. (Tr. 1681, 1818.)

{¶142} Appellant points out that on cross-examination Kurtz testified that he does not maintain the systems that generate the information concerning individual phones; just that he merely harvests the data. (Tr. 1685.) Appellant argues that since Kurtz did not testify as to the regularity and reliability involved in the creation of the information he testified to, the company's records regarding Kozic's phone was not properly admissible under the business records exception to the hearsay rule.

{¶143} Evid.R. 803(6), the business records exception to the hearsay rule, provides that the following is not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness * * *.

{¶144} A business record is admissible if authenticated by testimony of a custodian or other qualified person. Evid.R. 803(6). This does not require the witness providing the foundation to have first-hand knowledge of the making of the record. *State v. Wallace,* 7th Dist. No. 05 MA 172, 2007-Ohio-3184, ¶ 21 (customer service assistant at BMV permitted to lay foundation for driving record regardless of whether he is "keeper of records"); *State v. Scurti,* 153 Ohio App.3d 183, 792 N.E.2d 224, 2003-Ohio-3286 (7th Dist.) Rather, it must only be established that the witness is sufficiently familiar with the operation of the business and the circumstances of preparation, maintenance and retrieval that he can reasonably testify on the basis of this knowledge that the record is what it purports to be and that it was made in the

ordinary course of business as per the elements of Evid.R. 803(6). *Id.* Those other elements are: a record made at or near the time by a person with knowledge if it was kept in the course of regular business activity and it was the regular practice to make the record. Evid.R. 803(6).

{¶145} In this instance, the information identifying the phone as belonging to Heather Kozic was properly authenticated. States Exhibit No. 80 was the subscriber information for the phone. Kurtz testified that the information was maintained and kept in the regular course of business by T-Mobile. (Tr. 1680.)

{¶146} Accordingly, appellant's tenth assignment of error is without merit.

Sufficiency of the Evidence

{¶147} Appellant's eleventh assignment of error states:

> DEFENDANT/APPELLANT'S CONVICTION IN COUNT 22, ENGAGING IN A PATTERN OF CORRUPT ACTIVITY IN VIOLATION OF OHIO REVISED CODE §2923.32(A)(1) MUST BE VACATED AS IT IS BASED ON LEGALLY INSUFFICIENT EVIDENCE[.]

{¶148} Under this assignment of error, appellant argues insufficiency of the evidence as it pertains to count 22 of the indictment, engaging in a pattern of corrupt activity. With little specificity, appellant argues that there was insufficient evidence of an enterprise or pattern of conduct. Appellant argues that there was no ongoing organization, other than the fact that appellant and his codefendants were siblings. Additionally, he argues that there was not a continuing unit since he and his codefendants were not all each charged together in every count of the indictment.

{¶149} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id*. In reviewing the record for

sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith* at 113.

{¶150} Appellant was convicted of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1). That section states, "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 * * *."

{¶151} In this case, there was sufficient evidence of engaging in a pattern of corrupt activity. Appellant and his co-defendant, Zoltan Kozic, burglarized numerous homes and sold drugs on numerous occasions. Based on the evidence adduced at trial involving the various dealings of appellant and his co-defendant, there is a sufficient basis on which to conclude that the duo engaged in an enterprise which carried out the common purpose to engage in burglaries and drug trafficking.

{¶152} After viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of all charges proven beyond a reasonable doubt. Accordingly, appellant's eleventh assignment of error is without merit.

Weight of the Evidence

{¶153} Appellant's twelfth assignment of error states:

> DEFENDANT/APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶154} Again, with little specificity, appellant argues that his convictions for counts 3 (burglary), 5 (burglary), 6 (burglary), 7 (burglary), 8 (burglary), 9 (burglary), 10 (burglary), 11 (attempted burglary), 12 (possessing criminal tools),[1] and 22

1. Appellant's brief refers to counts 12 (possessing criminal tools) and 13 (burglary) as being against the manifest weight of the evidence. Count 13 involved a burglary at Ivy Hills in Boardman for which the jury found him not guilty. His argument thereafter and related to those counts focuses solely on the offenses stemming from the attempted burglary in Hubbard. Presumably, his reference to count 13 was a typographical error and his argument in that regard is directed to count 11 (attempted burglary) and count 12 (possessing criminal tools) each of which stemmed from the attempted burglary in Hubbard.

(engaging in a pattern of corrupt activity) were against the weight of the evidence. Principally, he contends that most of those counts were supported by either evidence that was improperly admitted or from testimony from "unindicted co-defendant" Barry Stewart.

{¶155} A weight-of-the-evidence challenge requires an appellate court to review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In weighing the evidence and the reasonable inferences that can be drawn therefrom, if there exists two fairly reasonable views of the evidence, the reviewing court cannot simply substitute its judgment for the jury and choose the one it finds more persuasive or believable. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). In assessing the credibility of the witnesses, the reviewing court is guided by the principle that the credibility of the witnesses is primarily the responsibility and province of the jury. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967). This is because the jury is in the best position to assess the credibility of a trial witness based on their observations of the witnesses' demeanor, gestures, and voice inflections. *Gore* at 201, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 410, 461 N.E.2d 1273, (1984). In reviewing all of the evidence, a weight-of-the-evidence challenge requires the reviewing court to determine if the greater amount of credible evidence supported the jury's finding of guilt. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶156} Reversal based on a successful weight-of-evidence challenge is reserved only for the exceptional case in which the evidence weighed so heavily against conviction that the jury clearly must have lost its way, creating a manifest miscarriage of justice. Id. Indeed, reversing on weight of the evidence after a jury trial is so extreme that it requires the unanimous vote of all three appellate judges rather than a mere majority vote. *Thompkins* at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution (noting that the power of the court of appeals is limited in order to

preserve the jury's role with respect to issues surrounding the credibility of witnesses).

{¶157} In this instance, the greater amount of credible evidence supported the jury's finding of guilt on counts 3 (burglary), 5 (burglary), 6 (burglary), 7 (burglary), 8 (burglary), 9 (burglary), 10 (burglary), 11 (attempted burglary), 12 (possessing criminal tools), and 22 (engaging in a pattern of corrupt activity).

{¶158} Concerning counts 3 (burglary), 5 (burglary), 6 (burglary), 7 (burglary), 8 (burglary), 9 (burglary), 10 (burglary), and 22 (engaging in a pattern of corrupt activity), Barry Stewart testified that he helped appellant (and, in some instances, appellant and his co-defendant, Zoltan Kozic) burglarize those residences.

{¶159} Stewart's testimony was further corroborated by other evidence as it related to some of the burglary counts. As for count 3 involving the Mystic Rock Road burglary in St. Clair Township in Columbiana County, appellant's wife's cellular phone was found nearby. As for count 5 involving the McCoy Avenue burglary in St. Clair Township in Columbiana County, Brandy Stearns Ramirez identified appellant's co-defendant, Zoltan Kozic, as coming from that residence.

{¶160} As for counts 11 (attempted burglary) and 12 (possessing criminal tools) involving the West Park Avenue attempted burglary in Hubbard, two witnesses identified him running from the area of that residence.

{¶161} To the extent that appellant argues that certain counts were improperly supported by evidence that was improperly admitted, those issues have been addressed in appellant's other assignments of error. To the extent that appellant argues that those counts and others were based on testimony from Barry Stewart, what he terms an "unindicted co-defendant," as already indicated, it is well settled that the trier of fact is in a better position to determine credibility issues, since it personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶162} Accordingly, appellant's twelfth assignment of error is without merit.

Allied Offenses

{¶163} Appellant's thirteenth assignment of error states:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO MERGE THE SENTENCE FOR COUNT NOS. 16 AND 17 AS THEY WER ALLIED OFFENSES OF SIMILAR IMPORT SUBJECT TO MERGER[.]

{¶164} On March 11, 2010, with the assistance of a confidential informant, police conducted a controlled purchase of two 80-millgram oxycodone green colored pills and five 40-milligram oxycodone yellow colored pills from appellant. Appellant was charged with those offenses in counts 16 (drug trafficking) and 17 (drug trafficking) of the indictment and the jury found him guilty on both counts. The trial court sentenced appellant to a 12-month term of imprisonment for each offense to be served consecutively. Appellant argues that the offenses were allied offenses of similar import and that the trial court should have merged the sentences for each rather than ordering them to be served consecutively.

{¶165} In addition to protecting against a second prosecution for the same offense following an acquittal or a conviction, the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against multiple punishments for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *see also* Ohio Constitution, Article I, Section 10 ("No person shall be twice put in jeopardy for the same offense.")

{¶166} Ohio has codified that protection in R.C. 2941.25, the multiple-count statute:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶167} Ohio Supreme Court precedent had instructed that sentencing courts employ a two-tiered analysis in order to determine whether two particular offenses were allied offenses of similar import. The first step involved comparing the elements of the offenses in the abstract without regard to the facts of the case (i.e., without considering the defendant's conduct) to determine whether the elements corresponded to such a degree that the commission of one offense would result in the commission of the other offense. *State v. Rance*, 85 Ohio St.3d 632, 636, 710 N.E.2d 699 (1999); *see also State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 14-15, 23-27 (but modifying *Rance* so that an exact alignment of the elements or a strict textual comparison was not required). If they were of dissimilar import, sentencing could proceed on both; if they were allied offenses of similar import, the court proceeded to look at the defendant's conduct to determine whether they were committed separately or with separate animus. *Cabrales,* 118 Ohio St.3d 54, 886 N.E.2d 181, at ¶¶ 14, 31; *State v. Jones,* 78 Ohio St.3d 12, 14, 676 N.E.2d 80 (1997).

{¶168} In 2010, the Ohio Supreme Court overruled *Rance.* The Court was unable to reach a majority opinion and the decision instead contained two plurality opinions and a minority opinion. However, a unanimous Court agreed with the syllabus which held: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *State v. Johnson,* 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus. When combining opinions, a majority of the Court found that the *Rance* test was contrary to the plain language of R.C. 2941.25, which specifically instructs the

court to view the defendant's conduct. *Id.* at ¶¶ 41-42 (plurality) ¶ 78 (O'Donnell, J., concurring in syllabus and judgment and concurring separately). Because *Johnson* did not contain a majority opinion, little else from the various opinions can be considered precedent. *See State v. Bickerstaff,* 7th Dist. No. 09 JE 33, 2011-Ohio-1345, ¶ 75. However, this court has observed that "[o]ur only new guidance is to consider the defendant's conduct and thus the particular facts of each case to determine whether the offenses are of similar import." *State v. Gardner*, 7th Dist. No. 10 MA 52, 2011-Ohio-2644, ¶ 23.

{¶169} Appellant was convicted of two counts of the same offense, drug trafficking in violation of R.C. 2925.03(A)(1). To be guilty of trafficking under R.C. 2925.03(A)(1), the offender must knowingly "[s]ell or offer to sell a controlled substance."

{¶170} Here, appellant sold oxycodone pills. The state argues that appellant, with a separate animus for each, sold two separate and distinct drugs that day. Although some of the pills were 40 milligram and some were 80 milligram, they were all oxycodone and the Ohio Revised Code makes no distinction on that basis. The Code does make a distinction based on whether the sum total of each of the different size pills exceeds the bulk amount for that controlled substance, but in this instance both amounts fell under the bulk amount. Consequently, each of these counts involved the very same criminal offense. They can be committed with the same conduct and are allied offenses of similar import under R.C. 2941.25(A).

{¶171} The next determination is whether the exception to merger in R.C. 2941.25(B) applies – i.e., whether the offenses were committed separately or with a separate animus as to each. They were not. Counts 16 and 17 were committed as part of the same controlled buy. They were committed on the same day, at the exact same time, and as part of the same, single transaction. (Trial Tr., Vol. III, 637-643.) Video surveillance of the buy was played for the jury and the confidential informant, Matthew J. Nicholson, who bought the pills from appellant, testified:

Q And what were you just counting there?

A The pills.

* * *

Q When you refer to, couldn't get any more big boys, what do you mean by that?

A The 80-milligram Oxys.

Q Okay.

A Versus the 40s.

Q He brought you 40's?

A He brought me 40s and 80s.

Q Okay. And you were asking about why there's 40s there?

A Yeah. It was supposed to be just 80s, and they didn't have it -- they didn't have 80s. So, he brought back 40s and 80s.

(Trial Tr., Vol. III, 744-745.)

{¶172} In sum, appellant did not commit these two drug trafficking offenses separately or with a separate animus. And the trial court should have merged the convictions for those offenses.

{¶173} Accordingly, appellant's thirteenth assignment of error has merit, and the trial court should have merged appellant's sentences for counts 16 (drug trafficking) and 17 (drug trafficking). This aspect of appellant's case is remanded for a new sentencing hearing.

Sentencing Criteria

{¶174} Appellant's fourteenth assignment of error states:

THE DEFENDANT/APPELLANT'S AGGREGATE SENTENCE IS CONTRARY TO LAW, AS THE TRIAL COURT IMPOSED A SENTENCE FOLLOWING CONVICTION BY JURY THAT WAS DOUBLE THE RECOMMENDED SENTENCE IN EXCHANGE FOR A PLEA[.]

{¶175} Appellant states that at a February 2011 motions hearing he rejected a plea offer that would have resulted in a 10-year prison sentence. (02/22/2011 Motions Hearing Tr. 3.) Upon his conviction following a jury trial, the trial court sentenced appellant to a 20-year prison sentence. Appellant contends the trial court doubled his prison sentence simply because he exercised his right to a jury trial.

{¶176} "It is patently unconstitutional for a sentencing court to penalize those who exercise their constitutional rights or even their statutory rights." *State v. Donald*, 7th Dist. No. 08 MA 154, 2009-Ohio-4638, ¶ 10, citing *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (court cannot base harsher sentence on defendant's successful use of appeal or postconviction proceedings). For example, courts have concluded that a sentencing court cannot increase a sentence based upon the fact that the defendant chose to exercise his right against self-incrimination. *Id*. citing *State v. Hall,* 179 Ohio App.3d 727, 2008-Ohio-6228, ¶¶ 16, 20, 903 N.E.2d 676 (10th Dist.) (remand for resentencing where court based sentence in part on fact that appellant would not testify against codefendant); *State v. Smith,* 173 Ohio App.3d 735, 2007-Ohio-6355, 880 N.E.2d 161, ¶ 28 (2d Dist.) (remand for resentencing where court emphasized defendant's refusal to testify against his brother as this resulted in an improper penalization of a defendant for exercising his Fifth Amendment right to remain silent); *State v. Glass,* 8th Dist. No. 83950, 2004-Ohio-4495, ¶¶ 8-9 (remand for resentencing where court used the defendant's failure to testify against codefendant as an aggravating sentencing factor).

{¶177} In this case, appellant seems to argue that the ten-year difference between the sentence that was proposed as part of plea negotiations prior to trial and the sentence he received following his jury-trial conviction is alone enough to demonstrate that the trial court was punishing him for exercising his right to a jury trial. However, as the state correctly notes, there is no evidence in the record that proves that the court was punishing appellant for exercising his right to a jury trial. In fact, the only evidence in the record demonstrates the opposite. At sentencing, the

trial court stated, "Well, this Court has no intention of punishing him for exercising his lawful constitutional rights." (Sentencing Hearing Tr. 13.)

{¶178} Accordingly, appellant's fourteenth assignment of error is without merit.

Cumulative Error

{¶179} Appellant's fifteenth assignment of error states:

> DEFENDANT/APPELLANT'S CONVICTIONS MUST BE REVERSED UNDER THE DOCTRINE OF CUMULATIVE ERROR[.]

{¶180} Appellant argues that the cumulative effect of the errors he alleged in his previous fourteen assignments of error denied him his constitutional right to a fair trial.

{¶181} "The cumulative error doctrine refers to a situation in which the existence of multiple errors, which may not individually require reversal, may violate a defendant's right to a fair trial. To affirm a conviction in spite of multiple errors, we must determine that the cumulative effect of the errors is harmless beyond a reasonable doubt. The errors may be considered harmless if there is overwhelming evidence of guilt, if Appellant's substantial rights were not affected, or if there are other indicia that the errors did not contribute to the conviction." (Internal citations omitted.) *State v. Anderson,* 7th Dist. No. 03 MA 252, 2006-Ohio-4618, at ¶ 80.

{¶182} As indicated, application of the cumulative error doctrine requires the occurrence of multiple errors, each of which, taken in isolation, do not constitute reversible error. However, many of the alleged errors assigned by appellant and argued by him to constitute cumulative error, are the type of errors which, if found meritorious, would necessarily require reversal. In other words, many of the alleged errors assigned by appellant are not the type that could be construed to be harmless.

{¶183} Under appellant's second assignment of error, we concluded that the trial court erred in not granting appellant's motion to suppress admission of the screwdriver since the search of appellant's vehicle and the seizure of the screwdriver

therefrom were unlawful. That error clearly affected appellant's conviction on count 12 (possessing criminal tools), but was otherwise harmless especially in regards to the other counts in which testimony regarding the screwdriver was introduced, i.e., counts 9 (burglary) and 11 (attempted burglary). The only other error occurred during sentencing, not trial, regarding merger of counts 16 (drug trafficking) and 17 (drug trafficking). Consequently, while there was two instances of harmless error, there was other overwhelming evidence of appellant's guilt. Nor could it be said that those two errors affected appellant's substantial rights or contributed to his conviction on the relevant counts.

{¶184} Accordingly, appellant's fifteenth assignment of error is without merit.

{¶185} The judgment of the trial court is affirmed in part and reversed in part. Appellant's conviction on count 12 (possessing criminal tools) is vacated as indicated under appellant's second assignment of error concerning the unlawful search of his vehicle and the seizure of the screwdriver therefrom. The remainder of appellant's convictions are affirmed. Two aspects of appellant's sentence are reversed. As indicated under appellant's thirteenth assignment of error, appellant's sentence is reversed and remanded for a new sentencing hearing so that appellant's conviction and sentence for counts 16 (drug trafficking) and 17 (drug trafficking) can be merged. Additionally, pursuant to our resolution of appellant's second assignment of error, appellant's sentence on count 12 (possessing criminal tools) is vacated and the matter is remanded for resentencing to address the removal of that sentence.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.