[Cite as *State v. Wackenthaler*, 2004-Ohio-5501.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-030901 TRIAL NO. B-0305668
Plaintiff-Appellee,	:	
vs.	:	*D E C I S I O N.*
GARY WACKENTHALER,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: October 15, 2004

Roger W. Kirk, for Appellant,

Michael K. Allen, Hamilton County Prosecuting Attorney, and *James Michael Keeling*, for Appellee.

Please note: We have removed this case from the accelerated calendar.

MARK P. PAINTER, Judge.

{¶1} Defendant-appellant Gary Wackenthaler appeals his convictions for burglary[1] and safecracking.[2] We affirm.

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[1] R.C. 2911.12(A)(2).

{¶2} Wackenthaler was charged with both crimes because of his involvement with his nephew, Richard Vance. Wackenthaler drove Vance to a home in the City of the Village of Indian Hill, where Vance broke into the home and stole various items, including a safe. The two men then took the safe to another location and broke it open; there was nothing inside.

{¶3} Police eventually apprehended Vance on other charges. They soon charged him with the Indian Hill burglary. Vance pleaded guilty to burglary and received a four-year prison sentence. The police arranged for him to call Wackenthaler and tape their conversation in an attempt to implicate Wackenthaler. This tape was later admitted into evidence.

{¶4} At trial, one of the residents of the burglarized home testified that Vance had come to her home previously, claiming that he had done some work in the house in the past. Two police officers—first Officer Steven Makin, then Officer Michael Dressell—testified regarding Vance's statements and the taped conversation. A babysitter testified that she saw Wackenthaler driving his van on the same street and at the same time that the house was burglarized. She said that a younger man called from the burglarized house down the street and that Wackenthaler went back to the house to pick him up.

{¶5} Further, Vance testified that Wackenthaler knew that he was involved in a burglary and helped to break open the safe. And an audiotape was introduced into evidence to demonstrate that Wackenthaler was the driver during the burglary.

{¶6} A jury found Wackenthaler guilty of both counts; the trial court sentenced him to five years' imprisonment for the burglary and to 17 months' imprisonment for the safecracking, to be served concurrently.

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[2] R.C. 2911.31(A).

{¶7} On appeal, Wackenthaler assigns five errors: (1) his due-process rights were prejudiced and he received ineffective assistance of counsel; (2) the trial court improperly admitted the audiotape; (3) the trial court erroneously instructed the jury on the offense of complicity; (4) the verdict was against the manifest weight of the evidence; and (5) the sentence was contrary to law.

I. Ineffective Assistance of Counsel

{¶8} Wackenthaler argues that his trial counsel was deficient because counsel (1) failed to move the court to separate the witnesses, (2) failed to object to the prosecutor's leading questions, (3) requested a jury instruction on complicity, and (4) failed to request a polling of the jury.

{¶9} To establish ineffective assistance, a defendant must prove that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) the substandard performance actually prejudiced the defendant.[3] We must indulge in a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance.[4] Trial counsel's performance will not be deemed ineffective unless counsel's representation fell below an objective standard of reasonableness[5] and there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.[6]

{¶10} We have recently held that the failure to request a separation of witnesses or a polling of the jury, along with the failure to object to leading questions, does not

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[3] *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.
[4] Id.
[5] Id.
[6] *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

necessarily amount to ineffective assistance.[7] And Wackenthaler's trial counsel requested the proper jury instruction on complicity. We cannot say that trial counsel's performance fell below an objective standard of reasonableness, or that Wackenthaler was prejudiced in any way.

{¶11} We therefore overrule Wackenthaler's first assignment of error.

II. The Taped Conversation

{¶12} In his second assignment, Wackenthaler argues that the audiotape of his conversation with Vance should not have been admitted. He is mistaken.

{¶13} Wackenthaler contends that the audiotape was improperly obtained and contained evidence regarding other acts for which he was not on trial. But Wackenthaler never filed a motion to suppress the audiotape prior to trial, so the trial court was not—and we are not now—required to examine the collateral question of how such evidence came into the prosecution's possession.[8]

{¶14} This does not matter anyway; the police may record a telephone conversation if the police officer is a party to the communication or if one of the parties to the communication has given prior consent for the recording.[9] Vance consented to the recording, so it was not improperly obtained.

{¶15} Evidence of other crimes, wrongs, or bad acts is admissible to prove motive, intent, preparation, plan, and knowledge, among other things.[10] On the tape, it is clear that Wackenthaler knew that he was driving Vance to burglarize homes. The tape was therefore properly admitted.

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[7] *State v. Penn*, 1st Dist. No. C-030433, 2004-Ohio-1491.
[8] *State v. Davis* (1964), 1 Ohio St.2d 28, 203 N.E.2d 357.
[9] *State v. Childs*, 88 Ohio St.3d 558, 2000-Ohio-425, 728 N.E.2d 379.
[10] Evid.R. 404(B).

{¶16} We therefore overrule Wackenthaler's second assignment of error.

III. Complicity Instruction and Testimony

{¶17} In his third assignment, Wackenthaler claims that the trial court provided an erroneous jury instruction on complicity. He argues that he was not charged with complicity and that it was error to allow police officers to testify about complicity before Vance testified.

{¶18} We first note that Wackenthaler's trial counsel did not object to the instruction given to the jury—in fact, he asked for it. Wackenthaler has therefore waived all but plain error.[11]

{¶19} A charge of complicity may be stated in terms of the complicity section of the Revised Code or in terms of the principal offense.[12] Thus, a jury instruction on complicity was not improper.

{¶20} Wackenthaler relies on *State v. Taniguchi*[13] for the proposition that the police witnesses lent an improper air of credibility to the later presentation of Vance's testimony. In *Taniguchi*, the Tenth Appellate District reversed a conviction where an investigator testified about co-conspirators' statements prior to the co-conspirators' testimony. The investigator was the first witness that the prosecution called, and the court held that no complicity had been alleged at that point. So the court reversed Taniguchi's conviction because of an improper order of proof.

[11] Crim.R. 30(A).
[12] R.C. 2923.03(F).
[13] (1994), 96 Ohio App.3d 592, 645 N.E.2d 794.

{¶21} The court relied on Evid.R. 801(D)(2)(e), which states that a statement by a co-conspirator during the course of and in furtherance of a conspiracy is permitted and is not considered hearsay upon independent proof of the conspiracy.

{¶22} The *Taniguchi* court held, "The fact that [the investigator] testified concerning statements made by the codefendants before any conspiracy was even alleged clearly violated the law."[14] We are not sure that we agree with (or even fully understand) *Taniguchi*. We would reverse a case for improper order of proof only in an extraordinary case—and this case is by no means extraordinary.

{¶23} In his brief on appeal, Wackenthaler asserts that Officer Makin's testimony was improper because he testified about Vance's out-of-court declarations before Vance testified. But Officer Makin barely said anything about Vance's statements before the recording was played. He testified, "After we spoke to Mr. Vance that evening we made arrangements with him to drive him around to get him released from jail into our custody the next day." At that point, Wackenthaler's trial counsel objected. The parties held a discussion in chambers that outlined Wackenthaler's objections, which consisted mostly of arguments about other bad acts.

{¶24} When the trial resumed, the prosecutor asked Officer Makin if the police began to develop another suspect based on Vance's statements. They had. So Officer Makin then testified that they asked Vance to call Wackenthaler so the police could record their conversation. Officer Makin then described how the police set up the phone call, how they set up the wiretap, and what he could hear during the conversation. He also testified that he had reviewed the tape and that he recognized both Vance's voice and Wackenthaler's voice. Then the tape was played for the jury. Officer Makin's testimony

[14] Id. at 595.

did nothing more than properly authenticate the recording, which served to prove Wackenthaler's complicity in the offenses.

{¶25} The jury instruction regarding complicity was not erroneous. We further hold that the recorded conversation that was played for the jury during the officer's testimony constituted evidence of Wackenthaler's complicity, and that any error was harmless.

{¶26} We therefore overrule Wackenthaler's third assignment of error.

IV. Manifest Weight

{¶27} In his fourth assignment, Wackenthaler argues that his conviction was against the manifest weight of the evidence.

{¶28} A review of the manifest weight of the evidence puts the appellate court in the role of a "thirteenth juror."[15] The court must weigh the evidence, consider the credibility of witnesses, and determine whether the trier of fact lost its way in finding the defendant guilty. A new trial should be granted on the weight of the evidence only in exceptional cases.[16] And "[n]o judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the case."[17]

{¶29} A witness saw Wackenthaler and his van at the scene of the burglary. Vance testified that Wackenthaler drove him to and from the scene of the burglary. And the recorded conversation demonstrated that Wackenthaler himself knew that he was

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[15] *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.
[16] Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.
[17] Section 3(B)(3), Article IV, Ohio Constitution.

driving Vance to a burglary and that he did not want to be implicated. We cannot say that the jury lost its way in finding Wackenthaler guilty.

{¶30} We therefore overrule Wackenthaler's fourth assignment of error.

V. Wackenthaler's Sentence

{¶31} In his final assignment, Wackenthaler argues that the sentence he received was contrary to law. Not so.

{¶32} A trial court should impose the shortest sentence for a first offender unless it makes certain findings on the record.[18] But the trial court need not give its reasons for those findings.[19]

{¶33} The trial court properly held—both on the record and in its felony sentencing worksheet—that the shortest prison term would demean the seriousness of each offense and would not adequately protect the public.[20] This was sufficient to justify the five-year prison term for the burglary and the 17-month term for safecracking.

{¶34} Wackenthaler argues that the trial court improperly relied on the fact that he had previously served a prison term. Wackenthaler claims that he actually served the term in question in the Adams County Jail. But the presentence-investigation report stated that Wackenthaler did, in fact, serve a prison term. It was not improper for the trial court to rely on this. Even if Wackenthaler never served a prior prison term, the trial court's finding that the shortest term would demean the seriousness of each offense and would not adequately protect the public was enough to impose the terms that Wackenthaler received.

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[18] See R.C. 2929.14(B); *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165, 793 N.E.2d 473.
[19] *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110, 715 N.E.2d 131.
[20] See R.C. 2929.14(B)(2).

{¶35} We therefore overrule Wackenthaler's fifth assignment of error. Accordingly, we affirm the trial court's judgment.

Judgment affirmed.

WINKLER, P.J., and **HILDEBRANDT, J.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.