**[Cite as *State v. Yates*, 2009-Ohio-6622.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | |
| | : | Hon. William B. Hoffman, P.J. |
| Plaintiff-Appellee | : | Hon. John W. Wise, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 2009 CA 0059 |
| TAMICO YATES | : | |
| | : | |
| | : | |
| Defendant-Appellant | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Licking County Court of Common Pleas Case No. 08 CR 424 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | December 14, 2009 |

APPEARANCES:

For Plaintiff-Appellee:

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*Delaney, J.*

{¶1} Defendant-Appellant Tamico Yates appeals her conviction in the Licking County Court of Common Pleas for Engaging in a Pattern of Corrupt Activity, in violation of R.C. 2923.32; Theft, in violation of R.C. 2913.02; Possession of Criminal Tools, in violation of R.C. 2923.24; and Forgery, in violation of R.C. 2913.31.

## STATEMENT OF THE FACTS AND THE CASE

{¶2} An investigation by the Ohio Organized Crime Investigations Commission discovered a counterfeit check cashing enterprise being operated in 15 counties in the State of Ohio. On November 10, 2006, a search warrant was executed at an apartment belonging to Clyde Haynie, III, located in Franklin County, Ohio. It was determined that Haynie, also known as C.J., printed counterfeit checks from a computer in his apartment and signed the counterfeit checks. Haynie distributed the checks to individuals who would cash the checks at various businesses. The individuals would then split the proceeds from the check with Haynie.

{¶3} As stated above, the counterfeit check cashing enterprise operated in multiple counties in the State of Ohio. A number of counterfeit checks printed and signed by Haynie were cashed by members of the enterprise at businesses, including Kroger and Meijer, located in Licking County.

{¶4} During the search of Haynie's apartment, the officers discovered personal documents belonging to Appellant. Upon further investigation, the officers established Appellant's involvement in the counterfeit check cashing enterprise in Montgomery County, Ohio. Members of the enterprise testified that Appellant gave them counterfeit checks and drove with them to various businesses located in Montgomery County to

cash the checks. After the person cashed the check, they gave Appellant her share of the proceeds.

{¶5} The investigation showed that Haynie signed the counterfeit checks delivered by Appellant and cashed in Montgomery County, just as Haynie signed the counterfeit checks cashed in Licking County. Witnesses involved in the Licking County check cashing operation testified that they saw Appellant at Haynie's apartment where the checks were produced and signed by Haynie.

{¶6} Based upon the investigation, Appellant was indicted by the Licking County Grand Jury on June 20, 2008 for one count of Engaging in a Pattern of Corrupt Activity, one count of Theft, one count of Possession of Criminal Tools, and one count of Forgery. Appellant entered a plea of not guilty to all charges and the matter was scheduled for a jury trial.

{¶7} A jury trial was held on February 23, 2009. The jury found Appellant guilty on all counts. The trial court sentenced Appellant to a total of four years in prison.

{¶8} It is from this decision Appellant now appeals.

**ASSIGNMENTS OF ERROR**

{¶9} Appellant raises three Assignments of Error:

{¶10} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT IT MUST FIND THE STRUCTURE OF AN ENTERPRISE BE SEPARATE AND APART FROM THE PREDICATE ACTS.

{¶11} "II. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION.

{¶12} "III. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

**I.**

{¶13} Appellant argues in her first Assignment of Error that the trial court erred when it failed to instruct the jury, under the Ohio corrupt activity statute, that the enterprise must have an existence distinct from the corrupt activity.

{¶14} Appellant was charged with violation of R.C. 2923.32(A)(1) for engaging in a pattern of corrupt activity. The statute reads:

{¶15} "(A)(1) No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity or the collection of an unlawful debt."

{¶16} The trial court instructed the jury as follows:

{¶17} "First Count. The defendant is charged with engaging in a pattern of corrupt activity. Before you may find the defendant guilty of engaging in a pattern of corrupt activity, you must find beyond a reasonable doubt that on or about at least June 6th, 2006, through on or about at least July 28th, 2006, and in Licking County, Ohio, the defendant did, while employed by or associated with any enterprise, to wit: Persons and such entities associated in fact for either illicit or licit purposes, including but not limited to Clyde Haynie the Third, Octavia Patrick, Candice Patrick, Laquisha Patrick, Asia Winston, Jasmine Wright, and others, did recklessly engage in a pattern of corrupt activity.

{¶18} "Enterprise. Enterprise includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, governmental 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.

{¶19} "* * *

{¶20} "Pattern of corrupt activity. Pattern of corrupt activity means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated and are not so closely related to each other and connected in time and the place that they constitute a single event.

{¶21} "Corrupt activity. Corrupt activity means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing or intimidating another person to engage in conduct constituting the offenses as set forth in Count 2, grand theft, and/or Count 4, forgery." (T. 618-620).

{¶22} We first note that Appellant did not object to the instruction as given. She has therefore waived all but plain error. "Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. " *State v. Long* (1978), 53 Ohio St.2d 91, 95. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. Id. at 97.

{¶23} Appellant argues that the prosecution must prove the enterprise is separate and apart from the predicate offense. *United States v. Turkette* (1981), 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246. This Court has previously had the opportunity to review the issue presented by Appellant in *State v. Linkous*, Licking App. No. 08CA51, 2009-Ohio-1896. In that case, the defendant was charged with a violation

of R.C. 2923.32(A)(1) in connection with a series of incidents involving the breaking and entering, theft, and robbery of a residence and several businesses in the Newark, Ohio area. Id. at ¶2. The trial court instructed the jury as to engaging in a corrupt activity as follows:

{¶24} "'Enterprise. Enterprise includes any individual or sole proprietorship, partnership, limited partnership, corporation, trust, union, governmental agency and any 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. Elements that must be satisfied for the finding of an enterprise-for finding that an enterprise exists are, one, an ongoing organization; two, with associates that function as a continuing unit.

{¶25} "'Finding. If you find that the State proved beyond a reasonable doubt all the essential elements of engaging in a pattern of corrupt activity as charged in the 20th count of the indictment, your verdict must be guilty.

{¶26} "'If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of engaging in a pattern of corrupt activity as charged in the 20th count of the indictment, your verdict must be not guilty.

{¶27} "'Special finding. If you find the defendant guilty of engaging in a pattern of corrupt activity, you will separately determine whether the most serious offense in the pattern of corrupt activity was or was not a felony of the first degree, to wit: Count 4.

{¶28} "'If you find the defendant not guilty of engaging in a pattern of corrupt activity, you need not make this determination.'" Id. at ¶89-93.

{¶29} In his appeal of his conviction for engaging in a pattern of corrupt activity, the defendant made the identical argument that the trial court erred in not instructing the jury that it must find the structure of an enterprise be separate and apart from the predicate acts. We overruled the defendant's Assignment of Error, relying upon the authority of the Ninth District Court of Appeals in *State v. Wilson* (1996), 113 Ohio App.3d 737, 682 N.E.2d 5. The court in *Wilson* stated:

{¶30} "Defendant has argued that there was insufficient evidence to convict him of engaging in a pattern of corrupt activity and conspiracy to engage in a pattern of corrupt activity because the state did not prove that he was employed by or associated with an enterprise that was separate and apart from the pattern of corrupt activity in which it allegedly engaged. Defendant's argument derives from a discussion in *United States v. Turkette* (1981), 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246, about what the federal government must prove in order to sustain a conviction under the Racketeer Influenced and Corrupt Organizations Act, Section 1961 *et seq.,* Title 18, U.S.Code:

{¶31} "'* * * In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate

elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.' (Citations omitted.) 452 U.S. at 583, 101 S.Ct. at 2528-2529, 69 L.Ed.2d at 254-255.

{¶32} "Pursuant to R.C. 2923.32(A)(1), a defendant may be convicted of conspiracy to engage in a pattern of corrupt activity and engaging in a pattern of corrupt activity if the state proves that he or she was part of an 'enterprise' that engaged in the underlying offenses. To meet this burden, the state must establish that the defendant was employed by or associated with an 'enterprise.' Under the statute, an 'enterprise' is '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.' R.C. 2923.31(C). It includes both licit and illicit enterprises. *Id.* Ohio courts, unlike their federal counterparts, have not defined 'enterprise' in such a way that a defendant may be convicted of those offenses only if he or she was associated with an "enterprise" that had an existence separate and apart from the corrupt activity. *State v. Habash* (Jan. 31, 1996), Summit App. No. 17073, unreported, 1996 WL 37752. Rather, a defendant may be convicted of those offenses if he was employed by or associated with an entity that meets the statutory definition of an 'enterprise.' See *id.*

{¶33} "Since Ohio courts have not required that an 'enterprise' have an existence separate and apart from the underlying corrupt activity, defendant's

convictions were supported by sufficient evidence. Defendant's first assignment of error is overruled."

{¶34} In accord with this Court's decision in *Linkous* and the Ninth District's holding in *Wilson*, we do not find Appellant has demonstrated plain error as a result of the trial court's instruction to the jury on the offense of engaging in a pattern of corrupt activity.

{¶35} Appellant's first Assignment of Error is overruled.

**II., III.**

{¶36} Appellant's second and third Assignments of Error raise common and interrelated issues; therefore, we will address the arguments together. She argues her convictions were against the sufficiency and manifest weight of the evidence because the State failed to prove, beyond a reasonable doubt, that venue was proper in Licking County. We again review these claims under a plain error analysis because Appellant failed to challenge Licking County as a proper venue at trial.

{¶37} Appellant maintains that the evidence presented showed that Haynie printed and signed the counterfeit checks in his apartment located in Franklin County. Some of the counterfeit checks were cashed in Licking County but there was no testimony that Appellant was involved in those transactions. The evidence presented regarding Appellant's involvement in the check cashing enterprise demonstrated that she was involved in activities in Montgomery County.

{¶38} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, superseded by

constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. "While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenges questions whether the State has met its burden of persuasion." *State v. Thompkins,* supra at 78 Ohio St.3d 390.

{¶39} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492 superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668.

{¶40} Specifically, an appellate court's function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks,* supra. This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Thompkins,* 78 Ohio St.3d at 386, 678 N.E.2d 541.

{¶41} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way

and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶42} R.C. 2901.12(A) provides as follows: "The trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." Proper venue is also guaranteed by Section 10, Article I of the Ohio Constitution. Venue is not a material element of the offense charged, but is a fact that must be proved in criminal prosecutions, unless it is waived by the defendant. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. While it is not necessary that the venue of the crime be stated in express terms, it is essential that it be proven by all the facts and circumstances, beyond a reasonable doubt, that the crime was in fact committed in the county and state alleged. *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969, paragraph one of the syllabus.

{¶43} R.C. 2901.12(H) governs venue in criminal prosecutions and provides in part:

{¶44} "When an offender, as part of a course of criminal conduct, commits offenses in different jurisdictions, the offender may be tried for all of those offenses in any jurisdiction in which one of those offenses or any element of one of those offenses occurred. Without limitation on the evidence that may be used to establish the course

of criminal conduct, any of the following is prima-facie evidence of a course of criminal conduct:

{¶45} "(1) The offenses involved the same victim, or victims of the same type or from the same group.

{¶46} "(2) The offenses were committed by the offender in the offender's same employment, or capacity, or relationship to another.

{¶47} "(3) The offenses were committed as part of the same transaction or chain of events, or in furtherance of the same purpose or objective.

{¶48} "(4) The offenses were committed in furtherance of the same conspiracy.

{¶49} "(5) The offenses involved the same or a similar modus operandi.

{¶50} "(6) The offenses were committed along the offender's line of travel in this state, regardless of the offender's point of origin or destination."

{¶51} Appellant was convicted of one count of Engaging in a Pattern of Corrupt Activity, one count of Theft, one count of Possession of Criminal Tools, and one count of Forgery. Pursuant to R.C. 2901.12(H), if these offenses constitute a course of criminal conduct, then venue lies for all those offenses in any jurisdiction in which Appellant committed any one offense or any element thereof. *State v. Giffin* (1991), 62 Ohio App.3d 396, 399, 575 N.E.2d 887.

{¶52} In *State v. Giffin*, the Tenth District Court of Appeals held that a prosecution for engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1) is properly venued in any county in which a portion of the corrupt activity occurred or in which an organization formed for the purpose of engaging in corrupt activity is based. See also, *State v. Haddix* (1994), 93 Ohio App.3d 470, 638 N.E.2d 1096.

{¶53} The defendant in *Giffin*, supra, was convicted of aggravated burglary, aggravated robbery, theft, and engaging in a pattern of corrupt activity based upon his activities in a burglary ring that conducted burglaries in Fairfield, Pickaway, and Pike Counties. None of the offenses were committed in Franklin County, but the defendant was tried in Franklin County on those charges.

{¶54} The evidence from the trial revealed that the hub of the burglary ring was located in Franklin County. In finding that venue was proper in Franklin County, although the defendant was not directly involved in the Franklin County activity, the Tenth District stated:

{¶55} "Consequently, if at least one element of one of the offenses making up the course of criminal conduct was committed in Franklin County, defendant's trial was properly venued in that jurisdiction. The elements of a crime are the constituent parts of an offense which must be proved by the prosecution to sustain a conviction. Elements necessary to constitute a crime must be gathered wholly from the statute and not *aliunde. State v. Draggo* (1981), 65 Ohio St.2d 88, 91, 19 O.O.3d 294, 295, 418 N.E.2d 1343, 1346.

{¶56} "Applying the foregoing herein, we note that none of the four aggravated burglaries, the theft offenses, or the aggravated robbery for which defendant was convicted, nor any elements thereof, occurred in Franklin County. However, those theft offenses are the predicate offenses supporting defendant's conviction for engaging in a pattern of corrupt activity; and elements of the 'pattern of corrupt activity' charge occurred in Franklin County. [Footnote omitted]. Under R.C. 2923.32, 'engaging in a pattern of corrupt activity' is defined as follows:

{¶57} "(A)(1) No person employed by, *or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity* or the collection of an unlawful debt." (Emphasis added.)

{¶58} "The term 'enterprise' is defined broadly to include:

{¶59} "'* * * [A]ny individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, *or group of persons associated in fact although not a legal entity.* " Enterprise" includes illicit as well as licit enterprises.' (Emphasis added.) R.C. 2923.31.

{¶60} "R.C. 2923.31 *et seq.,* Ohio's RICO statute, was patterned loosely after the Federal RICO legislation. [Footnote omitted]. See Am.Sub.H.B. No. 5, 141 Ohio Laws, Part I, 1105; see, also, *Daniels v. True* (1988), 47 Ohio Misc.2d 8, 547 N.E.2d 425; *Guice v. Qua-Guice Pontiac, Inc.* (1988), 42 Ohio Misc.2d 9, 537 N.E.2d 259. The Ohio statute, like its federal counterpart, was designed to cast a broad net over those who conduct organized criminal activities spanning a number of jurisdictions. *State v. Thrower* (1989), 62 Ohio App.3d 359, 575 N.E.2d 863. Under federal law, substantive RICO violations are properly tried in any district where the 'enterprise' conducted business. *United States v. Persico* (S.D.N.Y.1985), 621 F.Supp. 842; *United States v. Castelano* (S.D.N.Y.1985), 610 F.Supp. 1359. Drawing an analogy to conspiracy prosecutions, federal courts have found it immaterial that an individual defendant was not physically present in the district so long as it can be established that the defendant participated in an enterprise that conducted illegal activities in that district. *Id.;* see, also, *United States v. Chestnut* (C.A.2, 1976), 533 F.2d 40. [Footnote omitted].

{¶61} "Because the venue issue herein appears to be one of first impression, the federal analysis is instructive. In the instant case, testimony revealed that the hub of the burglary ring was the Columbus auction house of Tom Cummings, a major principal in the ring. Cummings personally undertook much of the planning function of the enterprise and members of the ring periodically met at the auction house to discuss the activities of the ring. In addition, Fred Woyan, a participant in the Pike County burglary, and Jimmie Waddell, a participant in one of the Fairfield County burglaries, resided in Columbus and participated in those meetings. Moreover, some of the residences actually burglarized by members of the ring were located in Franklin County. Although defendant was not directly involved in the Franklin County incidents, his association with the enterprise extends into Franklin County by virtue of these activities. Consequently, as the jury determined, defendant did engage in a pattern of corrupt activity, part of which occurred in Franklin County; and by operation of R.C. 2901.12(H), he was properly tried in Franklin County not only on that charge, but on all the charges within his course of criminal conduct, including the four aggravated burglaries, the aggravated robbery, and theft offenses at issue."

{¶62} We find in the present case, as in *Giffin*, supra, the evidence demonstrated that Appellant was not directly involved in the Licking County incidents, but her association with the counterfeit check cashing enterprise extended into Licking County by virtue of those activities. Upon review of the record, we find the State established venue in Licking County.

{¶63} Appellant's second and third Assignments of Error are overruled.

{¶64} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, J.

Hoffman, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE

PAD:kgb

**[Cite as *State v. Yates*, 2009-Ohio-6622.]**

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | |
| | : | |
| Plaintiff-Appellee | : | |
| -vs- | : | JUDGMENT ENTRY |
| TAMICO YATES | : | |
| | : | Case No. 2009 CA 0059 |
| Defendant-Appellant | : | |

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. WILLIAM B. HOFFMAN

HON. JOHN W. WISE