[Cite as *State v. Doumbas*, 2015-Ohio-3026.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100777

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARC DOUMBAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-571014-C

BEFORE: Dorrian, A.J., Klatt, P.J., and Sadler, J.*
(*Sitting by assignment: Judges of the Tenth District Court of Appeals)

RELEASED AND JOURNALIZED: July 30, 2015

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JULIA L. DORRIAN, A.J.:

{¶1} Defendant-appellant, Marc Doumbas, appeals from a judgment of the Cuyahoga County Court of Common Pleas convicting him of two counts of bribery following a jury trial. For the following reasons, we affirm.

{¶2} In January 2013, appellant, G. Timothy Marshall, Thomas Castro, and Anthony Calabrese were indicted on charges of bribery, conspiracy, and engaging in a pattern of corrupt activity. The charges related to events that occurred from April through November 2012, when appellant was representing Castro on criminal charges of rape against two victims, M.T. and L.A. Castro and Calabrese entered guilty pleas on certain charges, and the case proceeded to a jury trial against appellant on three counts of bribery and against Marshall on two counts of bribery.[1]

{¶3} At trial, appellant testified that Calabrese, who was Castro's business attorney, referred Castro to appellant to handle a petition for a civil protection order filed by L.A. When Castro was subsequently charged with raping M.T. and L.A., appellant represented Castro on those criminal charges. Marshall, who shared office space with appellant, assisted appellant with the representation of Castro.

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[1] The charges that proceeded to trial were the fourth, fifth, and eighth counts of the original indictment and were renumbered as counts one through three for the jury. For purposes of this decision, we will refer to the charges as they were renumbered for the jury.

Count One — Blue Point Grille Lunch Meeting

{¶4} In the first count presented to the jury, the state alleged that, on or about April 19, 2012, appellant and Marshall committed bribery at a lunch that Marshall arranged with a former employee of his, Trina Fenn, and others at the Blue Point Grille restaurant. At the time of the luncheon, Fenn worked in the Cuyahoga County Prosecutor's Office with M.T. Marshall invited Fenn and another former employee, Mary Jo O'Toole, to meet him for lunch; appellant and another friend of Marshall's also joined the group.

{¶5} Fenn testified that, during the lunch, Marshall asked if she knew M.T. and explained that appellant was representing Castro on rape charges filed by M.T. Marshall suggested that Fenn could talk to M.T. and determine whether she would enter into a civil settlement for her pain and suffering. Marshall indicated that M.T. could work with a third-party representative in reaching the settlement and that M.T. could receive $54,000 in settlement, along with $6,000 for her representative. Based on Marshall's statements, Fenn believed that the criminal case would be dropped as part of the settlement. O'Toole testified that she could not hear the entire conversation, but she believed that Marshall wanted Fenn to talk to M.T. and get her to recant her story or get her to drop the charges. Appellant testified that he arrived late to the lunch meeting and did not speak with Fenn regarding any bribe or payment for M.T., nor hear anyone else offer a bribe for M.T. at the lunch. Fenn testified that she was uncomfortable with the conversation and did not mention it to M.T. until several months later. After Fenn told M.T. about the lunch,

M.T. informed the prosecutor handling the rape charges against Castro. The jury acquitted appellant of the bribery charge related to this lunch meeting.

Count Two — Marshall's Discussion with Harvey Bruner

{¶6} In the second count presented to the jury, the state alleged that Marshall committed bribery through his discussion with attorney Harvey Bruner regarding a settlement offer for M.T. and that appellant was complicit in the bribery. As part of Castro's defense strategy in the underlying criminal case, appellant and Marshall began to prepare a mitigation strategy to reduce any potential prison sentence. After Castro pled guilty to two counts of sexual assault, these efforts continued. Appellant and Marshall discussed contacting Bruner, a criminal defense attorney who represented M.T.'s boyfriend, John Brown, in an unrelated matter. The idea was that Bruner, through Brown, could contact M.T. and that Bruner could potentially represent her in reaching a civil settlement.

{¶7} Bruner testified that Marshall called him and indicated that $50,000 was available to compensate M.T. through a civil settlement. Bruner stated that Marshall indicated that he wanted M.T. to "say something nice to the Judge when [Castro] is sentenced." (Tr. 738.) Bruner testified that he was uncomfortable with the conversation but conveyed the message to Brown for M.T. Bruner did not discuss the offer with M.T. directly. He also did not speak directly with appellant regarding this settlement offer.

Count Three — Calabrese's Discussions with Hector Martinez

{¶8} In the third count presented to the jury, the state alleged that Calabrese committed bribery through settlement discussions with L.A.'s attorney, Hector Martinez ("Martinez"), and that appellant was complicit in the bribery. Marshall was not charged in the third count. Following Castro's guilty plea, Calabrese made contact with Martinez. Martinez testified that he met with Calabrese in Martinez's car and Calabrese raised the possibility of a civil settlement. Martinez then obtained authorization from L.A. to enter into settlement discussions. Martinez told L.A. that Calabrese made an initial offer of $50,000 in exchange for settlement of all civil claims and "a favorable letter recommending probation and no jail * * * written to the sentencing judge." (Tr. 923.) Martinez testified that L.A. rejected the initial offer, and Calabrese increased the offer to $60,000; Calabrese later made a third offer of $90,000. L.A. also testified at trial that the settlement offers were contingent on her writing a letter indicating that Castro should receive treatment and should not be sentenced to jail. Both Martinez and L.A. testified that they never spoke directly with appellant regarding any civil settlement offer.

{¶9} Calabrese did not testify at trial. Castro testified that it was his understanding that Martinez "offered up a favorable victim impact statement where [L.A.] would give a favorable statement on there and check the no jail box." (Tr. 1062.) Appellant testified that he was in communication with Calabrese during the period when Calabrese was conducting negotiations with Martinez, but he denied that he was aware of any settlement discussions until Castro informed him after the third and final offer had

been made. He also denied knowing of any contingencies upon which the offer was made.

{¶10} Ultimately, the jury found appellant not guilty on the first count and guilty on the second and third counts. The jury also found Marshall guilty on the first and second counts. Marshall's convictions were the subject of a separate appeal in this court. *State v. Marshall*, 8th Dist. Cuyahoga No. 100736, 2015-Ohio-2511.

{¶11} Appellant appeals from the trial court's judgment, assigning six errors for this court's review:

> **ASSIGNMENT OF ERROR NO. 1**: The Trial Court erred to the prejudice of Defendant in entering a judgment of conviction that was based upon insufficient evidence, in derogation of his right to Due Process of Law, as protected by the 14th Amendment to the United States Constitution.
>
> **ASSIGNMENT OF ERROR NO. 2**: The Trial Court erred and abused its discretion in the admission of the opinions and "impressions" of various witnesses, to the prejudice of the Defendant and in derogation of his right to Due Process of Law, as protected by the 14th Amendment to the United States Constitution.
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> **ASSIGNMENT OF ERROR NO. 3**: The Trial Court erred and abused its discretion in the admission of the testimony of an "expert witness" on legal ethics,[2] to the prejudice of the Defendant and in derogation of his right to Due Process of Law, as protected by the 14th Amendment to the United States Constitution.

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[2] We note that the question of whether appellant committed bribery differs from the question of whether he committed a violation of legal ethics. We offer no opinion in this decision as to whether appellant violated provisions of the Ohio Rules of Professional Conduct, as that question may only be considered by the Board of Professional Conduct of the Supreme Court and by the Supreme Court. Gov.Bar R. V(2).

> **ASSIGNMENT OF ERROR NO. 4**: The Trial Court erred and abused its discretion in the [sic] refusing to permit the Defendant to introduce evidence of the prior inconsistent statements of a State's witness, to the prejudice of the Defendant and in derogation of his right to Due Process of Law, as protected by the 14th Amendment to the United States Constitution.
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> **ASSIGNMENT OF ERROR NO. 5**: The Defendant was denied his right to the effective assistance of counsel, to the prejudice of the Defendant and in derogation of his right to counsel, as protected by the 6th and 14th Amendments to the United States Constitution.
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> **ASSIGNMENT OF ERROR NO. 6**: The Trial Court erred to the prejudice of Defendant in entering a judgment of conviction that was against the manifest weight of the evidence, in derogation of his right to Due Process of Law, as protected by the 14th Amendment to the United States Constitution.

Sufficiency of the Evidence

{¶12} In his first assignment of error, appellant asserts that there was insufficient evidence to support his convictions for bribery. An appeal based on a claim of insufficient evidence presents the issue of whether the evidence was sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). "The test for sufficiency of the evidence is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *State v. Davis*, 49 Ohio App.3d 109 (8th Dist.1988), paragraph two of the syllabus. Where the evidence, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt," it is sufficient to sustain a conviction. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶13} Appellant was convicted of two counts of bribery, in violation of R.C. 2921.02(C). That statute provides that "[n]o person, with purpose to corrupt a witness or improperly influence a witness with respect to the witness's testimony in an official proceeding, either before or after the witness is subpoenaed or sworn, shall promise, offer, or give the witness or another person any valuable thing or valuable benefit." R.C. 2921.02(C). There was no evidence that appellant directly promised, offered, or gave any valuable thing to M.T., L.A., or any other individual; therefore, the state's case against appellant was based on him having been an accomplice to the acts of bribery.

{¶14} In relevant part, the statute defining complicity provides that no person "acting with the culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(A)(2). "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240 (2001), syllabus. An accomplice's shared criminal intent may be inferred from the circumstances surrounding the crime. *Id.* Mere association with the principal offender or presence at the scene of a crime is insufficient to establish complicity. *See State v. Widner*, 69 Ohio St.2d 267, 269 (1982); *State v. Sims*, 10 Ohio App.3d 56, 58 (8th Dist.1983). However, "'[p]articipation in criminal intent may be inferred from presence, companionship, and

conduct before and after the offense is committed.'" *State v. Cartellone*, 3 Ohio App.3d 145, 150 (8th Dist.1981), quoting *State v. Pruett*, 28 Ohio App.2d 29, 34 (4th Dist.1971).

{¶15} When prosecuting a defendant for complicity, "although the state need not establish the principal's identity, it must, at the very least, prove that a principal committed the offense." *State v. Hill*, 70 Ohio St.3d 25, 28 (1994). Therefore, we must first consider whether the state presented sufficient evidence to establish that a principal committed bribery for each charge on which appellant was convicted before turning to the question of whether the state presented sufficient evidence that appellant was complicit in the bribery.

Mitigation Package"

{¶16} Both of the counts on which appellant was convicted involved events that occurred after Castro's guilty plea. Appellant asserts that, both before and after the plea hearing, Marshall took the lead role in preparing a "mitigation package" as a strategy to reduce Castro's potential sentence. Castro testified that Marshall suggested a mitigation strategy immediately following the plea hearing:

> Q. Did Mr. Marshall or Mr. Doumbas suggest any kind of strategy to lower your risk?
>
> A. Yes. Mr. Marshall suggested a strategy and, you know, that's what we proceeded with.
>
> Q. Where was Mr. Doumbas when this was occurring?

A. I believe he was on his cell phone in the hallway.

Q. Was he nearby?

A. He was nearby.

Q. Did he participate in the discussion at all?

A. I do not recall.

Q. What was the strategy? What did you discuss?

A. The strategy would have been a bunch of things.

It was, I struggled with alcohol abuse and drug abuse and some other things, so the strategy would be to address some of these issues, get some counseling and put together a mitigation package, along with attempting of making restitution.

Q. Whose idea was it to make restitution?

A. Mr. Marshall.

(Tr. 1057-58.) Castro testified that Marshall suggested as part of the mitigation strategy that Castro should undergo psychological and behavioral assessments, attend Alcoholics Anonymous meetings, and obtain character letters from his family and friends.

{¶17} Appellant testified similarly regarding Marshall's role in preparing the mitigation strategy:

Q. Things already started prior to the time of the plea. For instance, you said you and Mr. Marshall urged [Castro] into treatment?

A. Right. I think Mr. Castro did a good job of characterizing what had transpired. Mr. Marshall has a background in probation. I have heard him say many times he is the first drunk [sic] and alcohol probation officer that had an entire docket of those probationers in the State of Ohio.

* * *

> Most people we encounter have some type of drug or alcohol issue in a criminal setting. So naturally, Mr. Castro gravitated toward Mr. Marshall, and Mr. Marshall took an interest in that subject matter and counseled him on that.
>
> I strictly handled the criminal case in terms of motions, evidence, witnesses, things of that matter.

(Tr. 1398-99.)

{¶18} Appellant argues that the events giving rise to the bribery charges were civil settlement discussions intended as a restitution component of this mitigation strategy. In this context, we consider whether the evidence was sufficient to support the bribery convictions.

Sufficiency of the Evidence for Conviction of Bribery of M.T.

{¶19} Appellant was convicted on the second count, which alleged that Marshall committed bribery during his conversation with Bruner regarding a civil settlement for M.T. and that appellant was complicit in the bribery. Marshall was found guilty of bribery on the second count, and this court affirmed, finding that his conviction was supported by sufficient evidence and was not against the manifest weight of the evidence. *Marshall* at ¶ 52-66. As this court explained, the evidence was sufficient to convict Marshall based on his conversation with Bruner, in which he offered $50,000 to M.T. to compensate her if she would "say something nice to the Judge when the man is sentenced," particularly when viewed in the context of his previous attempt to get M.T. to drop the criminal charges in exchange for money through the offer extended during the lunch meeting at the Blue Point Grille. *Id.* at ¶ 64-65. Thus, the state proved that a principal committed the

offense charged in the second count. *See Hill* at 28. Bruner testified that appellant was not involved in his conversation with Marshall and that he never spoke to appellant. Therefore, appellant could only be convicted as an accomplice to the bribery.

{¶20} Appellant argues that there was no evidence that he aided and abetted any effort to bribe M.T. He asserts, and these witnesses confirm, that he did not have any discussions with Bruner, Brown, or M.T. regarding any payment to M.T. The state argues that there was sufficient evidence that appellant was complicit in the bribery because he and Marshall discussed contacting Bruner and because appellant subsequently followed up with Marshall to determine whether Bruner had been contacted. The state further argues that the jury could rely on appellant's testimony that, as the attorney of record in the case, he would have been expected to know if someone associated with his team was doing something that could affect the client, including discussing the details of a restitution package. The state asserts that the jury could reasonably infer that appellant and Marshall planned that Marshall's conversation with Bruner would include an offer contingent on making a favorable statement at sentencing and that appellant supported and encouraged Marshall in making the offer.

{¶21} Marshall did not testify at trial. Neither Brown nor M.T. testified that they had any contact with appellant, and neither offered any testimony to support the conviction of appellant. Therefore, our analysis focuses on (1) Bruner's testimony regarding his conversation with Marshall, and (2) appellant's own testimony regarding the same.

{¶22} As the state notes, appellant admitted that he and Marshall discussed calling Bruner to determine whether M.T. had an attorney and, if not, whether Bruner could serve as M.T.'s attorney for purposes of negotiating a civil settlement. Appellant also admitted that he followed up later to determine whether Marshall had contacted Bruner. Construing this evidence in favor of the prosecution, it establishes that appellant supported and encouraged Marshall to call Bruner regarding making the contact with Brown or M.T. and engaging in civil settlement discussions if Bruner ultimately represented M.T. Therefore, construing the evidence in a light most favorable to the state, it could be found that the state presented sufficient evidence that appellant supported, encouraged, or advised the offer of a valuable thing or valuable benefit in the form of a civil settlement.

{¶23} Accordingly, we turn to the question of whether appellant shared Marshall's intent — i.e., the purpose to corrupt a witness. Because the state did not present any direct evidence establishing appellant's intent, we must consider whether it was reasonable for the jury to infer that appellant shared Marshall's criminal intent.

{¶24} In determining what the jury could reasonably infer regarding whether appellant shared Marshall's criminal intent, we are mindful of the prohibition on stacking inferences. Although this rule is extremely limited and has been narrowly construed, it remains the law in Ohio. *See State v. Kalman*, 8th Dist. Cuyahoga No. 90752, 2009-Ohio-222, ¶ 23. "An inference based solely and entirely upon another inference, unsupported by any additional fact or another inference from other facts, is an inference

on an inference and may not be indulged in by a jury." *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St.3d 329 (1955), paragraph one of the syllabus. However, "[a]n inference which is based in part upon another inference and in part upon facts is a parallel inference and, if reasonable, may be indulged in by a jury." *Id*. at paragraph two of the syllabus.

{¶25} Appellant testified that, shortly after the plea, there were discussions about mitigation and that reaching out to Bruner was a component of that mitigation strategy:

> [S]hortly after that Mr. Marshall and I did have a conversation that as part of the mitigation he was going to reach out to Harvey Bruner to see if [M.T.] had a civil attorney or, if she didn't have a civil attorney, could Harvey be that attorney.
>
> * * *
>
> [Marshall] called Mr. Bruner for that specific reason, and that was to have an attorney involved.

(Tr. 1404-05.) Appellant also testified that he subsequently followed up with Marshall:

> Well, when I discussed it with Mr. Marshall, it wasn't a foregone conclusion that he was going to reach out to Mr. Bruner. We had a preliminary discussion about it and that was that. In fact, the next discussion I recall was several days if not a week later, and I brought it up. I said Tim, did you ever call Harvey, what are you going to do there, because I wanted to know. I am lead attorney. And he said he had called Harvey but hadn't heard back from him. And that's it.

(Tr. 1445-46.)

{¶26} Where there is little or no direct evidence to establish that a defendant shared the criminal intent of the principal offender, this court and others have affirmed guilty verdicts when the jury could reasonably infer that the defendant knew the principal

offender would commit the offense. In one case with some similarities to the present facts, the Fourth District Court of Appeals found sufficient evidence to support a conviction for complicity to theft. *State v. Colbert*, 4th Dist. Jackson No. 05CA3, 2005-Ohio-4427. The evidence presented at trial in *Colbert* established that a department store employee observed Colbert carrying a number of items of makeup in the cosmetic department of the store. The employee watched Colbert because she did not have a cart to help carry the items. Colbert was then joined by another woman who had a cart; Colbert placed the items in the cart and the two women went to another area of the store. After the women exchanged a few words, Colbert walked away, and the other woman began opening the packages of cosmetics that Colbert had placed in the cart and putting the makeup in her purse. *Id*. at ¶ 2. Colbert testified that the other woman asked Colbert to take her to the store and, while there, asked her to pick up some makeup. Colbert further testified that the lights in the store gave her a migraine headache and that she went to wait in the car; she asserted that the makeup was still in the cart when she left the store. *Id*. at ¶ 4. The store employee testified in rebuttal that, when he confronted Colbert, she stated that the makeup was for her and that she had instructed the other woman to pay for it. *Id*. at ¶ 5.

{¶27} On appeal, Colbert argued that the evidence was insufficient to convict her for theft because the theft offense did not occur until after she left the store and because she did not know that the other woman would steal the cosmetics. *Id*. at ¶ 7. The Fourth District affirmed the conviction, concluding that the state presented enough

circumstantial evidence to allow a reasonable jury to infer that Colbert knew about the other woman's intent to steal. The court noted that the evidence demonstrated that the women arrived at the store together and that they had an opportunity to discuss what would occur at the store. Moreover, Colbert selected the items of cosmetics and placed them in the other woman's cart. They then had a brief conversation immediately before Colbert left, and the other woman began opening the packages and placing items in her purse. The court concluded that "[t]he temporal relationship between these events would allow a reasonable person to infer a logical connection between them" and that, viewed together, these acts and inferences would allow a reasonable person to conclude that Colbert knew about the other woman's intentions. *Id*. at ¶ 13. Therefore, the evidence was sufficient to establish that Colbert was guilty of complicity to theft.

{¶28} Based on the evidence presented at trial, we conclude that the jury could reasonably infer that appellant knew Marshall's discussions with Bruner would include a settlement or restitution offer contingent on a favorable statement at sentencing, particularly when viewed in context of Marshall's efforts at the Blue Point Grille, which would establish that appellant shared Marshall's criminal intent to corrupt a witness. Bruner provided direct evidence of the offer that Marshall made. Appellant similarly provided direct evidence that he and Marshall discussed reaching out to Bruner prior to the call. Appellant also testified that, based on his position as lead counsel, he would expect to know if someone associated with the case was doing something that could affect his client. Construing this evidence in favor of the prosecution, as we are bound

to do in a sufficiency review, the jury could reasonably conclude that appellant knew what Marshall planned to offer to M.T. through the call with Bruner. As in *Colbert*, the timing and circumstances leading up to Marshall's call to Bruner would allow a reasonable juror to conclude that appellant knew about Marshall's plan to offer a bribe for M.T. Appellant also admitted that he subsequently followed up to determine whether Marshall had contacted Bruner. From this additional fact, the jury could reasonably draw an additional, parallel inference that appellant supported or cooperated with the offer.

{¶29} We note that engaging in civil settlement does not necessarily imply intent to corrupt a witness. Indeed, according to George Jonson, the legal ethics expert witness presented by the state at trial, civil settlements can be pre-litigation or pre-trial. Pre-litigation settlement occurs when no civil case has been filed. Furthermore, according to Jonson, pre-litigation settlement usually involves a release from civil litigation, confidentiality, and non-disparagement clauses. Finally, according to Jonson, "if you settle a civil case there is no reason you can't come in and tell a criminal judge that has happened." (Tr. 883.) In this case, however, there were no indicia of a true civil settlement. There was no evidence that Marshall made any attempt to calculate the value of any potential civil claim against Castro or sought confidentiality or civil claim release provisions. *See Marshall* at ¶ 64.

{¶30} We conclude that, viewing the evidence presented at trial and reasonable inferences that could be drawn from that evidence in a light most favorable to the

prosecution, a rational jury could have found that all the elements of complicity to bribery were established beyond a reasonable doubt. Therefore, the evidence was sufficient to support appellant's conviction of bribery under the second count.

Sufficiency of the Evidence for Conviction of Bribery of L.A.

{¶31} Appellant was also convicted on the third count, which involved the bribery of L.A. through settlement offers made by Calabrese to her attorney, Martinez. Martinez testified at trial that Calabrese contacted him on

October 19, 2012, indicating that he was Castro's civil attorney and that Castro was interested in entering into a settlement with L.A. on any potential civil claims. At the time, L.A. had not filed a civil lawsuit against Castro. Martinez testified that Calabrese made an initial settlement offer of $50,000, in exchange for settlement of all claims and a favorable letter from L.A. to the sentencing judge recommending probation rather than jail for Castro. After L.A. rejected the initial offer, Calabrese increased the settlement offer to $60,000 on

October 31, 2012, and later to $90,000 on November 5, 2012.

{¶32} L.A. also testified at trial, asserting that the settlement offers were contingent on her writing a letter as part of her victim-impact statement indicating that Castro should receive treatment and not be sentenced to jail time. The state introduced evidence of text messages between L.A. and Martinez discussing the settlement offers, including messages in which L.A. rejected the first settlement offer and indicated that Martinez should tell Calabrese that she refused the offer and intended to write a negative

letter. Martinez responded that he had conveyed L.A.'s refusal, and Calabrese increased the offer. After Martinez later communicated a third offer from Calabrese, L.A. texted Martinez to state that she refused and that she would not accept any future offers. L.A. also indicated that the prosecutor was aware of the settlement offers and that the police wanted her assist in pursuing Castro on bribery charges.

{¶33} Calabrese did not testify at trial, but Castro provided a contradictory account of the settlement discussions between Calabrese and Martinez. Castro testified that he authorized Calabrese to make a settlement offer of $30,000 to L.A. and did not advise appellant or Marshall about this initial authorization. Castro further testified that it was his understanding that Martinez "offered up [to Calabrese] a favorable victim impact statement where [L.A.] would give a favorable statement * * * and check the no jail box." (Tr. 1062.)

{¶34} Calabrese pled guilty to five of the seven charges against him, including the charge that formed the basis for the third count presented to the jury in this case. Accordingly, the jury did not reach a verdict with respect to Calabrese on the third count. Nevertheless, construing the evidence presented at trial in favor of the prosecution, the state demonstrated that Calabrese made multiple settlement offers to L.A. through her attorney, Martinez, ranging from $50,000 to $90,000. Thus, the state established that Calabrese offered something of value to L.A. In addition to requiring settlement of any civil claims, these offers were contingent on L.A. providing a favorable letter or statement to the sentencing judge indicating that Castro should not receive jail time. As

noted above, in refusing the first offer, L.A. directed Martinez to refuse the offer and indicate that she intended to write a negative letter. Martinez responded that he told Calabrese. Based on this evidence, the jury could reasonably infer that, when Calabrese made the second and third offers, he knew that L.A. had not only refused the initial offer but had also indicated her inclination to provide a *negative* statement to the sentencing judge. Thus, the jury could reasonably conclude that Calabrese intended for the settlement offers to cause L.A. to change her statement to the sentencing judge, which would constitute corruption of a witness. *See State v. Lieberman*, 114 Ohio App. 339, 344 (10th Dist.1961) ("If the appellant offered any valuable thing for the purpose of inducing [the witness] to testify contrary to *her* belief as to the facts, he violated the [bribery] statute (and legal ethics) regardless of his own belief and regardless of what a jury might have ultimately found to be true."). (Emphasis sic.) Therefore, the state presented sufficient evidence to demonstrate that Calabrese committed bribery in making the settlement offers to Martinez. As noted above, there was no evidence that appellant was directly involved in making the offers to Martinez and L.A.; accordingly, appellant could only be convicted as an accomplice on the third count.

{¶35} With respect to appellant's role in the bribery of L.A., the state asserts that the testimony of Castro and appellant, along with telephone records, established that appellant took an active role in the offers to L.A. The state points to Castro's testimony that appellant was generally supportive of the "mitigation package" approach as a means of obtaining a more favorable sentence. Although the state concedes that there was no

direct evidence that appellant communicated with Martinez or Calabrese regarding bribe offers, the state cites Castro's testimony that he learned about the settlement discussions, including the provision for a favorable victim impact statement, from Calabrese and that he communicated the things he learned from Calabrese to appellant and Marshall. Specifically, the state relies on the following testimony from Castro:

> Q. Where was [L.A.] when all this was going on? I mean, where were you getting your information about what [L.A.] wanted?
>
> A. As far as the settlements are concerned?
>
> Q. Yes.
>
> A. I was getting all my information directly from Anthony [Calabrese].
>
> Q. The things you learned from Anthony [Calabrese], did you pass them to Mr. Marshall and Mr. Doumbas?
>
> A. I am sure I had mentioned it to them.

(Tr. 1076.) The state also cites the following portion of Castro's testimony:

> Q. So I assume that your attorneys here knew nothing about what you and Mr. Martinez and Mr. Calabrese were cooking up?
>
> A. No. They knew.

(Tr. 1114-15.)

{¶36} The state also relies on telephone records introduced at trial reflecting various conversations between and amongst appellant, Castro, Calabrese, Martinez, and L.A. throughout mid-October and early November. The state argues that these calls demonstrate a "cause-and-effect pattern" to the communications between appellant and Calabrese that is linked to certain communications between Calabrese and Martinez.

The state asserts that there was no other explanation for such frequent contact between the two men during this period because they had no social relationship and little-to-no professional relationship. The state argues that the telephone record evidence supports a reasonable inference that Calabrese consulted with appellant regarding the settlement offers to L.A. and, therefore, appellant was complicit in the bribery.

{¶37} Appellant argues that, to the extent Calabrese's acts could be construed as bribery, there is no evidence that he was involved. Appellant points to the fact that neither Martinez nor L.A. testified that they spoke directly to appellant during the period when a civil settlement was being discussed. Appellant also argues that Castro's testimony only establishes that he discussed the matter with Calabrese and Marshall, but fails to establish that appellant was involved. With respect to the telephone records, appellant asserts that they serve to reiterate that he was not involved in any discussions about a settlement with L.A. Appellant argues that, in contrast to the large number of calls between Castro and Calabrese, and between Calabrese and Martinez, the records only reflect minimal communications between appellant and Calabrese. Appellant testified that Calabrese had referred Castro to him and was the type of referring attorney who wanted to be informed about the progress of a case. Appellant denied that he discussed a bribe with Calabrese during any of their conversations.

{¶38} We find that the evidence presented at trial was sufficient to support appellant's conviction for bribery on Count Three under a theory of complicity. Appellant admitted that he spoke with Calabrese during the time when the settlement

negotiations were ongoing, but denied that they discussed any settlement offers to L.A. Thus, this is similar to Count Two, where there was no direct evidence that appellant shared the criminal intent of the principal offender. However, we find that the evidence presented regarding Count Three supports a reasonable inference that appellant knew Calabrese would make a settlement offer to L.A. that was contingent on a favorable letter to the sentencing judge and that appellant supported or cooperated with such an offer.

{¶39} The telephone records reflect a number of contacts between appellant and Calabrese between October 17, 2012, when Castro's plea hearing was conducted, and November 6, 2012, when L.A. rejected the third settlement offer. As the state notes, the records indicate that 13 telephone calls occurred between appellant and Calabrese on October 17. However, ten of the contacts lasted fifteen seconds or less, suggesting that Calabrese and appellant did not actually speak to each other during those calls. One conversation of three-and-a-half minutes occurred at 10:58 a.m., which appears to have been prior to the plea hearing. The two men spoke again later in the day, with a call at 5:31 p.m. that lasted just over eight minutes, and another call at 5:41 p.m. that lasted just over two minutes. The records do not reflect any further telephone contact between appellant and Calabrese until October 26, when Calabrese placed a brief call of 43 seconds to appellant. Calabrese again placed brief calls of less than one minute to appellant on October 29 and 30. Calabrese called appellant twice on October 31, with each call lasting less than one-and-a-half minutes. The two men exchanged several calls lasting less than a minute on the morning of November 1 and the afternoon of November

2 before having an extended conversation of eight-and-a-half minutes at 6:43 p.m. on November 2. Again, on November 6, the men exchanged multiple calls lasting less than one minute during the afternoon before having a four-minute conversation at 7:32 p.m. They spoke again the following afternoon, on November 7, for just less than five-and-a-half minutes at 4:12 p.m.

{¶40} The telephone evidence established that appellant and Calabrese were in direct contact between October 17, 2012, when Castro pled guilty and November 6, 2012, when L.A. informed Martinez that the prosecutors were aware of the settlement offers. In particular, the evidence demonstrated that, on October 17, after Castro had entered a guilty plea, appellant and Calabrese had two contacts, totaling just over ten minutes. Later that evening, appellant and Castro had conversation over 20 minutes long, and shortly thereafter Calabrese and Castro spoke for more than ten minutes. The jury could reasonably infer that these conversations involved planning the next steps after the guilty plea, including making an initial settlement offer to L.A., which was conveyed to Martinez two days later.

{¶41} Additionally, there was a key exchange of calls *after* a conversation between Calabrese and Martinez on November 2, 2012, when Calabrese likely learned that L.A. had not yet responded to the second offer, which would permit the jury to reasonably infer that appellant was involved in planning the third settlement offer. After Calabrese and Martinez spoke from approximately 3:39 p.m. until approximately 3:43 p.m. on November 2, Calabrese attempted to contact appellant at 4:02 p.m., with the call lasting

24 seconds. Calabrese then immediately contacted Castro at 4:03 p.m., with the call lasting over eight minutes (i.e., until approximately 4:11 p.m.). Then, at 4:18 p.m., Calabrese attempted to contact appellant again, with the call lasting only three seconds. It appears that a little less than an hour later, appellant unsuccessfully tried to return Calabrese's call, with a two-second call occurring at 5:09 p.m. Finally, at 6:43 p.m., Calabrese called appellant and they spoke for eight-and-a-half minutes. Later that evening, Calabrese and Castro spoke for almost three minutes. Calabrese then unsuccessfully tried to reach Martinez twice in the following two days, and when the two men spoke on the morning of

November 5, Calabrese extended a third settlement offer of $90,000.

{¶42} Similar to the reasoning in *Colbert* the temporal connection between Calabrese's contacts with Martinez regarding the second offer on November 2 and the third offer on November 5, and his contacts with appellant prior to the third offer, would support a reasonable inference that appellant was advised of and supported making the third offer. See *Colbert* at ¶ 13 (concluding that "[t]he temporal relationship between these events would allow a reasonable person to infer a logical connection between them" and that, viewed together, these acts and inferences would allow a reasonable person to conclude that Colbert knew about the principal offender's intent to steal). Castro also testified that he told Marshall about the Calabrese-Martinez negotiations around the time of the second offer and that appellant was in the room while he and Marshall discussed the negotiations.

{¶43} The state argues that a reasonable inference that appellant was aware of and supported the bribe offers can be drawn from the following evidence: (1) Castro's testimony that appellant knew about the settlement discussions and was supportive of the mitigation package strategy; (2) appellant's admission that he was aware of settlement discussions and testimony that, as lead counsel, he would expect to know everything about the case; and (3) the timing and frequency of communications between appellant and Calabrese. Construing this evidence and all reasonable inferences from it in favor of the prosecution, we conclude that the jury could reasonably infer that appellant knew that the settlement offers to L.A. were contingent on her making a favorable statement or checking a "no jail" box on her victim impact statement, and that appellant supported or cooperated with the settlement offers. Castro testified that he knew the favorable impact statement was a term of the negotiations between Calabrese and Martinez. Castro also testified that he told appellant and Marshall the things he learned from Calabrese about the negotiations with Martinez. From this evidence, the jury could reasonably infer that Castro told appellant that the negotiations required having L.A. provide a favorable statement in exchange for a settlement payment.

{¶44} The evidence also demonstrated that appellant and Calabrese were in direct communication while the settlement discussions with Martinez were occurring. Although appellant testified that there was no discussion of a bribe during his conversations with Calabrese, the jury could have rejected that assertion. Based on an inference that appellant knew that the settlement offer was contingent on a favorable

statement from L.A., and the additional fact that appellant and Calabrese were in direct contact during the relevant period, the jury could reasonably have drawn a second, parallel inference that appellant supported or cooperated with Calabrese's offers to Martinez regarding L.A. Thus, the evidence, if believed, would permit a rational jury to find that all the essential elements of complicity to bribery were established beyond a reasonable doubt. Therefore, the evidence was sufficient to support appellant's conviction of bribery under the third count.

{¶45} Because we find that the evidence was sufficient to support appellant's convictions for bribery, we overrule appellant's first assignment of error.

Manifest Weight of the Evidence

{¶46} Next, we turn to appellant's sixth assignment of error, in which he asserts that his convictions were not supported by the manifest weight of the evidence. While sufficiency of the evidence involves determining whether the evidence is legally sufficient to support the verdict as a matter of law, a claim that a criminal conviction was against the manifest weight of the evidence "addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins*, 78 Ohio St.3d 380, 386-87. The court applies a separate and distinct test to a manifest-weight claim that is much broader than the standard for a sufficiency claim. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 193. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with

the factfinder's resolution of the conflicting testimony." *Thompkins* at 387. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving the conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This authority "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶47} Appellant argues that there was no evidence that any crime was committed, or that he was involved in committing any crime. Appellant further argues that the jury based its decision on inadmissible opinions and impressions, together with unsupported inferences. As explained below, we conclude that the trial court did not err by permitting witnesses to testify as to their impressions or opinions related to statements made by others. Moreover, we find that the evidence presented was sufficient to permit a reasonable inference that appellant was complicit in the bribery of M.T. and L.A. Therefore, we cannot conclude that the jury "clearly lost its way" or created a "manifest miscarriage of justice" by convicting appellant.

{¶48} Accordingly, we overrule appellant's sixth assignment of error.

Objections to Admission or Exclusion of Evidence

{¶49} Appellant's second, third, and fourth assignments of error each assert that the trial court erred by admitting or excluding particular evidence. Generally, the decision

whether to admit or to exclude evidence rests within the sound discretion of the trial court. *State v. Brown*, 8th Dist. Cuyahoga No. 99024, 2013-Ohio-3134, ¶ 50, citing *State v. Jacks*, 63 Ohio App.3d 200, 207 (8th Dist.1989). Therefore, an appellate court that reviews the trial court's decision with respect to the admission or exclusion of evidence must limit its review to a determination of whether the trial court committed an abuse of discretion. *Id.*, citing *State v. Finnerty*, 45 Ohio St.3d 104, 107 (1989). An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *State v. Minifee*, 8th Dist. Cuyahoga No. 99202, 2013-Ohio-3146, ¶ 23, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Within this context, we now turn to appellant's second, third, and fourth assignments of error.

Admission of "Opinion and Impression" Testimony

{¶50} Appellant argues in his second assignment of error that the trial court abused its discretion by allowing certain witnesses to testify as to their impressions or opinions regarding other people's statements or actions. Specifically, appellant points to testimony from O'Toole and Fenn regarding their impressions of Marshall's comments at the Blue Point Grille luncheon. Appellant also cites Bruner's testimony that Marshall was attempting to facilitate a bribe during their telephone conversation, and similar testimony from Brown regarding his impression of the Marshall-Bruner conversation based on what Bruner had told him. Finally, appellant claims that Martinez was improperly allowed to testify about a meeting with prosecutors in which one of the prosecutors asserted that the

offers Martinez received constituted bribery. Appellant argues that this testimony was not admissible as lay opinion testimony under Evid.R. 701, nor as present sense impression evidence under Evid.R. 803.

{¶51} Evid.R. 701 provides that opinion testimony from lay witnesses is admissible if they are rationally based on the witness's perceptions and are helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. The decision to admit lay opinion testimony is reviewed under the abuse-of-discretion standard. *State v. Strothers*, 8th Dist. Cuyahoga No. 97687, 2012-Ohio-5062, ¶ 25.

{¶52} With respect to the testimony of O'Toole and Fenn regarding their impressions of Marshall's statements at the Blue Point Grille luncheon, we note that this evidence was related to the first charge of bribery. Because appellant was acquitted on the first charge, he cannot demonstrate that he was prejudiced by the admission of this evidence. *See State v. Ahmad*, 8th Dist. Cuyahoga No. 84220, 2005-Ohio-2999, ¶ 120. Moreover, this court concluded in *Marshall* that the trial court did not err by admitting this testimony. *Marshall* at ¶ 26. The court also concluded that the trial court did not abuse its discretion by admitting the testimony from Bruner and Brown regarding the Marshall-Bruner telephone conversation. *Id.* The court found that the testimony was rationally based on the witnesses' impressions of the relevant interactions and assisted the jury in understanding Marshall's conduct. *Id.*

{¶53} The *Marshall* decision did not address the opinion testimony from Martinez because it related to Count Three, and Marshall was not named as a defendant on that

charge. Appellant's counsel failed to object to this portion of Martinez's testimony at trial and, therefore, he has waived all but plain error. *State v. Jones*, 91 Ohio St.3d 335, 343 (2001); *State v. Tibbs*, 8th Dist. Cuyahoga No. 89723, 2008-Ohio-1258, ¶ 9. Plain error exists where, but for the error, the outcome of the trial clearly would have been different. *Tibbs* at ¶ 9. Appellate courts find plain error only in exceptional circumstances where it is necessary to prevent a manifest miscarriage of justice. *Id.*

{¶54} The testimony in question occurred when Martinez was explaining why he pled no contest to a misdemeanor charge related to his involvement in the matter:

> Q. So why did you plead no contest?
>
> A. Because I was threatened.
>
> Q. Do you remember having a discussion with the prosecutors back in December?
>
> A. Yes.
>
> Q. Do you remember being asked the question about whether you thought this was bribery?
>
> A. I was asked the question and yes, I remember that.
>
> Q. What did you say in response?
>
> A. I didn't respond right away. I agreed with what Mr. Soucie said.
>
> Q. What did Mr. Soucie say?
>
> A. He said it's a bribe. And I said right, Paul, it's a bribe.

(Tr. 937-38.) In this context, we conclude that the outcome of the trial would not clearly have been different if this testimony had been excluded; the admission of this testimony does not constitute a manifest miscarriage of justice.

{¶55} Accordingly, we overrule appellant's second assignment of error.

Admission of Expert Witness Testimony

{¶56} In his third assignment of error, appellant claims that the trial court abused its discretion by admitting the testimony of an expert witness on legal ethics. At trial, counsel for the state and for Marshall presented expert witnesses to discuss the legal and ethical aspects of the case. Marshall's counsel called Robert Glickman, an experienced attorney and former Cuyahoga County Court of Common Pleas judge. The state called George Jonson, another experienced attorney, and the trial court admitted him as an expert in "Ohio law and specifically legal ethics." (Tr. 859-60.) Jonson testified in part regarding the ethical implications of a criminal defense attorney offering a payment in exchange for a victim of a crime stating that he did not want the perpetrator to go to jail.

{¶57} Appellant argues that the trial court erred by admitting Jonson's testimony because it was irrelevant. Appellant claims that Jonson only testified regarding the ethical implications of certain conduct, while the question before the jury was whether the state established the essential elements of the crime of bribery. Appellant also asserts that Jonson's testimony was irrelevant because it addressed a hypothetical situation, rather than the facts of the actual case, and that the testimony could only have confused the jury.

{¶58} Appellant concedes in his brief that, except with respect to a portion of Jonson's testimony addressing a Florida ethics case, his trial counsel did not object to Jonson's testimony. Therefore, appellant waived all but plain error. *Jones* at 343; *Tibbs* at ¶ 9.

{¶59} This court previously addressed the argument that Jonson's testimony was irrelevant in the *Marshall* decision. *See Marshall* at ¶ 19. As explained in that decision, Jonson's expert testimony was relevant and helpful for the jury to understand and determine a relevant factual issue in the case. In his defense at trial, appellant asserted that, to the extent any payments were offered to M.T. or L.A., they were ethically and legally permissible attempts to settle potential civil claims against Castro. Jonson's testimony was relevant to the jury's evaluation of this defense. *Id*. Appellant argues that, even if Jonson's testimony was relevant, it should have been excluded under Evid.R. 403, which provides for the exclusion of relevant evidence where the risk of confusion or unfair prejudice arising from the evidence substantially outweighs its probative value. Appellant claims that Jonson's testimony, when combined with the impression and opinion testimony from other witnesses, was potentially confusing to the jury when determining whether the prosecution had established the legal elements of the crime of bribery. However, as explained above, we conclude that the trial court did not abuse its discretion by allowing the lay witnesses to testify regarding their opinions and impressions of statements made by others. Allowing Jonson's testimony, within the context of the other evidence presented at trial, does not constitute plain error.

{¶60} Accordingly, we overrule appellant's third assignment of error.

Prior Inconsistent Statements

{¶61} In his fourth assignment of error, appellant argues that the trial court erred by refusing to admit evidence of an alleged prior inconsistent statement by Bruner. At trial, the judge rejected the attempt to introduce testimony from Bob DeSimone and Thomas Kelley regarding Bruner's statements about his conversation with Marshall. This court previously addressed this same argument in the *Marshall* decision:

> Marshall also argues that the trial court abused its discretion by not allowing him to present extrinsic evidence of alleged prior inconsistent statements made by Bruner to an investigator. Again, we disagree.
>
> Evid.R. 613(B) governs the admissibility of extrinsic evidence of a prior inconsistent statement to impeach a witness. It states, in relevant part:
>
> "Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness."
>
> The decision whether to admit extrinsic evidence of a prior inconsistent statement which is collateral to the issue being tried and pertinent to the credibility of a witness is a matter within the sound discretion of the trial judge. *State v. Soke*, 105 Ohio App.3d 226, 239 (8th Dist.1995), citing *State v. Cornett*, 82 Ohio App.3d 624, 635 (12th Dist.1992); *State v. McKinney*, 8th Dist. No. 99270, 2013-Ohio-5730, ¶ 13.

For extrinsic evidence to be admissible under Evid.R. 613(B), a proper foundation for its admission must be established. *State v. Martinez*, 8th Dist. No. 97233, 2013-Ohio-1025, ¶ 15. A foundation must be established through direct or cross-examination in which: (1) the witness is presented with the former statement; (2) the witness is asked whether he or she made the statement; (3) the witness is given an opportunity to admit, deny, or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness regarding the inconsistent statement. *State v. Morgan*, 8th Dist. No. 97934, 2012-Ohio-4937, ¶ 14-15, citing *State v. Theuring*, 46 Ohio App.3d 152, 155 (1st Dist.1988).

If a witness denies making the statement, extrinsic evidence of the statement is generally admissible if it relates to "[a] fact that is of consequence to the determination of the action." Evid.R. 613(B)(2)(a); *McKinney* at ¶ 14, citing *Martinez* at ¶ 16. If, however, the witness admits making the prior statement, the trial court does not abuse its discretion by refusing to admit extrinsic evidence of that statement. *Id.* Additionally, when a witness claims a lack of memory regarding the events described in a prior statement, the prior statement is considered inconsistent and is therefore admissible. *State v. Wilbon*, 8th Dist. No. 82934, 2004-Ohio-1784, ¶ 26, citing *State v. Portis*, 10th Dist. No. 01AP-1458, 2002-Ohio-4501 (A proper foundation for the admission of extrinsic evidence of a prior inconsistent statement is made upon a witness stating that she did not recall making the prior statement.).

During his questioning, Bruner testified that he and Marshall discussed the payment of money and that the amount mentioned was $50,000. After Bruner testified, Marshall's trial counsel claimed that Bruner made prior statements to investigator Bob DeSimone that were inconsistent with Bruner's trial testimony and sought to have DeSimone testify about those statements. Most significantly, Marshall's trial counsel proffered that DeSimone would testify that Bruner told him that he and Marshall did not discuss a specific amount of money and that he (Bruner) could not recall whether he and Marshall discussed the payment of money.

The trial court did not allow DeSimone to testify, concluding that trial counsel did not lay the proper foundation for his testimony by presenting the statements to Bruner and allowing him a chance to admit or deny making the statements. After reviewing the record, we cannot conclude that the trial court abused its discretion because it is unclear whether Marshall's trial counsel laid a proper foundation to admit the extrinsic evidence. Trial counsel's attempt to lay a proper foundation for this

> evidence was very confusing. In any event, even if there was a proper foundation, we conclude that the extrinsic evidence was inadmissible under Evid.R. 613(B) for another reason.
>
> Evid.R. 613(B) allows the admission of extrinsic evidence of a prior inconsistent statement only to impeach a witness's credibility. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 180. Here, it appears that Marshall sought to use Bruner's alleged prior inconsistent statement not solely to impeach him but also to prove that Marshall did not attempt to offer M.T. a bribe through Bruner. Because the extrinsic evidence of a prior inconsistent statement was not offered solely for the purpose of impeaching Bruner, it was not admissible under Evid.R. 613(B). *State v. Trefney*, 11th Dist. No. 2011-P-0032, 2012-Ohio-869, ¶ 90 (rejecting the attempt to introduce out-of-court statement for its truth "under the guise" of Evid.R. 613(B)); *Bethel* at ¶ 182. Therefore, even if the trial court made the correct evidentiary ruling for the wrong reason, Marshall suffered no prejudice. *See State v. Varholick*, 8th Dist. Cuyahoga No. 96464, 2011-Ohio-5277, ¶ 7 (appellate courts "shall affirm a trial court's judgment that is legally correct on other grounds, that is one that achieves the right result for the wrong reason, because such error is not prejudicial").
>
> For this reason, we overrule Marshall's sixth assignment of error.

Marshall at ¶ 32-40. Defense counsel asserted that Thomas Kelley was present with DiSimone at the meeting with Bruner; therefore, the same reasoning applies to any testimony that Kelley would have offered. The trial court did not abuse its discretion by excluding the testimony from DiSimone and Kelley regarding an alleged prior inconsistent statement by Bruner.

{¶62} Accordingly, we overrule appellant's fourth assignment of error.

Ineffective Assistance of Counsel

{¶63} Finally, in his fifth assignment of error, appellant asserts that he was denied the effective assistance of counsel. Appellant argues that his trial counsel provided ineffective assistance in two ways. First, appellant argues that his trial counsel was

ineffective by failing to object to some of the witnesses' testimony regarding their feelings or impressions about statements made by other people. Second, appellant argues that his trial counsel was ineffective in failing to file a motion in limine to exclude the testimony of George Jonson or object to his testimony at trial.

{¶64} The test for ineffective assistance of counsel requires a defendant to prove "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing a claim of ineffective assistance of counsel, we examine whether counsel's acts or omissions "were outside the wide range of professionally competent assistance" and "recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. To establish the second element, the defendant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on has having produced a just result." *Id.* at 686.

{¶65} With respect to appellant's first basis for claiming ineffective assistance of counsel, appellant concedes that his counsel objected to many of the instances when witnesses testified to their impressions or opinions about statements made by others. The trial court repeatedly overruled these objections. This court has previously held

that, in some circumstances, trial counsel may make a strategic decision not to object to certain testimony to avoid calling attention to the testimony. *State v. Owens*, 8th Dist. Cuyahoga No. 98165, 2012-Ohio-5887, ¶ 19. In this case, based on the trial court's repeated denial of similar objections, appellant's counsel may have made a strategic decision not to call additional attention to the testimony by objecting to it. Given that appellant's counsel objected to most of the testimony related to witness's feelings or impressions that was specifically cited in appellant's second assignment of error, we conclude that any failure to object to other instances of similar testimony did not constitute deficient performance. Moreover, we rejected appellant's second assignment of error, in which he argued that the trial court abused its discretion by admitting this testimony. Accordingly, his trial counsel was not ineffective for failing to object to properly admitted testimony. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 109.

{¶66} Appellant also argues that his counsel performed deficiently by failing to file a motion in limine to exclude Jonson's testimony or objecting to Jonson's testimony. Once again, however, this appears to be conduct that falls within the "wide range of professionally competent assistance." *Strickland* at 690. The state called Jonson as a witness and the trial court admitted him as an expert witness on Ohio law of legal ethics. Appellant's counsel did not file a motion in limine seeking to exclude Jonson as a witness and did not object to Jonson's admission as an expert witness. Instead, appellant's counsel relied on cross-examination of Jonson. Appellant's counsel and counsel for his

codefendant also introduced their own expert witness on legal ethics, Robert Glickman. Glickman's testimony was favorable to appellant's theory of the case, including testimony regarding settlement of civil claims arising from an event that leads to criminal prosecution.

{¶67} Generally, the decision whether to present an expert witness is considered a matter of trial strategy. *See State v. Coleman*, 45 Ohio St.3d 298, 307-08 (1989); *State v. Kleyman*, 8th Dist. Cuyahoga No. 90817, 2008-Ohio-6656, ¶ 67. As noted in the *Marshall* decision, the first mention of any expert witness was when Castro, who had not yet pled guilty, listed Glickman as a potential expert witness. *Marshall* at ¶ 81. The state subsequently identified Jonson as a potential expert witness in a supplemental discovery response; the same day, Marshall filed a supplemental witness list including Glickman. *Id.* It appears that counsel for appellant and counsel for Marshall wished to have the option of calling Glickman as a favorable expert witness. Therefore, appellant's counsel may have made the decision not to file a motion in limine seeking to exclude Jonson as the state's expert witness or object to his qualification as an expert on the basis that, if the trial court excluded or refused to qualify Jonson, it may have similarly excluded appellant's expert Glickman on the same grounds. Appellant's counsel instead opted to rely on cross-examination of Jonson in an attempt to weaken the influence of his testimony on the jury. This type of strategic decision falls within the realm of professionally competent assistance and does not constitute deficient

performance by appellant's counsel. *See State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶ 83.

{¶68} Accordingly, we overrule appellant's fifth assignment of error.

Conclusion

{¶69} For the foregoing reasons, we overrule appellant's six assignments of error and affirm the judgment of the Cuyahoga County Court of Common Pleas.

{¶70} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JULIA L. DORRIAN, ADMINISTRATIVE JUDGE

WILLIAM A. KLATT, P.J, and
LISA L. SADLER, J.., CONCUR*

*(Dorrian, Klatt, and Sadler, Judges,
of the Tenth Appellate District, sitting by
assignment in the Eighth Appellate District.)