

ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2013-0827
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Clark County
v.	:	Court of Appeals,
	:	Second Appellate District
JORDAN BEVERLY,	:	
	:	
Defendant-Appellee.	:	Court of Appeals
	:	Case No. 11-CA-0064
	:	

REPLY BRIEF OF APPELLANT STATE OF OHIO

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT.....	3
A. The appellate court committed legal error, and Beverly agrees.	3
B. Ample and specific evidence supports Beverly’s conviction.	6
CONCLUSION.....	13
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases	Page(s)
<i>State v. Birdsong</i> , 11th Dist. No. 2013-L-003, 2014-Ohio-1353	8
<i>State v. Guinn</i> , 42 Ohio St. 3d 92 (1989).....	5
<i>State v. Humphrey</i> , 2d Dist. No. 02-CA-0025, 2003-Ohio-2825	10
<i>State v. Kersey</i> , 2d Dist. No. 98-CA-13, 1999 WL 22652 (Jan. 22, 1999).....	10
<i>State v. Manley</i> , 71 Ohio St. 3d 342 (1994).....	5
<i>State v. McGlothlan</i> , 138 Ohio St. 3d 146, 2014-Ohio-85.....	4, 5
<i>State v. Miranda</i> , 138 Ohio St. 3d 184, 2014-Ohio-451.....	7, 8
<i>State v. Montoya</i> , 12th Dist. No. CA2012-02-015, 2013-Ohio-3312	9
<i>State v. Perry</i> , 11th Dist. No. 2011-L-125, 2012-Ohio-4888	8, 9
<i>State v. Robinson</i> , 124 Ohio St. 3d 76, 2009-Ohio-5937.....	<i>passim</i>
<i>State v. Thompkins</i> , 78 Ohio St. 3d 380 (1997).....	7
<i>State v. Widner</i> , 69 Ohio St. 2d 267 (1982).....	5
Statutes	
R.C. 2923.31(C).....	10
R.C. 2923.32(A)(1).....	6

INTRODUCTION

After an 8-day trial, a jury convicted Beverly of violating the Corrupt Practices Act. The Second District reversed by misinterpreting the Act. Beverly now concedes the Second District's legal error but insists that the jury acted irrationally in convicting him. Under the meaning of the statute that all now agree governs, no court, not even the Second District panel below, could label the jury's conviction under the Act irrational. This Court should reverse and reinstate the verdict on the Corrupt Practices Act.

Beverly repeatedly concedes the lone question this Court accepted for review: whether Ohio's Pattern of Corrupt Practices Act contains a separate-structure requirement for its enterprise element. The answer—as Beverly recognizes—is plainly no. That ends this case because the Second District used the wrong legal standard to reverse a jury verdict finding Beverly guilty of a Corrupt Practices Act charge.

But Beverly insists that the Second District's legal error can be ignored, and its judgment affirmed, because it “correctly held that there was insufficient evidence” to support his conviction. Br. at 2. Yet Beverly offers no way to square the Second District's legal error with his insistence that it reached the right result. And he provides no examples of cases where this Court—after concluding that an appellate court has applied the wrong legal standard when reversing a conviction on a sufficiency challenge—has done anything other than reinstate the conviction. Indeed, Beverly offers no authorities of any kind that support the result the Second District reached.

But even if Beverly could show that the Second District's legal error should be ignored, he cannot defend the judgment below as a proper application of this Court's precedents defining sufficiency-of-the-evidence review on appeal. That review must regard the evidence “in the light most favorable to the prosecution.” *State v. Robinson*, 124 Ohio St. 3d 76, 2009-Ohio-5937

¶ 34. Beverly repeatedly claims that the jury heard “no evidence” that his actions violated the Act, *see, e.g.*, Br. at 6, 7, but in fact, specific evidence supports the enterprise element of Beverly’s conviction and he fails to confront that evidence. That is, he never offers a single reason to doubt that the jury acted “rational[ly]” when it found him guilty of violating the Corrupt Practices Act. *Robinson*, 2009-Ohio-5937 ¶ 34.

Contrary to Beverly’s insistence that “no evidence” sustains the jury’s guilty verdict, the jury heard abundant evidence of his guilt. For example:

- evidence linking him to the thefts of vehicles later used in burglaries;
- evidence tying him to several residential burglaries;
- his admission to taking license plates to switch out on the stolen vehicles;
- his admission that the usual plan for these burglaries involved his partner breaking in and then letting Beverly in through the front door; and
- his admissions that he and his partner fenced guns and flat-screen TVs from these burglaries to the same two people in exchange for cash.

This only samples the evidence from an 8-day trial that included Beverly’s recorded statement to investigators played for the jury. The jury had ample evidence to conclude that Beverly, along with his partner, formed an enterprise that stole vehicles, used those vehicles to burgle houses, and systematically fenced high-value goods for cash to repeat buyers. And this was no bloodthirsty jury. Although it convicted Beverly of the Corrupt Practices Act count, it acquitted him of other counts, including one that charged burglary. *Compare* Indictment, R.1 with Verdict Forms, R. 27, 29, 30 (not-guilty verdicts to burglary, stolen-property, and weapon-under-a-disability counts).

ARGUMENT

Beverly repeatedly concedes that the Second District committed legal error when it held that his conviction under the Corrupt Practices Act rested on insufficient evidence. That resolves this appeal and this Court should reverse and reinstate the conviction. This Court has consistently reinstated convictions when the district courts of appeals applied the wrong legal standard to reverse a jury verdict challenged on sufficiency grounds. Beverly's only response is a no-harm-no-foul argument that the Second District correctly reversed even though it used the wrong legal standard for "enterprise" in the Corrupt Practices Act. That effort falls flat as well. First, this Court need not itself test the sufficiency of the evidence when the lower court performed that review under the wrong legal standard and gave no hint that it would reverse under the correct standard. This Court sits to correct legal error, and Beverly now agrees that the lower court committed such an error. Second, when viewed under the right legal standard, the jury had ample evidence before it to rationally conclude that Beverly violated the Corrupt Practices Act.

A. The appellate court committed legal error, and Beverly agrees.

Beverly agrees that the State is "no longer" required to prove that an enterprise is a "structure separate and apart from" a pattern of corrupt activity under the Act. Br. at 1. He thus agrees with the State that the answer to the question accepted for review is that "the State is not required to prove" that an enterprise exhibits "a structure separate and distinct from the pattern of activity in which it engages." State's Br. at 6. Beverly's concession should end the case; this Court should reverse the Second District and reinstate Beverly's conviction.

Beverly's agreement with the State on the question accepted for review is not an isolated concession. He says several times that the legal question before the Court should be answered as the State urges in its merit brief. On page 2, Beverly notes that the "Second District may have

incorrectly defined an enterprise.” Later, he argues that the lower court should be affirmed *even though* it is “questionable to what degree [Ohio law embraces] the requirement that an enterprise have a structure separate and apart from the pattern.” Br. at 5. Still later, Beverly contends that Second District’s (erroneous) “reliance on the ‘separate and apart’ language” does not undermine its holding. Br. at 6. The Second District’s judgment rests on a legal error, and Beverly does not defend that error.

The Court need do no more to resolve this case than take Beverly’s concession of legal error at face value, reverse the judgment below, and reinstate Beverly’s conviction under the Corrupt Practices Act. When this Court concludes that an appellate judgment reversed a conviction for insufficient evidence the usual course is to reinstate the jury’s conviction. Earlier this term, the Court reversed the Eighth District, which had reversed a verdict of domestic violence on the grounds of insufficient evidence. *State v. McGlothan*, 138 Ohio St. 3d 146, 2014-Ohio-85 ¶ 6. Concluding that the “court of appeals misread” the precedent interpreting the relevant statute, this Court “reverse[d] the judgment” and “reinstate[d] the judgment of the trial court” finding the defendant guilty. *Id.* ¶¶ 13, 18.

That same pattern describes a 2009 holding of the Court regarding a conviction for disruption of public service. *State v. Robinson*, 124 Ohio St. 3d 76, 2009-Ohio-5937. The jury found the defendant guilty. *Id.* ¶ 13. The Third District reversed, concluding that the conviction rested on insufficient evidence. *Id.* ¶ 14. This Court disagreed with the appellate court’s reading of the statute, *id.* ¶ 37, and reversed. *Id.* ¶ 46. Reasoning that the appellate court had “erroneously substituted its judgment for that of the jury and failed to view the evidence in the light most favorable to the prosecution,” *id.* ¶ 43, the Court reversed and “reinstate[d] the judgment of the trial court convicting” the defendant. *Id.* ¶ 46.

This pattern of reversing and reinstating when a district court of appeals commits legal error in a sufficiency review is hardly a new phenomenon. For decades, this Court has reinstated convictions reversed in the intermediate courts of appeals when those courts misread controlling law. *See, e.g., State v. Manley*, 71 Ohio St. 3d 342, 347-48 (1994) (reversing and reinstating conviction because appeals court had viewed the evidence “in less than the most favorable light to the prosecution” when demanding that the prosecution prove an element of the statutory offense “only by some affirmative proof”); *State v. Guinn*, 42 Ohio St. 3d 92, 94 (1989) (reversing and reinstating conviction because, contrary to appellate holding, the defendants actions “squarely fit[] within th[e] statutory definition”); *State v. Widner*, 69 Ohio St. 2d 267, 269 (1982) (reversing and reinstating conviction after explaining statutory elements needed to support conviction). Like all of these cases, the Second District misread a relevant statute and therefore erroneously reversed Beverly’s conviction.

And this usual result makes sense here. The Second District did not hold that it would reverse under a correct reading of the statute. Indeed, its opinion does not even suggest that it would have reversed had it applied the meaning of the statute that Beverly now agrees is the right one. Therefore, affirming the Court below as Beverly wants would mean affirming a result that the Second District itself never indicated that it endorsed. The usual path is the right path here. The judgment should be reversed and the conviction reinstated.

The Second District’s judgment below misreads Ohio’s Corrupt Practices Act. Beverly agrees (although he urged the erroneous reading in his brief to the Second District, *see* Br. of Appellee in 2d Dist. No. 11-CA-0064, at 9 (Sept. 9, 2012)). That makes this case far easier than *McGlothan*, *Robinson*, and similar cases. The appellate opinion devotes only one paragraph to the evidence surrounding the Corrupt Practices Act charge. App. Op. ¶ 31. That paragraph

erroneously defines “enterprise” as including a “structure separate and apart from” the pattern of corrupt practices. *Id.* And the immediately preceding paragraph uses that same (incorrect) definition when summarizing what the lower court regarded as the relevant law. *Id.* at ¶ 30. The Second District addressed Beverly’s sufficiency challenge only by applying an erroneous statutory definition. This Court should reverse the Second District’s judgment and reinstate Beverly’s Corrupt Practices Act conviction.

Beverly’s only response is the suggestion that the “totality” of the Second District’s holding as to sufficiency should be affirmed. Br. at 6. But there is simply nothing more to the opinion beyond the two paragraphs where the Second District twice misstates the law (App. Op. ¶¶ 30-31) and concludes that the record contains “no evidence” satisfying that rigorous standard. *Id.* ¶ 31. That is, no part of the opinion concludes, or even hints, that the court would have reversed Beverly’s conviction if it had applied the right standard. The opinion below rests on a legal error. And that error was the “totality” of its holding. As this Court has done many times in the past, it should correct that error and reinstate the jury’s verdict.

B. Ample and specific evidence supports Beverly’s conviction.

Because Beverly concedes the only question before the Court, his entire brief consists of a back-up argument. Beverly claims that the jury irrationally convicted him of violating the Corrupt Practices Act because the jury never heard sufficient evidence of the “enterprise” element. *See* R.C. 2923.32(A)(1) (“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 . . .”) (emphasis added). As Beverly now recognizes, the enterprise element requires no more than evidence of purpose, relationships among those associated with the enterprise, and enough longevity to accomplish the purpose. Br. at 4, 5. The evidence at

Beverly’s trial easily showed the jury that Beverly was part of an enterprise that stole vehicles, used those vehicles to burgle empty houses, and then fenced the spoils for cash.

Deference to the jury poses a high hurdle for any defendant raising a sufficiency challenge to overturn a verdict. “In determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, [t]he 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” *Robinson*, 2009-Ohio-5937 ¶ 34 (internal quotation marks and citations omitted). “Where reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of an appellate court to substitute its judgment for that of the factfinder” when assessing a verdict for sufficiency of the evidence. *Id.* “In essence, sufficiency is a test of adequacy. . . .” *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997). And that challenge to adequacy is, at bottom, usually a claim that the conviction “constitutes a denial of due process.” *Id.*

The evidence here of Beverly’s participation in organized vehicle thefts, burglaries, and sales of stolen property matches the kinds of cases where Ohio appellate courts have affirmed Corrupt Practices Act convictions involving similar enterprises. Consider merely a sample from the last three years.

In February 2014, this Court addressed a sentencing challenge to a Corrupt Practices Act conviction stemming from “a marijuana-trafficking ring.” *State v. Miranda*, 138 Ohio St. 3d 184, 2014-Ohio-451 ¶ 4. As in Beverly’s case, the defendant was charged with one count under the Act and one count for each of the underlying offenses (possession and trafficking). *Id.* The Court explained that the “conduct required” to violate the Act “is independent of the conduct

required” to commit the underlying offenses. *Id.* at ¶ 13 (internal quotation marks omitted); *see also id.* ¶ 26 (Lanzinger, J., concurring) (Act criminalizes corrupt activity “within a criminal enterprise”). That is, the trafficking ring constituted the enterprise, even though the defendant was also convicted of trafficking. Here, Beverly was part of a vehicle-theft, burglary, and fencing ring. He was also charged with several underlying offenses. But the latter charges do not subtract from the Corrupt Practices Act charge. Conviction on both was appropriate.

Other examples show that Beverly’s conviction is a routine application of the enterprise element in the statute. In one case, a defendant faced ten counts, one of “engaging in a pattern of corrupt activity, . . . [one of] theft of blank checks, . . . and eight counts of theft by deception.” *State v. Birdsong*, 11th Dist. No. 2013-L-003, 2014-Ohio-1353 ¶ 2. The plan involved stealing checks, passing them “at various stores . . . to obtain merchandise,” and then pawning or selling the stolen goods to “people . . . [known] to be looking for such merchandise.” *Id.* ¶ 4. The defendant argued “only that the state failed to present sufficient evidence of an enterprise.” *Id.* ¶ 44. The appellate court disagreed, explaining that the defendant “engaged in an enterprise” that stole “merchandise that could be quickly converted to cash”; that “there were relationships between those associated with the enterprise”; and that the “crimes were committed in a one-month period, long enough to permit [the members] to pursue the enterprise’s purpose.” *Id.* ¶ 51. By proving those features, the court concluded, “the state presented sufficient evidence to establish the existence of an enterprise.” *Id.*

In another example, a defendant argued “with little specificity, that there was no basis to support his conviction” under the Corrupt Practices Act. *State v. Perry*, 11th Dist. No. 2011-L-125, 2012-Ohio-4888 ¶ 99. The charge under the Act related to “a series of burglaries.” *Id.* ¶ 2. The court affirmed the conviction and held that the trial evidence—including cell-phone records

linking defendant to the sites of the thefts, *id.* ¶ 82, and the recovery of stolen items from his hotel room, *id.* ¶¶ 2, 81, 95—provided “a sufficient basis on which to conclude that the duo engaged in an enterprise which carried out the common purpose to engage in theft.” *Id.* ¶ 99.

Yet another example shows that Beverly’s conviction is within the norm of convictions affirmed under the Act. The Twelfth District reviewed a conviction regarding an enterprise formed to sell heroin. In affirming, the court noted that, the enterprise “had a purpose to sell heroin,” the defendants formed relationships for “the purpose of selling heroin,” the defendants took directions from another about the price of heroin, and “the transactions transpired over the course of a month.” *State v. Montoya*, 12th Dist. No. CA2012-02-015, 2013-Ohio-3312 ¶ 55. Those facts satisfied the purpose, relationship, and duration components of the enterprise element, and a “rational trier of fact, when viewing the evidence in a light most favorable to the prosecution, could find [that the defendant] engaged in a pattern of corrupt activity.” *Id.*

Beverly’s only response is framed as pure generality. He says there is “no evidence” that Beverly or his companion stole vehicles, Br. at 6, that others were involved beyond Beverly and his partner Brandon Imber, *id.*, or that he participated in a plan to burgle houses and fence the loot. *Id.* at 7. Specific evidence contradicts Beverly’s argument at every turn.

The jury heard evidence linking Beverly to several stolen vehicles, including those used to burgle houses. For example, a detective linked Beverly, along with Imber, to a stolen ODOT vehicle. Trial Trans. at 265-272. The jury also heard testimony of a car owner who had his car stolen and the homeowner who later saw that stolen car in his driveway a few minutes before Beverly tried to break into his house. *See* Trial Trans. 577-79 & Exs. 144, 170 (describing stolen Chevrolet Caprice); Trial Trans. at 666-75 (describing attempted break in). And the jury heard evidence, including eyewitness testimony and the results of a fingerprint analysis, linking

Beverly to a truck stolen in Warren County and then crashed in Clark County. *See* Trial Trans. at 1232-1247 (theft of vehicle); *id.* at 509-512 (eyewitness testimony that Beverly was in the truck when it crashed); *id.* at 612-636 (matching Beverly's print to item in same truck). The jury also heard, in Beverly's own words, his admission that he bought the battery used to steal that truck (because the battery was dead when he and Imber first tried to steal it from the car lot). *See* Ex. 481 at 15:42:30-43:00; Trial Trans. at 1237-48 (owner describing theft on security video). Beverly also admitted in testimony played for the jury that he stole license plates from trucks "similar to ours" when investigators asked about the plates found on several stolen vehicles. *See* Ex. 481 at 15:43:10-45; *see also* Trial Trans. at 1484. The jury rationally connected Beverly to several stolen vehicles, including those used to burgle houses.

Beverly also challenges the idea that the enterprise involved more than he and Imber. Br. at 6. The law and the facts say otherwise. A two-person enterprise meets the statutory definition. But the facts before the jury connected at least two others (the fences for the stolen property) to the enterprise.

Two people may constitute an enterprise. *See* R.C. 2923.31(C) (enterprise includes an "individual"); *State v. Humphrey*, 2d Dist. No. 02-CA-0025, 2003-Ohio-2825 ¶ 34 ("The State's evidence clearly demonstrates that a group of [2 people] . . . associated together for the common purpose of engaging in a course of criminal conduct; distributing illegal drugs such as cocaine in the Springfield area."); *cf. State v. Kersey*, 2d Dist. No. 98-CA-13, 1999 WL 22652, at *4 (Jan. 22, 1999) ("We do not find . . . any case law that supports [the] contention that one cannot be found to have been 'associated' with an enterprise unless she conducted business with more than one other person in the organization"). Even if Beverly and Imber were the only members of the enterprise, Beverly's conviction should stand.

The facts, though, make that legal question irrelevant. Beverly's own words implicate at least two others in the enterprise as the fences that Beverly used to convert the stolen household goods (mostly guns and TVs) to cash. As the jury heard, Beverly told investigators he could "take" the investigators to the place that he and Imber fenced stolen guns. Ex. 481 at 15:21:45-55. Beverly described this location in some detail, telling investigators that when he took them there they would be "more than satisfied" because it would contain "more guns than what you think." *Id.* at 15:33:35-15:33:46. As to the fence used for TVs, Beverly identified the person by name. *Id.* at 15:24:55-15:25:30. Beverly also agreed to take investigators to that location. *Id.*; *see also* Trial trans. at 1379.

Beverly also takes aim at the evidence about the plan to steal from houses while others were away and fence the property for cash. Br. at 7. Ample evidence let the jury connect the dots about this plan. Start with the evidence about Beverly's role in vehicle thefts (as described above). Add the following: Beverly's admission that he was involved in at least 3 or 4 home burglaries, Ex. 481 at 15:54:30-15:55:00; his admission that the "usual[]" plan for these burglaries included Imber breaking in and then letting Beverly in through the front door, *id.* at 15:59:00-16:00:00; and testimony that Beverly and Imber only broke in when homeowners were away. *See* Trial Trans. at 673-76 (describing flight after surprising present homeowner); *id.* at 1006-12, 1018-22 & Exs. 374, 374A (testimony of homeowner who was present when Imber said he was in the neighborhood doing tree-trimming work); *id.* at 1492-1500 (testimony of present homeowner; Imber and Beverly said they had run out of gas when the homeowner eventually answered the door). And top that off with Beverly's statements about the two fences he used and Beverly's offer to identify the houses where the fences lived (described above and at

Trial Trans. 1379). The jury did not act irrationally by viewing the above evidence as proof that Beverly was part of a plan to steal vehicles, break into houses, steal items, and sell them for cash.

But there is more. Beyond evidence that rebuts the claims in his merit brief, the jury heard other evidence connecting Beverly to an ongoing plan involving vehicle thefts, burglaries, and sales of stolen property. The twelve learned that, on the night Beverly was apprehended, items stolen from houses that day were found in the truck and on his person. *See* Trans. Trans. at 1483-84. The jury heard expert and eyewitness testimony linking him to burglaries. *See* Trial Trans. at 526-29, 564, 1581-84 & Ex. 525 (matching Beverly's DNA to cigarette butt found at burglary scene); Trial Trans. at 669-676 (homeowner identifying Beverly as one of two people that tried to break into his house). The jury also heard Beverly explain that he and Imber would frequently go down to the Cincinnati area, but find their own way back. *See* Ex. 481 at 15:36:30-15:37:00. Often, when they turned up in Clark County again, it was in a stolen vehicle. And the jury heard Beverly admit that the stump grinder found attached to a stolen ODOT truck linked to Imber and Beverly was destined for yet another fence, who Beverly identified by name, until that person backed out of the planned deal. *Id.* at 15:38:00-15:39-40.

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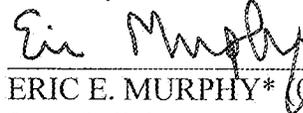
After hearing 8 days of detailed evidence, the jury did not act irrationally by finding Beverly guilty. And the Second District never held that it did. Instead, the Second District held only that the evidence was insufficient to prove an enterprise "separate and distinct" from the pattern of underlying crimes. App. Op. ¶ 31. Once that legal error is corrected (as Beverly concedes it must be) and the statute is properly applied, no court, even the Second District panel that decided this case, would hold that Beverly's conviction rests on insufficient evidence.

CONCLUSION

The Court should reverse the judgment of the Second District and reinstate the conviction under Ohio's Pattern of Corrupt Practices Act.

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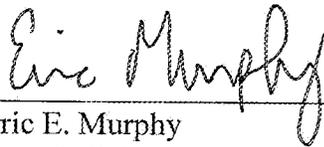
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant State of Ohio was served on May 5, 2014, by U.S. mail on the following:

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