[Cite as *State v. Noe*, 2009-Ohio-6978.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Appellee

v.

Thomas W. Noe

Appellant

Court of Appeals Nos. L-06-1393
L-09-1193

Trial Court Nos. CR-2006-1348

DECISION AND JUDGMENT

Decided: December 31, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, John J. Weglian, Lawrence J. Kiroff, Kevin A. Pituch and Jeffrey D. Lingo, Assistant Prosecuting Attorneys, for appellee.

William C. Wilkinson, O. Judson Scheaff, III, Craig A. Calcaterra and John R. Mitchell, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Thomas W. Noe, appeals the November 27 and December 8, 2006 judgments, and the June 26, 2009 judgment[1] of the Lucas County Court of Common Pleas which, following a jury trial convicting appellant of one count of

[1]On June 5, 2009, this case was remanded to the trial court to conform the judgment entry to the requirements under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. Appellant filed a notice of appeal from the June 26, 2009 judgment entry. On July 22, 2009, the appeals were consolidated.

engaging in a pattern of corrupt activity, two counts of aggravated theft, four counts of money laundering, 18 counts of forgery, and four counts of tampering with records, sentenced appellant to a total of 18 years of incarceration and a $139,000 fine. The court also ordered restitution in the amount of $13,747,000, and repayment of the costs of his prosecution in the sum of $2,979,402.89. For the reasons that follow, we find that appellant's convictions are affirmed but that the matter must be remanded for a postrelease control hearing in accordance with R.C. 2929.191.

{¶ 2} The relevant facts are as follows. In 1997, the Ohio General Assembly permitted the Ohio Bureau of Workers' Compensation ("BWC") to diversify its large investment portfolio with alternative investments. To that end, and under the BWC's Emerging Managers Program, appellant, a rare coin dealer, submitted a proposal to the BWC to establish Capital Coin Fund, a limited liability company, with the primary purpose of buying and selling of rare coins. On March 31, 1998, the operating agreement creating Capital Coin Fund, Ltd. ("CCF I") was signed by the BWC and appellant. Under the terms of the agreement, the BWC was to provide $25,000,000 as its capital contribution (in exchange for 250 units of interest) while appellant's company, Vintage Coins and Cards ("VCC"), and Delaware Valley Rare Coin Co., Inc., a Pennsylvania Company, as managing members of CCF I, each contributed $5,000 (in exchange for one manager/member unit each.) Section 5.1 of the operating agreement provided that "the Managers, in their full and exclusive discretion, shall manage and control and make all decisions affecting the business and assets of the Company * * *."

{¶ 3} On July 13, 2001, Capital Coin Fund, Ltd. II ("CCF II") was formed. As with CCF I, the BWC invested $25,000,000; appellant, as the sole manager, invested $10,000 through VCC. Again, the purpose of CCF II was to buy and sell rare United States coins. CCF II also gave the manager authority to make unspecified "alternative investments."

{¶ 4} Appellant believed that it was important to conceal the nature of the BWC investments from other coin dealers. Accordingly, appellant set up various companies to conceal the relationship. For CCF I, appellant created Rare Coin Enterprises ("RCE") in Maumee, Ohio, and in Broomall, Pennsylvania; Visionary Rare Coins in California; and Karl D. Hirtzinger, LLC, in Minnesota. For CCF II, appellant created Rare Coin Alliance in Delaware, Errors and Oddities in Florida, Spectrum Fund in California, and Numismatic Professionals in Colorado. The entities involved in the criminal prosecution were those run by appellant in Maumee, Ohio. Such entities included CCF I, CCF II, VCC, and RCE.

{¶ 5} Following the organization of CCF I, the BWC began questioning some of the transactions that were being approved by appellant. In 2005, an official investigation commenced regarding the management of the Coin Funds. Based upon information obtained during the initial investigation, a search warrant for VCC, located in Maumee, Lucas County, Ohio was executed on May 26, 2005. Computers, voluminous paper records, coins and various other collectibles were seized.

{¶ 6} On February 13, 2006, a fifty-three count indictment was filed against appellant. Specifically, appellant was indicted on one count of engaging in a pattern of corrupt activity, 11 counts of theft, 11 counts of money laundering, eight counts of tampering with records, and 22 counts of forgery. On February 15, 2006, appellant entered a not guilty plea as to all the counts.

{¶ 7} On February 27, 2006, appellant filed an affidavit in the Supreme Court of Ohio requesting that the assigned trial judge, Honorable Thomas J. Osowik, and all the judges of the Lucas County Court of Common Pleas, be disqualified from presiding over his case. In his memorandum in support, appellant chronicled his lengthy involvement with the Ohio Republican Party and, particularly, the Lucas County Republican Party. Appellant specified that this involvement included his and his wife's active campaigns against all democratic judicial candidates, Judge Osowik included. In response, Judge Osowik stated that he felt no bias or prejudice against appellant and that he could fairly and impartially serve on the case. The Administrative Judge, Honorable James D. Bates, filed a response to appellant's affidavit indicating that, if Judge Osowik should be disqualified, the remaining Lucas County judges were able to preside over the case. On March 8, 2006, the court denied the affidavit of disqualification. See *In re Disqualification of Osowik*, 117 Ohio St.3d 1237, 2006-Ohio-7224.

{¶ 8} On May 19, 2006, appellant filed a motion to change venue; appellant argued that the "overwhelmingly negative pre-trial publicity," chiefly articles and editorials published in The Toledo Blade, prevented him from having a fair trial in Lucas

County. Following extensive briefing and a hearing on the issue on July 6, 2006, the trial court denied appellant's motion.

{¶ 9} On May 26, 2006, appellant filed a motion to dismiss Count 1 of the indictment. On June 21, 2006, appellant filed a motion to consolidate Counts 4, 6, 8, 10, 12, 14, 16, 18, and 20 into one count of theft, Count 2. The trial court denied appellant's motion to dismiss Count 1, but granted appellant's motion to consolidate. The state entered a nolle prosequi as to Count 21.

{¶ 10} A jury trial commenced on October 10, 2006. Following extensive voir dire, 12 jurors and four alternate jurors were seated. The state presented the testimony of 53 witnesses and numerous exhibits. The state issued a nolle prosequi as to four forgery counts where the witness died prior to trial.

{¶ 11} The state's theory at trial was that appellant transferred money from the coin funds to VCC and characterized the transfers as coin purchases when, in fact, no coins were purchased. Appellant then used the money for his own benefit. Appellant also wrote several checks from VCC to certain individuals; appellant endorsed the checks and deposited the proceeds into his personal checking account. Further, VCC employee Timothy LaPointe, at appellant's direction, created inflated inventories in order to deceive the BWC as to the amount of coins owned by the Coin Funds. Prior to agreed-on inspections, appellant and LaPointe would also borrow or obtain coins from various customers and coin dealers and create corresponding false inventories.

{¶ 12} At the conclusion of the state's case-in-chief, appellant raised a Crim.R. 29(A) motion for acquittal. As to the theft, money laundering, and tampering with records charges, appellant argued that because no evidence was presented to demonstrate what "consent" was given by the Coins Funds to appellant, the elements of theft, and the charges predicated on theft, were not supported by sufficient evidence. Further, as to the forgery counts, appellant contended that the activity alleged was not illegal because appellant did not intend to defraud the individuals who were listed as payees and whose signatures he signed. Appellant further argued that the state failed to establish the existence of an enterprise with regard to the engaging in a pattern of corrupt activity charge. Following the arguments of the parties, the trial court denied the motion. The state then rested; the defense did not present any witnesses and rested.

{¶ 13} Following deliberations, on November 13, 2006, the jury returned a verdict finding appellant guilty of engaging in a pattern of corrupt activity (with a special verdict of forfeiture as to appellant's NGC stock), two counts of theft, four counts of money laundering, four lesser-included counts of tampering with records, and 18 counts of forgery. The jury acquitted appellant of seven counts of money laundering and four counts of tampering with records.

{¶ 14} On November 27, 2006, appellant was sentenced to 10 years of imprisonment on Count 1, engaging in a pattern of corrupt activity, four years of imprisonment for Count 2, theft, eight years of imprisonment for Count 30, theft, six months of imprisonment on each of four counts of tampering with records, four years of

imprisonment on each money laundering count, and 11 months in prison for each of 18 forgery counts. The sentences for Counts 1 and 30 were ordered to be served consecutively. The remaining sentences were ordered to be served consecutive to Count 1 but concurrently to all the other counts for a total of 18 years of imprisonment. Appellant was also ordered to pay fines totaling $139,000.

{¶ 15} On November 27, 2006, a hearing was held on the state's motion for restitution and financial sanctions. In its December 8, 2006 judgment entry, the court ordered that appellant pay $13,747,000 to the victim, the state of Ohio, and that he pay the costs of prosecution which totaled $2,979,402.89. This appeal followed.

{¶ 16} Appellant has set forth the following seven assignments of error for our consideration:

{¶ 17} "Assignment of Error No. 1: The state failed to present any evidence on at least one element of each offense charged in the indictment in violation of Mr. Noe's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 10, and 16 of the Ohio Constitution.

{¶ 18} "Assignment of Error No. 2: The trial court violated Mr. Noe's right to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution by holding this trial in Lucas County, Ohio, an area overwhelmingly saturated with negative publicity about Mr. Noe and his alleged guilt.

{¶ 19} "Assignment of Error No. 3: The denial of Mr. Noe's affidavit of disqualification violated Mr. Noe's right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶ 20} "Assignment of Error No. 4: The trial court abused its discretion with regard to various evidentiary decisions that denied Mr. Noe a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶ 21} "Assignment of Error No 5: The trial court abused its discretion in refusing to instruct the jury on essential components of Mr. Noe's defense, denying Mr. Noe a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶ 22} "Assignment of Error No. 6: Mr. Noe's convictions for theft and money laundering were allied offenses of similar import, and sentences for both offenses violated Mr. Noe's rights against double jeopardy guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶ 23} "Assignment of Error No. 7: The trial court's cumulative trial and sentencing errors violated Mr. Noe's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 9, 10 and 16 of the Ohio Constitution and Ohio sentencing framework."

{¶ 24} In his first assignment of error, appellant contends that the state failed to present evidence on at least one element of each of the crimes alleged. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found all the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2000-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring).

{¶ 25} We will examine the elements of each crime, and the evidence presented in support thereof, in the order set forth in appellant's merit brief. Appellant was charged with theft offenses under R.C. 2913.02(A)(2), which provides:

{¶ 26} "(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

{¶ 27} "* * *

{¶ 28} "(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent; * * *."

{¶ 29} As to the theft charges, appellant contends that, pursuant to the operating agreements, once the BWC made its capital contributions to the coin funds in exchange for units (or securities), it was no longer the owner of the money; the coin funds were the owners. Thus, because the state failed to present evidence of CCF I's or CCF II's lack of consent regarding the transfers from the Coins Funds to VCC, the theft convictions were not supported by sufficient evidence. The state counters that the BWC was an "owner" as defined in R.C. 2913.01(D); alternatively, the state argues that the identity of a specific owner other than the defendant is not required under the theft statute.

{¶ 30} As summarized above, both operating agreements provided that the BWC would invest $25,000,000 and obtain 250 units or an 80 percent interest in the funds. Section 5.1 authorized the manager(s) to:

{¶ 31} "(a) Acquire, invest in, maintain, finance, refinance, own, encumber, sell, exchange and otherwise manage the coins and any other assets of the Company and to enter into other business arrangements with respect to Company assets deemed prudent by the Managers in order to achieve successful operation for the Company.

{¶ 32} "(b) Borrow money and to make and issue notes, obligations and evidences of indebtedness of all kinds, whether or not secured and to secure the same by necessary action, including, without limitation, the execution of notes and security agreements in order to secure a loan(s), make, enter into, perform and carry out any arrangements, contracts and/or agreements of every kind for any lawful purpose, without limit as to amount or otherwise, with any party; authorize or approve all actions with respect to

distributions from the Company and generally to make and perform agreements and contracts of every kind and description and do any and all things necessary or incidental to the foregoing for the protection and enhancement of the assets of the Company."

{¶ 33} The manager(s) was also required to keep "full and accurate records of all transactions of the Company." Yearly financial statements were also to be prepared and submitted and the books were required to be kept at the principal place of business of the Coin Funds (VCC in Maumee, Ohio) for inspection and copying during "reasonable business hours."

{¶ 34} In the Bill of Particulars, regarding the theft counts, the state alleged that on March 31, 1998, appellant, without consideration, transferred $1,375,000 from CCF I to VCC; appellant then repaid $95,000 to an individual and fraudulently represented it as a coin purchase when, in fact, no coins were purchased. The state further claimed that the money was obtained without the consent of the owner or the person authorized to give consent. The state next alleged that between September 16, 2003, and May 26, 2005, appellant, without consideration, transferred in excess of $1,000,000 from CCF I and CCF II to VCC. Appellant listed the transactions as coin purchases when, in fact, no coins had been purchased. The state again claimed that the money was obtained without the consent of the owner or the person authorized to give consent. At trial, the state presented testimony and evidence regarding the claims.

{¶ 35} In support of his argument that the state failed to establish an "owner" under the theft statute, appellant relies on the United States Supreme Court's case

captioned *Rhode Island Hosp. Trust Co. v. Doughton* (1926), 270 U.S. 69, a corporate tax case, for the proposition that "the stockholder does not own the corporate property." Citing *Rumbaugh v. Ohio Dept. of Commerce*, 155 Ohio App.3d 288, 2003-Ohio-6107, appellant further notes that a shareholder does not have a right to exercise managerial control of the company.

{¶ 36} R.C. 2913.01(D) provides that "owner" means, "unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful."

{¶ 37} In *State v. Rhodes* (1982), 2 Ohio St.3d 74, the Supreme Court of Ohio, interpreting R.C. 2913.01(D), held that in a prosecution for theft of a motor vehicle, the state was not required to provide the certificate of title to prove that the victim was the owner of the vehicle. Id. at syllabus. The court reasoned:

{¶ 38} "It is apparent from the language of R.C. 2913.01(D) that title ownership in a specific person other than the defendant is not an element of a theft offense. Indeed under this definition a thief can steal from a thief. Generally a thief is not concerned with who is the owner of property or who possesses a certificate of title to an automobile which he has stolen. Under these two sections it is merely necessary to prove that a defendant deprived someone of property who had 'possession or control of, or any license or any interest in' that property. It is unnecessary, however, for one from whom possession or control is taken to have lawful possession or control.

{¶ 39} "In the instant case appellant does not claim that he possessed any right, title, claim or interest in the motor vehicle. The identity of the holder of a certificate of title to the motor vehicle is not the controlling issue. The issue is whether the defendant had lawful possession of the vehicle.

{¶ 40} "For purposes of determining the commission of a theft offense under R.C. 2913.02, one need not hold a certificate of title to be in lawful possession of a motor vehicle. The state must prove that the defendant deprived the owner, as such term is defined in R.C. 2913.01(D), of the vehicle. This definition makes it clear that the 'ownership, possession, control, license, or interest' of the 'owner,' as that term is used in R.C. 2913.01 through 2913.71, may be unlawful in itself. It is the 'actor's,' i.e., the defendant's, relationship to the property which is controlling. *The important question is not whether the person from whom the property was stolen was the actual owner, but rather whether the defendant had any lawful right to possession*." (Emphasis added.) Id. at 76. Accord, *State v. Grayson*, 11th Dist. No. 2006-L-153, 2007-Ohio-1772; *Dayton v. Crane* (Jan. 23, 1998), 2d Dist. No. 16608.

{¶ 41} In the present case, reviewing the evidence in favor of the state, the state provided ample evidence demonstrating that the BWC had, at minimum, an "interest" in the Coin Funds as contemplated under R.C. 2913.01(D). Regardless, as referenced above, Ohio courts have focused on the actor's right to possession of the property. As noted by the state, appellant was limited in his role as funds manager by the terms of the operating agreements and the Ohio Act. Appellant was specifically prohibited from

using "the funds or assets of the Company in any manner except for the benefit of the Company in furtherance of its business purposes * * *." Taking money from the funds for personal use with no evidence of a note and overt attempts at concealment was, undoubtedly, contrary to the best interest of the Coin Funds. Accordingly, we find that appellant's theft convictions were supported by sufficient evidence.

{¶ 42} Appellant next argues that because the theft charges were not supported by sufficient evidence the money laundering and tampering with records charges were, likewise, not supported by sufficient evidence. Based upon our determination that the theft charges were supported by sufficient evidence, we find that appellant's argument fails.

{¶ 43} Appellant also raises a sufficiency argument as to his 18 forgery convictions. Specifically, appellant argues that because the check payees had no interest in the subject checks and suffered no loss, appellant's act of endorsing the payees' names was not a criminal act. The forgery statute at issue, R.C. 2913.31(A)(1) and (3), provides:

{¶ 44} "(A) No person, with purpose to defraud, or knowing that the person is facilitating a fraud, shall do any of the following:

{¶ 45} "(1) Forge any writing of another without the other person's authority;

{¶ 46} "* * *;

{¶ 47} "(3) Utter, or possess with purpose to utter, any writing that the person knows to have been forged."

{¶ 48} To "forge" means to "fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct." R.C. 2913.01(G). To "defraud" is to "knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." R.C. 2913.01(B). Finally, to "utter" means to "issue, publish, transfer, use, put or send into circulation, deliver, or display." R.C. 2913.01(H).

{¶ 49} Appellant argues that according to Ohio commercial law, R.C. Chapter 1303, because appellant did not need the consent of the persons whose names were written on the checks, because appellant was authorized to sign the names, and because appellant was the intended payee, there was no forgery. Appellant supports his argument with the case captioned *People v. Hoffman* (N.Y. Sup. 1977), 91 Misc.2d 525.

{¶ 50} In *Hoffman*, the defendant and the victim were business partners. Checks issued by the business were required to have both signatures. Because the victim was not involved in the daily operations, he would sign 20-30 blank checks when he visited the business. Id. at 526. In 1976, it was discovered that in 1974, the defendant wrote a check and listed the victim's name as the payee, the defendant co-signed the check and cashed it. Id.

{¶ 51} Reviewing the defendant's motion to dismiss the forgery indictment, the court noted:

{¶ 52} "It is apparent that Sidney Kaufman was not the intended payee, knew nothing of the check at the time, did not expect and was not entitled to the amount thereof. For reasons best known to the defendant, he used the name Sidney Kaufman as a payee not intending the latter to have an interest therein. Assuming the facts most favorable to the People, the defendant was using a devious method to draw a check to his own order or to cash. While that may constitute a larceny, it does not support a charge of forgery." Id. at 527.

{¶ 53} Convicted of violating the Wisconsin forgery statute in connection with the sale of stolen pharmaceuticals, the defendant in *State v. Czarnecki* (Wis.App. 2000), 615 N.W.2d 672, argued that his use of a fictitious name was "a commercially accepted practice, so endorsing the checks with such a name was not a false act." Id. at 675.

{¶ 54} Adopting a more liberal interpretation of the forgery statute than in *Hoffman*, the *Czarnecki* court noted that a forgery is committed when an individual lies about the genuineness of a document. Id. The use of an assumed name when signing or endorsing a check is not always a forgery. However, when the name is used for a fraudulent purpose, the act can be a forgery. Id. The court agreed that the Uniform Commercial Code permits an individual to endorse a check in a name that is not the name of the holder. Id. 677.

{¶ 55} "Indeed, a person may adopt any name he or she chooses, so long as it is used for an honest purpose. If there was an absence of facts supporting the intent to defraud here, Czarnecki's position might be well-taken, but such is not the case. Under

the present facts, Czarnecki's check endorsements using an assumed name were not permissible because they were done with a fraudulent intent." Id.

{¶ 56} We further note that under Ohio law, R.C. 2913.31(A) does not require that a defendant intend to defraud a particular person, or that the person harmed is the same person whose name was forged.

{¶ 57} Thus, the question here is whether the state proved that appellant uttered the check in the names of acquaintances or clients and endorsed them with the knowledge and intent to defraud *anyone*, if so, then the forgery convictions were supported by sufficient evidence. At trial, the state presented testimony of all the individuals whose names were unwittingly forged by appellant; the state also presented testimony that appellant uttered the checks with knowledge of the forgeries.

{¶ 58} For example, James Bremer testified regarding, inter alia, check number 6481. The check was written on April 7, 2000, for $5,000 and the payee was Jim Bremer. The check was signed by appellant. The endorsement was signed "Jim Bremer, For Deposit Only." Bremer testified that he and his brother had loaned appellant approximately $90,000, and that they had been repaid through a series of checks. Bremer testified that neither he nor his brother and ever purchased coins from appellant; in the 1980s they sold appellant some coins belonging to their grandfather. Bremer stated that he had not endorsed the check, did not receive the proceeds from the check, and did not recognize the account number to which it was deposited. A corresponding check register stub listed the payee of check number 6481 as Jim Bremer, and included the "#500" code

used by VCC for inventory purchases. Further, testimony was presented to demonstrate that appellant's intent was to defraud the state of Ohio by characterizing the transfers as coin purchases thereby avoiding the payment of income tax. Accordingly, we find that appellant's forgery convictions were supported by sufficient evidence.

{¶ 59} Finally, appellant argues that appellant's conviction for engaging in a pattern of corrupt activity was not supported by sufficient evidence. At the outset we reject appellant's first argument as it is premised on the alleged insufficiencies in appellant's convictions for theft, money laundering, tampering with evidence, and forgery. We found that these convictions were all supported by sufficient evidence.

{¶ 60} Appellant next contends that the state failed to prove the existence of an "enterprise" that was separate and distinct from appellant; thus, the entire engaging in a pattern of corrupt activity conviction should be vacated. Further, regarding the forgery convictions, appellant argues that the state failed to even allege an enterprise.

{¶ 61} Appellant was convicted of R.C. 2923.32(A)(1) which provides:

{¶ 62} "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 or the collection of an unlawful debt."

{¶ 63} R.C. 2923.31(C) defines "enterprise" as: "any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. 'Enterprise' includes illicit as well as licit enterprises."

{¶ 64} In *State v. Theisler*, 11th Dist. No. 2005-T-0106, 2007-Ohio-213, the Eleventh Appellate District examined whether, under R.C. 2923.32, the defendant could be convicted of acts constituting a criminal enterprise. The defendant was a partner (with two other medical doctors) in a pain management clinic; though a medical doctor, he was not licensed to practice medicine or dispense prescription medications in Ohio. Id. at ¶ 2. The defendant was permitted by his partners to dispense prescriptions signed by a partner in blank. Id. at ¶ 4.

{¶ 65} The defendant was indicted and convicted on counts of engaging in a pattern of corrupt activity, drug trafficking, illegal processing of drug documents, and practicing medicine or surgery without a license. Id. at ¶ 6. Relevant to this case, the defendant argued that his conviction for engaging in a pattern of corrupt activity was not supported by sufficient evidence. Specifically, the defendant contended that there was no evidence to establish an enterprise separate from the clinic. Id. at ¶ 25.

{¶ 66} Finding sufficient evidence to establish a criminal enterprise, the court concluded that at a minimum, the defendant was an employee of the clinic and, therefore, was "participating in the affairs of an 'enterprise'" under the statute. Id. at ¶ 40. So finding, the court noted:

{¶ 67} "'The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that.'" Id. at ¶ 37, quoting *Cedric Kushner Promotions, Ltd. v. King* (2001), 533 U.S. 158, 163.

{¶ 68} In *King,* the United Stated Supreme Court held that an individual as president and sole shareholder of a closely held corporation, was a person distinct from his company. The court reasoned:

{¶ 69} "[L]inguistically speaking, the employee and the corporation are different 'persons,' even where the employee is the corporation's sole owner. After all, incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." (Citations omitted.) Id.

{¶ 70} Thus, the court concluded that the owner was subject to liability under the Racketeer Influenced and Corrupt Organizations Act. Id. at 166.

{¶ 71} In the instant case, the testimony presented at trial demonstrated that appellant was directly involved in an "enterprise" with Timothy LaPointe and VCC to take money from the Coin Funds, funnel it through VCC, and spend it for his own personal use. Further, the evidence demonstrated that appellant directed LaPointe to conceal the thefts by creating false receipts and inventories. Accordingly, we find that appellant's engaging in a pattern of corrupt activity conviction was supported by sufficient evidence.

{¶ 72} Based on the foregoing, we find that appellant's convictions for theft, money laundering, tampering with records, forgery, and engaging in a pattern of corrupt activity were all supported by sufficient evidence. Appellant's first assignment of error is not well-taken.

{¶ 73} In appellant's second assignment of error, he argues that the trial court erred when it failed to grant appellant's motion for a change of venue. A motion for change of venue is governed by Crim.R. 18(B), which provides that "[u]pon the motion of any party * * * the court may transfer an action * * * when it appears that a fair and impartial trial cannot be held in the court in which the action is pending." Crim.R. 18(B) does not require a change of venue merely because of extensive pretrial publicity. *State v. Landrum* (1990), 53 Ohio St.3d 107, 116-117. The decision to grant or deny a change of venue is in the discretion of the trial court. Id. at 116.

{¶ 74} The Sixth Amendment to the United States Constitution provides:

{¶ 75} "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

{¶ 76} Appellant argues that he could not obtain a fair trial in Lucas County based on the media onslaught before and during the trial process. In support of this contention, appellant relies on the United States Supreme Court case of *Sheppard v. Maxwell* (1966), 384 U.S. 333, where the court granted habeas corpus relief to a defendant convicted of murder in a jurisdiction inundated with publicity implying or proclaiming the defendant guilty prior to and during the trial. The court held that nothing can prevent the press from

reporting on a trial, "[b]ut where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." Id. at 363. The United States Supreme Court has held that to presume prejudice the pretrial publicity must so deeply pervade the trial process that it prevents potential jurors from being capable of removing their personal bias about the defendant. See *Sheppard v. Maxwell*; *Irvin v. Dowd* (1961), 366 U.S. 717; and *Rideau v. Louisiana* (1963), 373 U.S. 723.

{¶ 77} In *Irvin v. Dowd*, the prejudice in a murder case was "clear and convincing." Reporters in a town of approximately 30,000, sought "curbstone" opinions as to the defendant's guilt and what punishment he should receive; the opinions were broadcast over local stations. The defendant's confession was announced and as was his alleged offer to plead guilty in exchange for 99 years of imprisonment. He was referred to in news stories as the "confessed" killer. It was also announced that he was identified in a police line-up and had faced a lie-detector test. Further, a lengthy criminal history was divulged.

{¶ 78} More telling was what happened during the voir dire proceedings. The newspapers reported the anger and bitterness of the prospective jurors and that "'impartial jurors are hard to find.'" Of the 430 prospective jurors, 268 were excused as having "fixed opinions" as to the defendant's guilt; 103 were excused due to their objection to the death penalty; and 30 were peremptorily challenged by the parties. Id. at 727. Finding that the community showed a "'pattern of deep and bitter prejudice'" the Court

commented that "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." (Citations omitted.) Id. at 728.

{¶ 79} In *Rideau v. Louisiana,* supra, police had taped the defendant's interrogation where he admitted to the charges later made against him. Local television stations then aired the interrogation to 24,000 viewers; the next day it was aired to an estimated 53,000 people and it was aired again to approximately 20,000 people. The parish had a population of approximately 150,000. The court found presumed prejudice holding, "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Id. at 726.

{¶ 80} In *Murphy v. Florida* (1975), 421 U.S. 794, 798-799, the Supreme Court of the United States explained its earlier cases saying, "[t]he proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." The *Murphy* court instead looked to the totality of the circumstances to determine if the trial process was fair. Further, the court held in *Nebraska Press Ass'n v. Stuart* (1976), 427 U.S. 539, 554, that "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial."

{¶ 81} The Supreme Court of Ohio has followed the above-quoted United States Supreme Court cases holding that in order to have presumed prejudice, the defendant must show that the inflammatory pretrial publicity saturated the community. *State v. Yarbrough*, 95 Ohio St.3d 227, 241, 2002-Ohio-2126. The Supreme Court of Ohio has further held that cases of presumed prejudice are rare, and that the voir dire process is the best way to determine bias on the part of potential jurors. See *State v. Lundgren*, 73 Ohio St.3d 474, 479, 1995 Ohio-227; *State v. Swiger* (1966), 5 Ohio St.2d 151, 164.

{¶ 82} *Lundgren*, involved a cult leader's kidnapping and murder of five of his followers. The defendant requested that venue be changed due to the "massive pretrial publicity" in Lake County. Specifically, the local newspaper had printed 227 articles, the Cleveland newspaper had printed 123 articles, and the local news and radio stations aired hundreds of stories. Id. at 478. In addition, the Lake County prosecutor had called members of defendant's group inhuman and claimed that they would die in the electric chair. The court denied appellant's motion to change venue.

{¶ 83} Quoting *Irvin v. Dowd*, supra, the *Lundgren* court noted: "'In these days of swift, widespread and diverse method of communication, * * * scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.'" Id. at 479, quoting *Irvin*, 366 U.S. at 722. This statement rings especially true in our current era of high-speed and portable internet access. Newspapers and other news media now have the ability to update their print stories online throughout the day and they may be accessed at the click of a button. Thus, not surprisingly, the

cases cited by appellant, especially those from the 1960s and 70s, involve far fewer media reports. However, the sheer number of media reports is an inescapable result of modern technology.

{¶ 84} Importantly, the voir dire proceedings conducted by the trial court were thorough and careful. The court sent notices to approximately 175 potential jurors and a week was set aside for jury selection. The jurors were interviewed individually in groups of 10 to 12; the court was able to get its desired number of 35 potential jurors prior to going through all those who reported for jury service. Of the 35, the parties were able to seat 12 jurors and four alternate jurors.

{¶ 85} As noted in *State v. Yarborough*, supra: "'[t]he examination of jurors on their voir dire affords the best test as to whether prejudice exists in the community against the defendant, and whether it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in absence of a clear showing of an abuse of discretion.'" Id. at 241, quoting *State v. Swiger* (1966), 5 Ohio St.2d 151, paragraph one of the syllabus.

{¶ 86} During the course of voir dire, multiple venire persons were completely unaware of the case while several indicated that they were suspicious of the veracity and evenhandedness of the reporting of the story, particularly through the print media. After reading carefully through the entire voir dire proceedings, we can find no evidence of any pervasive prejudice or bias from those called for jury service. While there were multiple

potential jurors who were dismissed based upon their preconceived belief of appellant's guilt, the majority of those dismissed were due to financial or domestic hardship based upon the length of the trial.

{¶ 87} Upon review of the proceedings herein and the relevant case law, and after reviewing the volumes of articles, editorials, and cartoons, it may be argued that the news media was not entirely unbiased with regard to the prosecution of appellant. However, we cannot conclude that the pretrial publicity was sufficient to create a presumption of prejudice. Accordingly, we cannot say that the trial court abused its discretion when it denied appellant's motion for a change of venue. Appellant's second assignment of error is not well-taken.

{¶ 88} In appellant's third assignment of error he argues that the Supreme Court of Ohio's denial of his affidavit of disqualification of the trial court judge violated his constitutional right to a fair trial. The state counters that this court lacks jurisdiction to decide this claim.

{¶ 89} R.C. 2701.03(A) provides:

{¶ 90} "If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section."

{¶ 91} Similarly, Section 5, Article IV, Ohio Constitution, provides that "[t]he chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof."

{¶ 92} Furthermore, Section 3(B)(2), Article IV, Ohio Constitution, provides the jurisdiction of the courts of appeals, and we may only "* * * review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the courts of appeals within the district, * * * [and that we] shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies."

{¶ 93} In the present case, appellant's affidavit of disqualification was denied by the Chief Justice of the Supreme Court of Ohio. Because neither the Ohio Constitution nor the legislature has granted jurisdiction to this court to review the administrative actions of the Chief Justice, we have no jurisdiction to review this issue. Appellant's third assignment of error is not well-taken.

{¶ 94} In appellant's fourth assignment of error, appellant argues that the trial court's rulings with regard to various evidentiary issues denied him his constitutional right to a fair trial. We first note that a trial court's ruling to admit or to exclude evidence will not be reversed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, 182; *State v. Smith*, 6th Dist. No. L-05-1350, 2007-Ohio-5592, ¶ 43. """[A]buse of discretion" connotes more than an error of law or judgment; it implies that

the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 95} Appellant first argues that the trial court erred by allowing witnesses David Tripp and Thomas Wersell to testify as to the value of the coins seized during the search of VCC. Appellant stresses the fact that Tripp refused to meet with defense counsel prior to trial.

{¶ 96} During direct examination, David Tripp testified regarding his extensive education and his employment as a numismatic consultant, appraiser, and author. Tripp had been employed at Sotheby's auction house and was currently a self-employed consultant with the company. Tripp was questioned regarding his knowledge of coins; specifically, the quality and value of rare coins. At this point, appellant's counsel objected and indicated to the judge the representations by the state that Tripp was to be a fact witness only and not be qualified as an expert to give an opinion as to the value of the coins seized at VCC. The state responded that Tripp was going to be asked only one question about value in relation to the inventory document prepared by VCC employee, Timothy LaPointe.

{¶ 97} Tripp then testified that in 2005, through Sotheby's, he was contacted by the state of Ohio's Auditor's Office about an appraisal and inventory of a numismatic

investment.[2] Tripp traveled to Maumee, Ohio, and, with BWC officials and law enforcement, he first entered VCC on May 25, 2005. On that date, the inspectors viewed only historical collectibles; Tripp testified that they were surprised to find collectibles because it was believed that the BWC investment contained only coins.

{¶ 98} Tripp testified that on May 26, 2006, they were allowed full access to the Coin Fund inventories. Tripp stated that based upon the inventory lists he had received there did not appear to be enough coins. Tripp testified that they worked from the inventory sheets prepared by VCC employee, Timothy LaPointe. Tripp stated that for CCF I, the five coins in the inventory were present and totaled $63,500. He indicated that based on his experience this was a "fairly correct" ballpark value. The inventory sheet for CCF II had 120 coins listed with a value of $307,155; Tripp stated that the prices "pretty much" reflected the market prices. Finally, Tripp testified as to the RCE coins which had a total purchase price of $781,175; however, Tripp stated that a $610,000 coin was not found. Finally, Tripp commented that "when you have a total aggregate value of 1.1 million and half of it is missing in one coin, it's a fairly heart-stopping moment." Tripp further indicated that other coins found at VCC were of insignificant numismatic value.

{¶ 99} In a similar vein, state's witness, Thomas Wersell, director of investigations for the BWC, testified regarding the expected values of the inventories in

[2]These inventories, conducted by additional Sotheby's personnel, were simultaneously taking place at the Coin Funds' subsidiaries in Delaware, Pennsylvania, Colorado, and Florida.

Colorado and Florida. Appellant's counsel objected to the testimony arguing that it was based on the Sotheby's reports which, as argued with regard to Tripp's testimony, were improperly admitted expert opinions. The state contended that Wersell's statements related to the investigation and did not go to the truth of the reports. The court overruled the objection and Wersell testified regarding the Florida, Pennsylvania, Delaware, and Maumee inventories. Wersell testified that according to the documentation received by the BWC, VCC was supposed to have $13 million dollars in inventory but that it had approximately $600,000.

{¶ 100} Appellant contends that the above testimony was impermissible because the state presented no other expert testimony as to the value of the coins seized from VCC, and that the state's theory was that they had expected to find over $13 million dollars worth of coins at the time of the search warrant. Conversely, the state asserts that Tripp simply testified as to the inventory lists created by Timothy LaPointe, and admitted into evidence without objection, prior to the execution of the search warrant. The only value testimony provided by Tripp was whether the price listed for each coin was "reasonable in the world of coin collecting."

{¶ 101} The line between expert testimony under Evid.R. 702 and lay opinion testimony under Evid.R. 701 is not always clear. Obviously, because Tripp was physically present during the Maumee inventory he had the personal knowledge necessary to testify as a fact witness. Tripp testified regarding the inventories prepared by Timothy LaPointe and whether the purchase price listed for the coins was reasonable.

The accuracy of the inventories was an issue raised by the defense but it was not material to the nature of Tripp's testimony. Tripp simply testified to what was on the list compared to what they found at VCC. As noted by the state, in the rare coin market, it was reasonable to presume the value of the coins based upon their purchase price. *State v. Awad*, 164 Ohio App. 3d 528, 2005-Ohio-5861, ¶ 33. The defense did not object to the admission of the inventory lists.

{¶ 102} With regard to appellant's ability to interview Tripp prior to trial, based on the nature of the case and Tripp's knowledge and status in the coin industry, a pre-trial interview may have been advantageous. However, based upon the fact that the inventory lists were admitted and deemed to be a reflection of the value of the coins, any error in the admission of Tripp's and Wersell's testimony was harmless.

{¶ 103} Appellant next argues that the trial court abused its discretion when it granted the state's motion in limine to exclude appellant's testimony as to the value of the Coin Funds. In particular, appellant wished to demonstrate that the Coin Funds actually returned a $10 to $13 million dollar profit. The state counters that appellant was permitted to present evidence of the value of the fund during the period in which he was a manager; their motion only excluded the period after May 24, 2005, when appellant was removed as manager.

{¶ 104} In its October 16, 2006 motion in limine, the state argued that evidence of the value of the Coin Funds after May 25, 2005, was not relevant to any of the charges. In opposition, appellant argued that in order to prove that a theft occurred, the state was

required to prove that, pursuant to R.C. 2913.01(C), appellant intended to retain the money for a time as to appropriate "a substantial portion of its value" or that he disposed of the money "so as to make it unlikely that the owner will recover it." Appellant argued that his advances on his profit distributions, to which he was entitled, could not be calculated without determining the actual amount of the profits. Appellant also took issue with the state's characterization of "post-Noe" coin fund assets, stating that following his removal as manager, the state, through Development Specialists Inc., merely liquidated the assets acquired by appellant during his tenure.

{¶ 105} Granting the state's motion, the trial court concluded that "testimony regarding the Coin Fund's valuation subsequent to the defendant's management and possession" or "[e]vidence of a prospective ability to repay is not relevant to the charges contained in the indictment nor could such evidence make any fact of consequence more or less probable."

{¶ 106} Based on the foregoing, we likewise conclude that the presentation of such evidence was not relevant to the determination of appellant's guilt or innocence regarding the charges in the indictment.

{¶ 107} Lastly, appellant contends that the trial court erred when it allowed witness Rex Decker to offer an expert opinion as an accountant. The testimony was presented to demonstrate the amount of personal state and federal income tax appellant avoided paying by forging several checks. Appellant argues that he was prejudiced because he received Decker's report a mere 18 days before trial and that, at trial, Decker's

testimony was "inconsistent" with limitations placed by the court. Conversely, the state contends that appellant had adequate notice of the substance of Decker's testimony and that there was no evidence of delay by the state or prejudice to appellant.

{¶ 108} Crim.R. 16(B)(1)(e) requires that the state disclose the names and addresses of witnesses it intends to use at trial. Where a defendant objects to the late disclosure of a state's witness, the trial court does not abuse its discretion in permitting the witness to testify where "the record fails to disclose (1) a willful violation of the rule, (2) that foreknowledge would have benefited the accused in the preparation of his or her defense, or (3) that the accused was unfairly prejudiced." (Citations omitted.) *State v. Scudder*, 71 Ohio St.3d 263, 269, 1994-Ohio-298. Further, where evidence has not been disclosed in a timely manner, a continuance should be requested. See *State v. Wiles* (1991), 59 Ohio St.3d 71, 80, citing *State v. Edwards* (1976), 49 Ohio St.2d 31, 42-43.

{¶ 109} According to appellant, on August 9, 2006, Decker was disclosed as a potential witness. On August 21, 2006, appellant was informed of the substance of Decker's testimony, and on September 22, 2006, appellant received Decker's report which, according to appellant, was "a confusing series of columns and an email with numbers listed."

{¶ 110} Upon review, there is no evidence that the state's late disclosure of the report was intentional or that it prejudiced appellant. At trial, Decker testified that he began work on the state's project the first or second week of September 2006. Further, the tax documents at issue had been provided to appellant in discovery months prior to

trial and the substance of Decker's testimony had been known approximately six weeks prior to the receipt of the report.

{¶ 111} Based on the foregoing, we find that appellant's fourth assignment of error is not well-taken.

{¶ 112} Appellant's fifth assignment of error asserts that he was denied a fair trial by the trial court's refusal to instruct the jury on basic tenets of corporate law. Appellant contends that the instructions were necessary in order to establish "critical portions of his defense" including the issues of who owned the funds allegedly stolen and the issue of consent. The state counters that the jury was instructed on all the relevant criminal statutes taken from Ohio Jury Instructions; instructions on Ohio corporate law were not warranted.

{¶ 113} Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. We review the trial court's decision to refuse the requested jury instructions for an abuse of discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64.

{¶ 114} In his proposed jury instructions, appellant, inter alia, requested that the jury be instructed as to the following definition of "owner":

{¶ 115} "'Owner' means any person, other than the defendant, who possesses legal title to, or who has possession or control of, * * * the property in this case, Capital Coin Funds I and II. Corporations and limited liability companies are separate legal entities that exist apart from individuals. Corporations and limited liability companies may own property, enter into contracts, sue and be sued, and can separately consent to legal transactions. [A shareholder of a corporation or a member of a limited liability company does not have possession or control of the property of the corporation or limited liability company and is therefore not the owner of that company's property.] In this case, the owner of the property alleged to have been stolen by the defendant is Capital Coin Funds I and II."

{¶ 116} Appellant also requested a corporate law definition of consent.

{¶ 117} Appellant's desire for the corporate law jury instructions was based on his defense theory that the Coin Funds, rather than the BWC, were the owners of the money and that they were able to consent to appellant's use of the money. However, even assuming that the Coin Funds were the owners of the money at issue and that the Coins Funds had the ability to consent to appellant's use of the money, there was no evidence to suggest that the operating agreements or any other agreement between the parties permitted personal use of the funds by appellant. See *State v. Evans* (Aug. 18, 1993), 1st Dist. Nos. C-910443, C-910515. Accordingly, we find that the trial court did not abuse its discretion when it refused to give the disputed jury instructions. Appellant's fifth assignment of error is not well-taken.

{¶ 118} In appellant's sixth assignment of error, appellant argues that because his convictions for theft and money laundering were allied offenses of similar import, his sentences for both offenses violated his rights against double jeopardy as guaranteed by the United States and Ohio Constitutions.

{¶ 119} Regarding allied offenses of similar import, R.C. 2941.25(A) provides: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 120} In *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291, the Supreme Court of Ohio, set forth the following test for determining whether certain offenses are allied offenses of similar import:

{¶ 121} "Courts should assess, by aligning the elements of each crime in the abstract, whether the statutory elements of the crimes 'correspond to such a degree that the commission of one crime will result in the commission of the other.' * * *. And if the elements do so correspond, the defendant may not be convicted of both unless the court finds that the defendant committed the crimes separately or with separate animus." Id. at 638 quoting, *State v. Jones*, 78 Ohio St.3d 12,14, 1997-Ohio-38. In *Rance*, the court declined to find that involuntary manslaughter and aggravated robbery were allied offenses of similar import holding that: "Because each offense requires proof of an element that the other does not, they are not allied offenses of similar import." Id. at 639. The *Rance* test then involves a two-step analysis of the case. First, the court must ask

whether the elements of the offenses correspond to such a degree that the commission of one crime will result in the commission of the other. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶ 14. Second, the court must review the defendant's conduct to determine if the crimes were committed separately or if there was a separate animus for each crime. Id.

{¶ 122} In *Cabrales*, the court clarified its *Rance* decision stating:

{¶ 123} "[N]owhere does *Rance* mandate that the elements of compared offenses must exactly align for the offenses to be allied offenses of similar import under R.C. 2941.25(A). To interpret *Rance* as requiring a strict textual comparison would mean that only where *all* the elements of the compared offenses coincide *exactly* will the offenses be considered allied offenses of similar import under R.C. 2941.25(A). Other than identical offenses, we cannot envision any two offenses whose elements align *exactly*. We find this to be an overly narrow interpretation of Rance's comparison test." (Emphasis in original.) Id. at ¶ 22. See *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059.

{¶ 124} The state cites to two cases that held that money laundering and theft are not allied offenses of similar import. In *State v. Gray*, 2d Dist. No. 04-CA-129, 2006-Ohio-40, the Second Appellate District held that money laundering and theft in office were not allied offenses. The court compared the elements of each crime apart from the specific facts of the case and held: "the statutory elements of these offenses differ such that commission of one offense does not result in commission of the others. Therefore,

the offenses are dissimilar and Defendant may be convicted of all of them." Id. at ¶ 26. Similarly, the Twelfth Appellate District refused to find money laundering as an allied offense to aggravated theft by deception, grand theft by deception, misrepresentation in the sale of securities, or passing bad checks. The court observed that the counts were based on separate acts of writing and depositing separate checks. *State v. Copeland*, 12th Dist. No. CA-2003-12-320, 2005-Ohio-5899, ¶ 95, reversed on other grounds, 110 Ohio St.3d 264, 2006-Ohio-4475.

{¶ 125} The Ohio courts have also failed to find theft and passing bad checks to be allied offenses holding: "It is not necessary that the presentment of a bad check results in the commission of another offense, such as theft." *State v. Ransby*, 8th Dist. No. 86768, 2006-Ohio-3596, ¶ 21. In other recent cases, that court has relied on the *Rance* analysis to exclude theft and other crimes from being allied offenses where it was not clear that one crime resulted in the commission of the other offenses. See *State v. Musselman*, 2d Dist. No. 22210, 2009 -Ohio- 424, ¶ 37 (the court did not find allied offenses among theft by deception, forgery and record tampering); *State v. Boldin*, 11th Dist. No. 2007-G-2808, 2008-Ohio-6408, ¶ 116. ("Thus, theft and aggravated burglary are not allied offenses of similar import, because the theft statute is meant to counter the nonconsensual taking of property, while the aggravated burglary statute is directed to protecting persons.")

{¶ 126} R.C. 2913.02(A)(2), the relevant theft statute, provides that "[n]o person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert

control over either the property or services in any of the following ways * * * [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent." Money laundering, R.C. 1315.55(A)(1), provides "[n]o person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity."

{¶ 127} In the present case, looking at the elements of theft and money laundering in the abstract, *Cabrales*, supra, we note that in order to commit theft, the purpose is to deprive the owner of property or services without or beyond the scope of the owner's consent. The purpose of money laundering is to further the commission of a corrupt activity. Although money laundering required proceeds from an unlawful activity, that activity need not be a theft. Thus, we do not find that the elements of the crimes correspond to such a degree that the commission of one crime results in the commission of the other. Accordingly, because theft and money laundering are not allied offenses of similar import, appellant's sixth assignment of error is not well-taken.

{¶ 128} Appellant's seventh and final assignment of error consists of six alleged post-trial errors committed by the trial court. First, appellant argues that the court, in accord with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, was required to sentence appellant to the statutory minimum.

{¶ 129} We first note that appellant was sentenced to one count of engaging in a pattern of corrupt activity, R.C. 2923.32(A)(1), a first degree felony, with a mandatory

ten year sentence, R.C. 2929.13(F); one count of aggravated theft, R.C. 2913.02(A)(2),(B)(1) and (B)(2), a third degree felony with a sentencing range from one to five years in prison; one count of aggravated theft, a first degree felony with a sentencing range from three to 10 years; four counts of money laundering, R.C. 1315.55(A)(1) and/or (A)(3), third degree felonies; four counts of tampering with records, R.C. 2913.42(A)(1),(2) and (B)(4) and/or R.C. 2913.42(A)(1),(2) and (B)(3)(d), first degree misdemeanors; and 18 counts of forgery, R.C. 2913.31(A)(1) and/or (A)(3), fifth degree felonies with a sentencing range from six to 12 months.

{¶ 130} Under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id. at paragraph seven of the syllabus. However, *Foster* still requires sentencing courts to consider "the statutory considerations" and "factors" in the "general guidance statutes," R.C. 2929.11 and 2929.12, in imposing sentences, as these statutes do not include a "mandate for judicial fact-finding." Id. at ¶ 36-42. "R.C. 2929.11, states that the court 'shall be guided by' the overriding purposes of felony sentencing * * *." Id. at ¶ 36. R.C. 2929.11 lists matters to be considered "in achieving those purposes." Id.

{¶ 131} "The second general statute, R.C. 2929.12, grants the sentencing judge discretion 'to determine the most effective way to comply with the purposes and principles of sentencing.' R.C. 2929.12(A) directs that in exercising that discretion, the

court shall consider, along with any other 'relevant' factors, the seriousness factors set forth in divisions (B) and (C) and the recidivism factors in divisions (D) and (E) of R.C. 2929.12. These statutory sections provide a nonexclusive list for the court to consider." Id. at ¶ 37.

{¶ 132} In the present case, before imposing sentence, the trial court stated that it had reviewed the presentence investigation report and the sentencing memoranda prepared by the parties. The court also stated that it had considered the principles and purposes of sentencing under R.C. 2929.11, as well as R.C. 2929.12, the seriousness and recidivism factors. The trial court stated that appellant engaged in a "substantial degree of premeditation" in an "elaborate scheme of theft" that began within hours of the inception of CCF I and continued for six years. The court noted that despite appellant's knowledge that certain state officials were suspicious of his operation of the Coin Funds, appellant continued to "manipulate the records" and present tampered records in order to continue the deception. Finally, the court observed that appellant was in a position of trust and used the position to facilitate the offense. The court noted that appellant expressed no genuine remorse for his conduct.

{¶ 133} Based on the foregoing, we find that the trial court acted within its discretion when it sentenced appellant. The trial court reviewed the necessary statutory considerations and factors, and the sentence imposed was within the statutory range. This court has consistently held, post *Foster*, that the sentencing court is not required to make any findings on the record in considering R.C. 2929.11 and 2929.12. Cf. *State v.*

Like, 6th Dist. No. WM-08-002, 2008-Ohio-4615, ¶ 11; *State v. Salinas*, 6th Dist. No. WM-07-017, 2008-Ohio-3580, ¶ 8-9; and *State v. Kocian*, 6th Dist. No. OT-07-018, 2008-Ohio-74, ¶ 10.

{¶ 134} Appellant next argues that the trial court erred when it failed to properly notify him of his postrelease control obligations. Specifically, appellant contends that the trial court failed to inform him that postrelease control was mandatory, mistakenly informed appellant that he would be subject to postrelease control only if he was released early from prison, failed to inform appellant of the length of his postrelease control, and failed to properly journalize appellant's postrelease control obligations.

{¶ 135} Conversely, the state contends that the Ohio General Assembly changed the law to address this problem. Specifically, the state relies on amended R.C. 2929.19(B)(3)(c) and (e), effective July 11, 2006, which provides:

{¶ 136} "(3) Subject to division (B)(4) of this section, if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶ 137} " * * *

{¶ 138} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person. If a court

imposes a sentence including a prison term of a type described in division (B)(3)(c) of this section on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(c) of this section that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under division (B) of section 2967.28 of the Revised Code. * * *.

{¶ 139} "* * *

{¶ 140} "(e) Notify the offender that, if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender. If a court imposes a sentence including a prison term on or after July 11, 2006, the failure of a court to notify the offender pursuant to division (B)(3)(e) of this section that the parole board may impose a prison term as described in division (B)(3)(e) of this section for a violation of that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code or to include in the judgment of conviction entered on the journal a statement to that effect does not negate, limit, or otherwise affect the authority of the parole board to so impose a prison term for a violation of that nature if, pursuant to

division (D)(1) of section 2967.28 of the Revised Code, the parole board notifies the offender prior to the offender's release of the board's authority to so impose a prison term. * * *."

{¶ 141} Based on the above, the state contends that the trial court's failure to properly notify appellant of his postrelease control obligations does not "negate" his mandatory period of postrelease control and that may be imposed by the parole board at any time during appellant's incarceration.

{¶ 142} In support of its argument, the state relies heavily on *Parker v. Ohio Adult Parole Auth.*, 8th Dist. No. 89693, 2007-Ohio-3262. In *Parker*, a habeas corpus case, the petitioner argued that because the trial court, at his 2002 sentencing hearing, did not inform him of the postrelease control requirement, the parole board was precluded from imposing postrelease control prior to his release from prison. The court, relying on R.C. 2929.191, concluded that the postrelease control sanction existed by operation of law. Id. at ¶ 5.

{¶ 143} In *State v. Singleton*, Slip Opinion No. 2009-Ohio-6434, the Supreme Court of Ohio clarified the proper application of amended R.C. 2929.191. For sentences imposed prior to its July 11, 2006 effective date, where the trial court failed to properly impose postrelease control, the court is required to conduct a de novo sentencing hearing. Id. at paragraph one of the syllabus. However, for sentences imposed after July 11, 2006, where postrelease control is not properly imposed, courts are required to follow the procedures set forth in R.C. 2929.191. Id. at paragraph two of the syllabus.

{¶ 144} At the November 20, 2006 sentencing hearing, the trial court stated:

{¶ 145} "Mr. Noe, you should be aware of the fact that if you're released early by the parole board on that case, on any cases beyond the mandatory minimum, parole board could let you out early. After prison release, if post release control is imposed, for violating the post release control conditions, the adult parole authority or the parole board may impose a more restrictive or longer control sanction, return you to prison for up to 9 months for each violation up to a maximum of 50 percent of the stated term. If the violation is a new felony, you could be returned to prison for the remaining period of control or 12 months, whichever is greater, plus receive a prison term for the new crime. That's all I have to say, and that's the statutory language."

{¶ 146} The November 27, 2006 sentencing judgment entry provided that appellant was notified of his appellate rights "and post-release control notice under R.C. 2929.19(B)(3) and R.C. 2967.28."

{¶ 147} Upon review of the relevant case and statutory law we must conclude that appellant was not properly notified of the mandatory term of postrelease control. To correct its error, *Singleton* provides that pursuant to R.C. 2929.191, the trial court may issue a nunc pro tunc judgment entry, following a hearing in accordance with subsection (C), correcting the postrelease control notification. Id. at ¶ 23.

{¶ 148} Appellant next contends that his 18 year sentence was disproportionately harsher than other similar or worse conduct/offenses (and has provided various examples) thus constituting "cruel and unusual punishment" in violation of appellant's rights under

the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution. The state asserts that following *Foster*, a trial court is simply required to show that the sentences were within the statutory range to be constitutional. The state has also provided examples of equivalent or harsher sentences for convictions similar to appellant's.

{¶ 149} In support of the Eighth Amendment argument, appellant notes that he is merely a first offender in his fifties who has committed no crimes of violence in the instant case. In *State v. Weitbrecht*, 86 Ohio St.3d 368, 370-371, 1999-Ohio-113, the Supreme Court of Ohio recognized:

{¶ 150} "The Eighth Amendment to the Constitution of the United States provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' * * * Historically, the Eighth Amendment has been invoked in extremely rare cases, where it has been necessary to protect individuals from inhumane punishment such as torture or other barbarous acts. *Robinson v. California* (1962), 370 U.S. 660, 676, 82 S.Ct. 1417, 1425, 8 L.Ed.2d 758, 768. Over the years, it has also been used to prohibit punishments that were found to be disproportionate to the crimes committed. In *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 30 O.O.2d 38, 203 N.E.2d 334, this court stressed that Eighth Amendment violations are rare. We stated that '[c]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.' Id. at 70, 30 O .O.2d at 39, 203 N.E.2d at 336. * * *."

{¶ 151} The court further stated that for an Eighth Amendment Cruel and Unusual Punishment violation to occur "'the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.'" Id. at 371, quoting *McDougle v. Maxwell* at 70.

{¶ 152} The *Weitbrecht* court used a tripartite analysis to assess whether the penalty imposed is disproportionate to the offense committed:

{¶ 153} "'First, we look to the gravity of the offense and the harshness of the penalty * * *. Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. * * * Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.'" Id. at 371, quoting *Solem v. Helm* (1983), 463 U.S. 277, 290-291.

{¶ 154} A reviewing court need not reach the second and third prongs of the test except in the rare case when a threshold comparison of the crime committed and the sentence imposed lead to an inference that the two are grossly disproportionate. *Weitbrecht* at 373, fn. 4, citing *Harmelin v. Michigan* (1991), 501 U.S. 957, 1005; *State v. Keller* (June 1, 2001), 2d Dist. No. 18411.

{¶ 155} Appellant did not raise the Eighth Amendment argument below. Therefore, we may only reverse appellant's sentence if, under the Eighth Amendment analysis, the trial court's sentence rises to the level of plain error. "Notice of plain error

under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, at paragraph three of the syllabus; *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 32.

{¶ 156} For the following reasons, we conclude that appellant's prison sentences are not "'shocking to any reasonable person.'" *Weitbrecht* at 371, quoting *McDougle v. Maxwell* at 70. Similarly, we conclude that appellant's prison sentences are not grossly disproportionate to appellant's offenses. Id. at 373, fn. 4. Appellant took advantage of his position of trust by stealing from the Coin Funds right from its inception. He deceived the BWC by creating false inventories; the money allegedly used for purchasing coins for the funds was used to pay personal debt and expenses.

{¶ 157} Based on the above, and considering the first prong of the tripartite test, we do not find that this is the rare case where a threshold comparison of the crimes that appellant committed and the sentences imposed leads to an inference that the two are grossly disproportionate. Thus, we need not perform the second and third elements of the tripartite test in our Eighth Amendment analysis. Id. Therefore, we conclude that the trial court did not commit constitutional error, let alone plain error, under the Eighth Amendment Cruel and Unusual Punishment Clause when it imposed 18 years of imprisonment for appellant's offenses.

{¶ 158} Next, appellant argues that the trial court erred by failing to determine the amount of restitution owed to a "reasonable degree of certainty." Ohio law allows the

court to order restitution for a felony theft offense; R.C. 2929.18(A) provides, in relevant part:

{¶ 159} "[T]he court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section * * *. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

{¶ 160} "(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. * * *. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. * * *."

{¶ 161} With respect to a trial court's ability to order restitution, this court held the following in *State v. King* (Feb. 27, 1998), 6th Dist. No. WD-97-015:

{¶ 162} "In an order of restitution, the amount of restitution must bear a reasonable relationship to the loss suffered. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181* * *; see, also, R.C. 2929.18(A)(1). Thus, it is held that restitution is limited to the actual loss caused by the defendant's criminal conduct for which he was convicted. *State v. Brumback* (1996), 109 Ohio App.3d 65, 82, 671 N.E.2d 1064. There must be competent and credible evidence in the record from which the court may ascertain the amount of restitution to a reasonable degree of certainty. Id. at 83, 671 N.E.2d 1064; *State v. Warner* (1990), 55 Ohio St.3d 31, 69, 564 N.E.2d 18."

{¶ 163} Further, we review an order of restitution under an abuse of discretion standard. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181.

{¶ 164} In the present case, a restitution hearing was held on November 26, 2006. At the hearing, the state presented testimony and evidence in support of its $13,747,000 restitution request. According to the state, the sum was arrived at by the trial testimony of VCC employee, Timothy LaPointe, bookkeeper for the Coin Funds and its subsidiaries, Patrick DeFrances, and Emlyn Neuman-Javornik, who testified regarding the report generated by the accounting firm of Crowe Chizek at the state auditor's request.

{¶ 165} Upon review, we conclude that the amount of restitution ordered by the court was quantified to a reasonable degree of certainty and was not an abuse of discretion.

{¶ 166} Next, appellant disputes the prosecution costs that he was ordered to pay. Appellant argues that the sum was derived from an "unauthenticated list of receipts" which resulted in the state's recovery of more than it spent to prosecute appellant. The court's award was based on the receipts provided by the state. We can find no abuse of discretion.

{¶ 167} Finally, appellant contends that the trial court erred when it ordered appellant to pay the costs of a special prosecutor, Lora Manon. The state counters that pursuant to R.C. 2923.31(B) and 2923.32(B)(2)(c), the state had specific statutory authorization to impose the costs of the special prosecutor.

{¶ 168} Appellant, in arguing that the court improperly ordered him to pay the special prosecutor costs, relies on this court's case captioned *State v. Perz*, 6th Dist. No. L-07-1330, 2008-Ohio-2383. In *Perz*, we determined that the trial court erred when it

imposed the costs of the special prosecutor pursuant to R.C. 2947.23[3] because "Ohio does not have a specific statute authorizing the payment of such costs." Id. at ¶ 18.

{¶ 169} Conversely, the state asserts that *Perz* is distinguishable because, under the corrupt activity statutes, R.C. 2923.31 et seq., the court was authorized to assess such costs. R.C. 2923.31(B) provides:

{¶ 170} "(B) 'Costs of investigation and prosecution' and 'costs of investigation and litigation' mean all of the costs incurred by the state or a county or municipal corporation under sections 2923.31 to 2923.36 of the Revised Code in the prosecution and investigation of any criminal action or in the litigation and investigation of any civil action, and includes, but is not limited to, the costs of resources and personnel."

{¶ 171} Further, R.C. 2923.32(B)(2)(c) states:

{¶ 172} "In addition to the fine described in division (B)(2)(a) of this section and the financial sanctions authorized by section 2929.18 of the Revised Code, order the person to pay to the state, municipal, or county law enforcement agencies that handled the investigation and prosecution the costs of investigation and prosecution that are reasonably incurred."

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[3] R.C. 2947.23(A)(1) provides, in part:

"In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs."

{¶ 173} Accordingly, under R.C. 2923.31(B) and 2923.32(B)(2)(c), a defendant may be required to pay the prosecution costs of the relevant "law enforcement agencies" including the costs of resources and personnel. The Ohio Revised Code defines "law enforcement officer" as, inter alia, "[a] prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor * * *." R.C. 2901.01(A)(11)(h). Thus, the above-quoted provisions provided for the recovery of the costs of the special prosecutor.

{¶ 174} Based on the foregoing, we find that appellant's seventh assignment of error is well-taken, in part. We find well-taken appellant's argument relating to the imposition of postrelease control.

{¶ 175} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial. The trial court did err, however, in sentencing appellant. The judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part, this case is remanded to the trial court for a hearing conducted pursuant to R.C. 2929.191(C). Pursuant to App.R. 24, each party is ordered to pay one-half of the costs of this appeal.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Sumner E. Walters, J. _____
CONCUR.
JUDGE

Judge Sumner E. Walters, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.