[Cite as *State v. Kelly*, 2016-Ohio-8582.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	Case No. 15CA11
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
PATRICK KELLY,	:	
		RELEASED: 12/30/16
Defendant-Appellant.	:	

APPEARANCES:

Scott P. Wood, Conrad/Wood, Lancaster, OH, for appellant.

Michael DeWine, Ohio Attorney General, and Jocelyn K. Lowe, James C. Roberts, and Melissa A. Schiffel, Ohio Assistant Attorneys General, Columbus, OH, for appellee.

Harsha, J.

{¶1} A jury convicted Patrick Kelly, the former Athens County Sheriff, of multiple counts of theft in office and other related charges. After merging some of the counts, the Athens County Court of Common Pleas sentenced Kelly to an aggregate seven-year prison term. During the trial the common pleas court also found Kelly in contempt of a gag order and fined him $500.

{¶2} Kelly asserts that the trial court erred in finding him guilty of criminal contempt. But Kelly has voluntarily paid his fine and has not alleged or established that he will suffer some collateral disability or loss of civil rights from the contempt conviction. Therefore, his appeal from the contempt conviction is moot and we dismiss it.

{¶3} Next, Kelly challenges the sufficiency of the evidence to support his theft-in-office convictions for: (1) selling county property to a scrap yard without the consent of the county commissioners and without depositing the cash proceeds in any public

account; (2) using county funds to pay for meals that did not relate to any legitimate public or law enforcement purpose; and (3) personally retaining cash donations to his campaigns in 2008 and 2012. To prove Kelly engaged in illegal scrap yard sales, the state presented evidence that Kelly was not authorized to retain the proceeds he obtained from sales of county property, including motor vehicles forfeited as the result of a conviction. Kelly failed to provide anyone in the sheriff's office with cash or receipts from the sales; he did not disclose them to state and county auditors or the county commissioners. Kelly claimed that he put them in a cash box only he had access to. Nonetheless, the jury was free to reject Kelly's unsupported claim that he used the proceeds for law-enforcement purposes by paying confidential informants.

{¶4} The state also presented evidence that Kelly received training on the proper accounting for special sheriff funds, including the Furtherance of Justice fund; that he used money from that fund to purchase at least 144 meals from 2009 to 2013; that notwithstanding his training, he provided no documentation of a legitimate law-enforcement purpose for 66 meals totaling over $3,000; that his justifications when questioned about certain of the meals were unpersuasive; and that when his office was audited and investigated, he drastically reduced his future meal expenditures from the fund.

{¶5} Finally, the state introduced evidence that during his successful campaign for sheriff in 2008, Kelly took campaign contributions in cash that were never deposited into his campaign account and were not reported as cash expenditures in his campaign-finance reports; he deposited campaign contributions into his or his wife's personal account instead of the campaign account; and took a portion of campaign contribution

deposits as cash. He also failed to account for proceeds from a spaghetti fundraiser for his campaign in 2008. The parties stipulated that Kelly committed these acts while he was a public official or party official. Lastly, the state introduced evidence that when he was sheriff, he instructed his campaign manager to redraft a campaign donation check to make it payable to him personally.

{¶6} After viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime of theft in office proven beyond a reasonable doubt. The evidence permitted the reasonable inference that Kelly, while acting in his capacity as Sheriff or other public/party official, purposely deprived the county and his campaign of their property, by knowingly obtaining control over their property without or beyond their consent. We reject Kelly's challenge to his theft-in-office convictions.

{¶7} Next, Kelly contends that there was insufficient evidence to support his conviction for failure to keep a cashbook because the state incorrectly argued at trial that R.C. 311.11 required that the sheriff's office keep an actual book, rather than a computerized program, to record cash transactions. Kelly's contention is meritless because the state did not argue that the sheriff's office had to keep a physical book to comply with the statute; it instead argued that Kelly failed to keep any record reporting the scrap yard transactions in either hard-copy or electronic form. To support its argument, the state introduced expert witness testimony that concluded Kelly did not keep a proper record in either form. We reject Kelly's challenge to his conviction for failing to keep a cashbook.

{¶8} Kelly also claims that there was insufficient evidence to support his perjury conviction. The state presented evidence that at a pretrial hearing Kelly testified under oath that he had complied with a subpoena for his records on confidential informants. However, he later admitted that he did not provide access to a record on his computer that documented payments to confidential informants. Kelly's false representation that he had provided all of the requested records was material because it could have affected the course or outcome of the proceeding—the trial court could have held him in contempt or ordered him to fully comply with the subpoena. The jury was free to credit this evidence, which was sufficient to support his conviction for perjury.

{¶9} Next, Kelly asserts that the trial court erred in failing to give his requested jury instruction that he could not alone constitute an enterprise for purposes of engaging in a pattern of corrupt activity. However, the trial court correctly instructed the jury that the General Assembly broadly defined "enterprise" for purposes of engaging in a pattern of corrupt activity to encompass even a single individual, organization, or association. Because Kelly's requested instruction was not a correct statement of the law, the trial court did not err in refusing to give it.

{¶10} Finally, Kelly contends that his conviction for engaging in a pattern of corrupt activity was not supported by sufficient evidence. Kelly claims that the state's theory that he engaged in a pattern of corrupt activity with an accomplice and the scrap yard did not support his conviction because there was no evidence that the other person and the scrap yard did anything illegal. But a court's limited review in a sufficiency-of-the-evidence challenge is not dependent upon what the parties argued at trial. Instead, after viewing the evidence in a light most favorable to the state, we determine only the

legal question of whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. As the trial court explained, there was evidence that Kelly was employed by or associated with two entities—the sheriff's office and his campaign committee—and that he used one or both of these entities to commit his various crimes of theft in office. His conviction was thus supported by sufficient evidence.

{¶11} Therefore, we dismiss Kelly's appeal from his contempt conviction as moot and affirm Kelly's remaining convictions and sentence.

I. FACTS

{¶12} The Athens County Grand Jury returned a multi-count indictment charging Patrick Kelly with ten counts of theft in office (violation of R.C. 2921.41, a felony of the fifth degree), three counts of theft in office (violation of R.C. 2921.41, a felony of the fourth degree), four counts of theft (violation of R.C. 2913.02, a felony of the fifth degree), one count of tampering with records (violation of R.C. 2913.42, a felony of the third degree), one count of tampering with evidence (violation of R.C. 2921.12, a felony of the third degree), one count of perjury (violation of R.C. 2921.11, a felony of the third degree), one count of obstructing official business (violation of R.C. 2921.31, a misdemeanor of the second degree), one count of failure to keep a cashbook (violation of R.C. 311.13, an unclassified felony), one count of money laundering (violation of R.C. 1315.55, a felony of the third degree), one count of dereliction of duty (violation of R.C. 2921.44, a misdemeanor of the second degree), and one count of engaging in a pattern of corrupt activity (violation of R.C. 2923.32, a felony of the first degree). Kelly entered a plea of not guilty to the charges.

A. Contempt

{¶13} Before trial began the Athens County Court of Common Pleas issued a gag order preventing trial participants, including Kelly, from making any extrajudicial statements that "the person knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the case." A few days later after the trial had commenced, the court was advised that Kelly had made statements to a television reporter that the testimony of a witness demonstrated the state had a weak case. The trial court halted the trial, held a contempt hearing, and found Kelly in contempt of the gag order. The court fined Kelly $500 for the contempt.

B. Election and Training

{¶14} The evidence at trial indicated that in 2008, Kelly was elected Athens County Sheriff, and in 2012, he was reelected. In 2011 and 2012, the state auditor conducted an audit of the sheriff's office. In 2012, the Ohio Bureau of Criminal Investigation ("BCI") began investigating the sheriff's office. In April 2014, following the return of the indictment in the case, Kelly was suspended from office pending resolution of the charges against him.

{¶15} In both 2009 and 2011, Kelly attended training sessions approved by the Ohio Peace Officer Training Academy and sponsored by the Buckeye State Sheriff's Association. Both training sessions emphasized that a sheriff must document receipts and expenditures from office funds in order to comply with statutory duties.

{¶16} The sheriff's office uses several special funds, including the Furtherance of Justice Fund ("FOJ"), the Law Enforcement Trust Fund ("LETF"), and the Mandatory

Drug Fund ("MDF"). FOJ is created by statute and requires the county commissioners to pay one-half of the sheriff's salary into the fund and further requires expenditures from the fund to be in the performance of official duties and for the furtherance of justice. LETF is funded by the sale of contraband, confiscated money, and other forfeited property and is used for complex or protracted investigations, including money for drug buys; like FOJ funds, expenses from LETF must be for a proper public purpose and supported by documentation. MDF is funded by fines in drug cases and is used for drug-enforcement purposes.

{¶17} Meals are considered proper expenses for a sheriff's office's FOJ funds, but the training Kelly received advised him that the law required expenses must be documented by receipt and a specification of an appropriate purpose, i.e., that the meal occurred during the performance of official duties and for the furtherance of justice. Kelly also received training that a sheriff's office must document payments to confidential informants. Kelly acknowledged that the money expended from these public funds must be documented.

C. Scrap Yard Sales of County Property

{¶18} After taking office in January 2009, Kelly sold property, including motor vehicles that had been forfeited to the county, to McKee Auto Parts, which operated a scrap yard. These sales occurred over a four year period, from April 2009 to May 2013, for a sum exceeding $3,300. Kelly had his friend Pearl "Soupy" Graham and jail trustees help haul some of the property to the scrap yard; sometimes the scrap yard owner's son would meet Kelly at a county storage area to haul cars to the scrap yard. Graham admitted that he told a television news reporter that if Kelly had told him he had

killed someone, Graham would dig the grave to hide the body. Graham further admitted that he knew he was hauling county property to the scrap yard. Peggy McKee, the owner of McKee Auto Parts, testified that she normally required titles for the vehicles delivered to her scrap yard, but she did not require Kelly to provide titles because he was the sheriff.

{¶19} Kelly admitted that he sold the county property to the scrap yard, received cash from the scrap yard, and, for the most part, did not deposit the receipts into the county general fund or into any of his sheriff's office's public funds. Kelly further conceded that at least one of the scrap yard transactions at issue involved a sheriff's car owned by the county and that the proceeds should have been placed in the county's general fund, but were not. According to Athens County Commissioner Lenny Eliason, even the proceeds of the sale of a vehicle specifically forfeited to the sheriff's office's LETF fund had to be deposited in the county's general fund, which Kelly failed to do. Conversely, Clermont County Sheriff Albert Rodenberg testified that receipts from the sale of forfeited property in a sheriff's LETF fund could remain in the LETF fund.

{¶20} During Kelly's tenure Vicki Marshall and Dawn Deputy acted as the sheriff's office's fiscal officers. Kelly failed to inform either of these fiscal officers that he had made most of the sales to the scrap yard. Nor did Kelly provide records of these transactions to the state or county auditor or the county commissioners.

{¶21} It was only in June 2013, after the execution of a search warrant of Kelly's home, that BCI agents seized Kelly's receipts of the scrap yard transactions in a bag in his sheriff's vehicle. Two of the receipts were from May 11, 2013 and showed that Kelly had received $470.40 in cash from the scrap yard. On June 12, 2013, BCI agent Kevin

Cooper went to talk to the sheriff's fiscal officer, Dawn Deputy, to see if these receipts had been deposited into a public account, but neither she nor the sheriff's secretary knew anything about it. The next day, however, after Kelly was informed that BCI had asked about the transaction, he showed the agent $389.85 of the money in his wallet and explained that he had paid $50 to Graham for transporting the property to the scrap yard and spent the remaining money on gloves and other equipment he and the trustees had used to transport the property. Kelly then deposited the remaining $389.85 in the county's general fund. BCI investigators later located the other receipts for Kelly's scrap yard transactions, which were not accounted for in any public fund.

{¶22} Kelly claimed that he used the proceeds of the scrap yard transactions for law-enforcement purposes by spending the money on two confidential informants, who had both since died. He testified that he kept this money in a box in his office that only he had the key to. Other than after-the-fact spreadsheets that he made himself several years later, Kelly failed to follow the procedures, which he learned during sheriffs' training and instituted for his office, by failing to contemporaneously document the payments and circumstances supporting the use of public funds to pay the confidential informants. In fact, Kelly continued to refuse to name the informants at trial despite their claimed deaths. BCI forensic accountant Michael Kaizar testified that $2,936.60 of his receipts from Kelly's sales of county property to the scrap yard were not accounted for in any public fund. Kaizar was unable to substantiate any of Kelly's purported payments to confidential informants, which was striking in contrast to the documentation Kelly required and received from most of his own employees. Even accepting the truth of Kelly's purported payments to confidential informants, Kaizar concluded that Kelly still

failed to account for at least $500 of the total amount of money he received from the scrap yard for county property.

D. Meals Paid for Out of the Sheriff's FOJ Fund

{¶23} From 2009 to 2013, Kelly paid for at least 144 meals using the sheriff's office FOJ debit card, spending over $7,000. Notwithstanding his training on the need to document and provide receipts for expenditures from the FOJ fund, Kelly did not provide documentation to prove that the meals occurred during the performance of official duties; and for 56 of these meals he did not document that they were for the furtherance of justice; he did not provide either receipts or documentation for 10 of these meals. The price of these meals totaled over $3,000. Kelly conceded that he should have documented the meal expenses, but failed to do so.

{¶24} In addition a sample of some of the receipts Kelly provided for meals indicated that they were not justifiable FOJ fund expenditures. A March 27, 2011 receipt for a meal at the Ponderosa restaurant in Athens included a notation that it was for a police chiefs' meeting, but it occurred on a Sunday and included kids' meals, which made it unlikely that a chiefs' meeting occurred or that it had the requisite law-enforcement purpose. When the state auditor's office questioned Kelly about the receipt, he initially suggested that the cashier had made an error in noting kids' meals and drinks. Later, Kelly said that the meal was instead for sheriff's office employees having lunch after a parade, but the state auditor determined that there were no parades in Athens County that day.

{¶25} Similarly, a receipt for a meal on the very next day also listed a chiefs' meeting, but was held at a Tumbleweed restaurant in Heath. Michelle Williams, Kelly's

administrative assistant at that time, testified that she never scheduled back-to-back chiefs' meetings and did not recall ever scheduling a chiefs' meeting at Tumbleweed restaurant.

{¶26} And a July 4, 2010 receipt for a meal at Pizza Hut seemed unlikely to have a law-enforcement purpose because it was a Sunday holiday and included kids' drinks and had no documented reason for the meal.

{¶27} Finally, when officials began to investigate his office Kelly reduced his expenditures on meals from the FOJ fund, from highs in 2009 ($1,597.46 in 34 transactions), 2010 ($2,402.89 in 51 transactions), and 2011 ($2,353.14 in 43 transactions), to lows in 2012 ($549.05 in 9 transactions) and 2013 ($592.67 in 9 transactions).

E. Taking Campaign-Fund Donations

{¶28} During his successful 2008 sheriff's campaign, Kelly: (1) took cash contributions that were listed on his campaign finance report, but were never deposited into his campaign account and were not listed as cash expenditures on his report; (2) deposited campaign contributions into his or his wife's personal bank accounts instead of the campaign account; and (3) took portions of campaign contribution deposits as cash. On the first day of trial, however, Kelly gave the state receipts suggesting that the campaign contributions had been used for campaign expenses for various purchases including fuel, in January and February 2008. BCI forensic accountant Kaizar concluded that most of these receipts covered a period before the campaign contributions occurred, so they could not justify Kelly's claim.

{¶29} In addition, evidence from the 2008 campaign-finance report indicated a spaghetti fundraiser raised $340, but none of the proceeds were deposited into the campaign account.

{¶30} Finally, Clinton Stanley, who was Kelly's campaign manager for both the 2008 and 2012 campaigns, testified that after he received two $500 checks from individuals who wanted to donate to Kelly's 2012 campaign, he deposited them into his personal account. Stanley then drafted two $500 checks payable to the Kelly campaign fund, but on Kelly's express instructions, he rewrote one of the checks to make it to Kelly himself and gave it to Kelly to cash. Kelly ultimately cashed that check.

F. Cashbook

{¶31} Sheriff Rodenberg testified he taught the sheriffs at the training session that Kelly attended. Rodenberg informed them that they were required by Ohio law to keep a cashbook, in either written form in a book or folder or in electronic form on a computer, documenting every dollar received and spent by the sheriff's office. Kelly testified that he kept an electronic cashbook in his office.

{¶32} The state presented evidence that Kelly failed to keep a record of the scrap yard transactions where he sold county property, the testimony concerning his failure to provide records of these transactions to his own fiscal officers, the state and county auditors, or the commissioners, and BCI forensic accountant Kaizar's testimony that nearly $3,000 of his receipts from these sales were not documented in any public fund.

G. Perjury

{¶33} After Kelly suggested to BCI investigators that he had used receipts from his scrap yard sales of county property to pay his undocumented confidential informants, the state issued a subpoena requesting the sheriff's records on confidential informants. The trial court held a hearing on the sheriff's compliance with the subpoena where Kelly testified under oath that he had complied with the subpoena by providing all of his records concerning payments made to confidential informants:

> BY THE JUDGE: Are these all the records that exist regarding payments made to confidential informants out of public monies?
>
> BY MR. KELLY: To the best of my knowledge this is all the documents that the Athens County Sheriff's Office has in its possession.
>
> BY THE JUDGE: Okay. Do you have any other documents regarding confidential informants where public monies were used to pay those informants?
>
> BY MR. KELLY: No, your Honor, not outside of what I have produced here.
>
> BY THE JUDGE: Okay. You see what we're trying to say is later we don't want, you know, other records to magically appear. Do you understand?
>
> BY MR. KELLY: You will not see anything magical.
>
> * * *
> BY THE JUDGE: Do you have any additional CI files that show payments in your possession?
>
> BY MR. KELLY: All the files that I have are right here. * * *

{¶34} Notwithstanding his sworn testimony at that September 2013 hearing, Kelly failed to provide the electronic document that BCI obtained from his office desktop computer when executing a search warrant in December 2013. This "list.pdf" document, which BCI forensic analysts determined was created in January 2013, purported to document Kelly's payments to confidential informants. At trial Kelly

conceded that this document was not in the stack of documents that he had provided to the state pursuant to the subpoena.

{¶35} But he claimed that other documents he had provided to the state contained the same information. BCI forensic accountant Kaizar testified that the list.pdf document contained different information from two other documents that Kelly had provided. On the other hand, BCI agent Cooper testified that the list.pdf document contained the same information as a combination of the two other documents. Our own review of the three exhibits establishes that the list.pdf document contains some information that is not included in either of the other two documents provided to the state, including the initials and ID number of the purported confidential informants.

H. Jury Question, Verdict, and Sentence

{¶36} During their deliberations the jury asked the court a number of questions, including whether an enterprise for purposes of charging Kelly with engaging in a pattern of corrupt activity could be comprised solely of Kelly or whether it had to include Pearl Graham and McKee Auto Parts. The trial court rejected Kelly's counsel's request that the jury be instructed that Kelly alone could not constitute an enterprise for purposes of the crime. Instead, it reiterated to the jury that the definition of enterprise included any individual or any organization or association. The court noted in rejecting Kelly's request that the evidence introduced by the state indicated that he had not acted by himself, but had acted in concert with and through his associations with the office of sheriff and his campaign committee.

{¶37} The jury returned verdicts finding Kelly guilty of 11 counts of theft in office in violation of R.C. 2921.41, a felony of the fifth degree, one count of theft in office in

violation of R.C. 2921.41, a felony of the fourth degree, one count of perjury in violation of R.C. 2921.11, a felony of the third degree, one count of failure to keep a cashbook in violation of R.C. 311.13, an unclassified felony, three counts of theft in violation of R.C. 2913.02, a felony of the fifth degree, and one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32, a felony of the first degree. The jury found Kelly not guilty of the remaining counts of the indictment. The trial court merged the theft offenses into related theft-in-office offenses and sentenced Kelly to an aggregate seven-year sentence. This appeal ensued.

II. ASSIGNMENTS OF ERROR

{¶38} Kelly assigns the following errors for our review:

1. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF CRIMINAL CONTEMPT.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF THEFT.

3. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THAT APPELLANT FAILED TO MAINTAIN A CASHBOOK AS REQUIRED BY R.C. §311.11.

4. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF PERJURY.

5. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY IN RESPONSE TO A QUESTION DURING DELIBERATIONS.

6. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ENGAGING IN A PATTERN OF CORRUPT ACTIVITY.

III. LAW AND ANALYSIS

A. Criminal Contempt is Rendered Moot by Voluntary Payment of Fine

{¶39} In his first assignment of error Kelly asserts that the trial court erred in finding him guilty of criminal contempt for violating the court's pretrial publicity order. Kelly claims that the trial court abused its discretion by finding him in contempt because it violated his constitutional right to due process of law and there was insufficient evidence to support the contempt finding. The state counters that Kelly's appeal from the contempt finding is moot and should be dismissed.

{¶40} A " 'case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). "It is not the duty of the court to answer moot questions, and when pending proceedings * * *, an event occurs, without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition * * *." *Miner v. Witt*, 82 Ohio St. 237, 92 N.E. 21 (1910), syllabus; *see also Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991) ("Ohio courts have long exercised judicial restraint in cases which are not actual controversies. No actual controversy exists where a case had been rendered moot by an outside event").

{¶41} These general precepts concerning mootness apply to appeals. *See Coates Run Property LL, LLC v. Athens Bd. of Zoning Appeals*, 4th Dist. Athens No. 15CA5, 2015-Ohio-4732, ¶ 12, citing *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm. of Ohio*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, ¶ 15 ("an appellate court need not consider an issue, and will dismiss the appeal, when the court becomes aware of an event that has rendered the issue moot").

{¶42} In criminal appeals cases "[w]here a defendant, convicted of a criminal offense, has voluntarily paid the fine or completed the sentence for that offense, an appeal is moot when no evidence is offered from which an inference can be drawn that the defendant will suffer some collateral disability or loss of civil rights from such judgment or conviction." *State v. Wilson*, 41 Ohio St.3d 236, 325 N.E.2d 236 (1975), syllabus; *Cleveland Hts. v. Lewis*, 129 Ohio St.3d 389, 2011-Ohio-2673, 953 N.E.2d 278, ¶ 18. The defendant has the burden of presenting evidence to establish at least an inference that he will suffer some collateral disability or loss of civil rights. *See Bartkowiak v. Bartkowiak*, 4th Dist. Vinton No. 04CA596, 2005-Ohio-5017, ¶ 7, citing *State v. Berndt*, 29 Ohio St.3d 3, 504 N.E.2d 712 (1987).

{¶43} The state has introduced uncontroverted extrinsic evidence that within a few days after he was found in contempt and fined, Kelly's wife, Debra, voluntarily paid the $500 fine that the trial court imposed. *See State ex rel. Ohio Republican Party v. Fitzgerald*, 145 Ohio St.3d 92, 2015-Ohio-5056, 47 N.E.3d 124, ¶ 16, quoting *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 8 (" '[a]n event that causes a case to become moot may be proved by extrinsic evidence outside the record' ").

{¶44} There is no indication in the record that Kelly sought to stay his contempt sentence before his wife voluntarily paid his fine on February 9, 2015, which was before his trial concluded. This distinguishes *Cleveland Hts.* at ¶ 3, where the defendant sought a stay of his sentence before he paid his fine, thereby preserving his claim for appeal. Nor does he claim any collateral disability or loss of civil rights from the

contempt conviction. In fact, in his reply brief, Kelly did not respond to the state's argument in its brief that his appeal from the contempt entry is moot.

{¶45} Under these circumstances, we apply "the general rule" that "when the contemnor complies with the trial court's instructions for purging contempt, or serves his sentence and pays his fine, an appeal from the contempt charge is moot." *See generally Columbus v. Cicero*, 10th Dist. Franklin No. 12AP-407, 2013-Ohio-3010, ¶ 12, and cases cited therein; *see also Dotts v. Schaefer*, 5th Dist. Tuscarawas No. 2014 AP 06 0022, 2015-Ohio-782, ¶ 21 ("An appeal from a finding of contempt becomes moot when the offender either purges himself of the contempt or serves the sentence"); *Bartkowiak*, 2005-Ohio-5017, at ¶ 10 ("Because [defendant] has already served his thirty day sentence and has failed to establish that he will suffer an adverse collateral disability based on the court's contempt finding and sentence, we dismiss his appeal as moot"). Therefore, Kelly's appeal from his contempt conviction is moot and we dismiss it.

B. Theft in Office: Sufficiency of the Evidence

1. Standard of Review

{¶46} In his second assignment of error Kelly asserts that there was insufficient evidence to convict him of theft in office. These convictions fell into three separate categories: (1) scrap yard sales of county property; (2) payment for meals using the FOJ fund; and (3) campaign-fund donations.

{¶47} "When a court reviews the record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond

a reasonable doubt.' " *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶48} "A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness." *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, __ U.S. __, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 99 S.Ct. 2781, 61 L.Ed.2d 560. In performing its role a jury is free to believe all, some, or none of any witness's testimony. *See, e.g., State v. Scott*, 4th Dist. Washington No. 15CA2, 2015-Ohio-4170, ¶ 25.

2. Scrap Yard Sales of County Property

{¶49} Theft-in-office is defined in R.C. 2921.41(A), which provides an aggravated form of theft by adding two elements to the basic theft offense. *See generally* Katz, Martin, Lipton, Giannelli, and Crocker, *Baldwin's Ohio Practice Criminal Law*, Section 110:25 (3d Ed.2014). R.C. 2921.41(A) states that "[n]o public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies: (1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense; (2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any

political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund." "Theft offense" includes "[a] violation of section 2913.02." R.C. 2913.01(K)(1).

{¶50} The predicate theft offenses provide 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 either of the following ways: (1) Without the consent of the owner or person authorized to give consent; (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent." R.C. 2913.02(A).

{¶51} The evidence was uncontroverted that Kelly was a public official—the Athens County Sheriff—and he used that office when he received property that belonged to the county—the proceeds of sales of county property from McKee Auto Parts from April 2009 to May 2013. Kelly argues, however, that the state did not prove that he committed the requisite underlying theft offense because there was no evidence that he took the proceeds from these scrap yard sales with a purpose to deprive the county. He points to his testimony that he used the proceeds to pay two unnamed and now deceased confidential informants for law-enforcement purposes.

{¶52} The state presented evidence that Kelly was not authorized to retain the proceeds from sales of county property, including motor vehicles forfeited as the result of a conviction; Kelly did not provide anyone in the sheriff's office with cash or receipts from the sales; he did not disclose them to state and county auditors or the county commissioners; and he claimed that he put them in a cash box only he had access to.

{¶53} BCI forensic accountant Kaizar testified that almost $3,000 of the proceeds from Kelly's sales of county property to the scrap yard was not accounted for

in any public fund. Kaizar was unable to substantiate Kelly's purported payments to confidential informants because of Kelly's failure to follow the practice of documenting these payments as he was trained to do and as Kelly required his own employees to do.

{¶54} In light of Kelly's lack of documentation to support his purported use of the proceeds to pay confidential informants and establish his deposit of funds in any proper account, the jury could weigh the evidence and reasonably infer that he stole the proceeds for his own personal use. As the factfinder, the jury could reasonably refuse to credit Kelly's unsupported claim that he used the money to pay confidential informants, which as Kaizar indicated, even if true, failed to account for at least $500 of the money Kelly received from the scrap yard sales.

{¶55} After viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime of theft in office proven beyond a reasonable doubt. The evidence permitted the reasonable inference that Kelly, while sheriff, with purpose to deprive the county of property, knowingly exerted control over the receipts of sales of county property to the scrap yard without or beyond the consent of the county, and he used his office to aid in committing the theft. Kelly's theft-in-office convictions relating to his sales of county property to the scrap yard were supported by sufficient evidence. We reject Kelly's claim that they were not.

3. Purchase of Meals with FOJ Fund

{¶56} Next Kelly argues that his theft-in-office conviction for using the sheriff's office's FOJ fund to purchase meals was not supported by sufficient evidence. He claims that the mere absence of a receipt or documentation is not tantamount to theft, which is the required predicate for theft in office. This claim is true as an abstract

principle. However, the record includes evidence that permitted the jury to reasonably conclude Kelly had not used the FOJ fund to purchase meals for the required law-enforcement purposes, i.e. that the meals did not occur during the performance of official duties and in the furtherance of justice.

{¶57} The state's evidence demonstrated that: Kelly received training on the proper accounting for special sheriff funds, including the FOJ fund; he used money from that fund to purchase at least 144 meals from 2009 to 2013; notwithstanding his training, he provided no documentation of a legitimate law-enforcement purpose for 66 meals (56 meals with receipts but no documentation of a law-enforcement purpose and 10 meals with no receipts or supporting documentation) totaling over $3,000; his justifications when questioned about certain of the meals were unpersuasive; and when his office was audited and investigated, he drastically reduced his meal expenditures from the fund.

{¶58} After viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime of theft in office proven beyond a reasonable doubt. The evidence permitted the reasonable inference that while he was sheriff, Kelly, with purpose to deprive the county of property from the FOJ fund, knowingly obtained control over the property without or beyond the consent of the county by using it for personal meals that were not authorized by or appropriate under the fund. We reject Kelly's claim.

4. Theft of Campaign-Fund Donations

{¶59} Next Kelly asserts that his theft-in-office convictions relating to campaign-fund donations were not supported by sufficient evidence.

{¶60} The jury convicted Kelly of three charges related to campaign-fund donations: Count 11 addressed theft of campaign contributions from January to December 2008 for his successful 2008 sheriff's campaign; Count 12 addressed theft of proceeds from an August 2008 spaghetti dinner during his 2008 campaign; Count 13 addressed his instruction to his campaign manager to rewrite a check funded by a campaign donation in 2012 and make it to Kelly personally instead of to his campaign; Count 24 repeated the allegations of Count 11, but alleged the alternate crime of theft. Ultimately, the jury convicted Kelly of all of these counts, but the trial court merged Count 24 into Count 11 for sentencing purposes.

{¶61} Kelly concedes that he received cash donations for his 2008 and 2012 campaigns, but failed to report his expenditures of this money. He claims that the lack of documentation for his campaign expenditures may have constituted a violation of campaign-finance reporting laws, but was insufficient to prove the predicate offense of theft required for his theft-in-office convictions. We reject Kelly's contention. The state introduced evidence that during his 2008 campaign, Kelly took cash campaign contributions that were never deposited into his campaign account and were not reported as cash expenditures in his campaign-finance reports; he deposited campaign contributions into his or his wife's personal bank accounts instead of his campaign account; he took portions of his campaign contributions as cash.

{¶62} Likewise, Kelly did not deposit any of the $340 he received from a 2008 campaign spaghetti fundraiser into his campaign account. And he did not produce any documentary evidence that he used those funds for campaign purposes.

{¶63} His campaign manager, Clinton Stanley, testified that he received donations for Kelly's 2012 campaign. When he drafted checks based on these donations for the Kelly campaign fund, Kelly instructed him to rewrite one of the $500 checks to make it payable to Kelly personally. Kelly cashed it.

{¶64} Kelly attempted an eleventh-hour justification for his failure to account for these campaign funds. On the first day of his trial he gave the state receipts, claiming they represented his campaign expenditures from the receipt of the campaign donations. However, BCI forensic accountant Kaizar testified that most of the forwarded receipts covered a period before the campaign contributions at issue. Based on this evidence the jury could reasonably infer that Kelly knowingly obtained control over these donations with the purpose to deprive his campaign fund of them, thus committing the predicate offense of theft in each of the three theft-in-office counts relating to his campaign-fund donations.

{¶65} But the mere proof of theft does not establish theft in office. The theft offense must be committed by a "public official or party official." R.C. 2921.41(A). "Public official" means "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers." R.C. 2921.01(A). "Party official" means "any person who holds an elective or appointive post in a political party in the United States or this state, by virtue of which the person directs, conducts, or participates in directing or conducting party affairs at any level of responsibility." R.C. 2921.01(C).

{¶66} Kelly was not a sheriff at the time the offenses in Counts 11 and 12 occurred, i.e. during his 2008 campaign. Kelly did not take office as sheriff until 2009, and there appears to be no testimonial evidence that he fit any of the remaining categories of "public official" defined in R.C. 2921.01(A) or "party official" in R.C. 2921.01(C) during the pertinent time period.

{¶67} Consequently, we ordered the parties to file supplemental briefs on this issue. The state filed a supplemental brief, but Kelly did not. According to the state's uncontroverted argument, it did not introduce evidence at trial on this element of the theft-in-office charges because the parties stipulated that Kelly was a public official or party official at the time the charged theft offenses were committed. Elements of a criminal offense may be established by stipulation of the parties. *See, e.g., State v. Booker*, 10th Dist. Franklin No. 15AP-42, 2015-Ohio-5118, ¶ 12-15; *State v. Davis*, 79 Ohio App.3d 450, 455, 607 N.E.2d 543 (4th Dist.1992).

{¶68} And as the state notes, the record includes a reference by the trial court to the parties' stipulation during its jury instructions. The court stated:

> [T]here were several stipulations that the parties agreed to [that were] not in the jury instructions. I'm going to read them to you. The agreement or the stipulations agreed to by both the State and the defense are as follows. * * * During the time period in question in the indictment the Defendant was a public official, an elected officeholder of the Athens County Sheriff's Office. No further testimony is required to establish that the Defendant was a public official as defined in Revised Code Section 2921.01(A)(c).

{¶69} In instructing the jury later regarding the theft-in-office offenses, the trial court stated that "[p]ublic official, which has already been stipulated to, but it means any elected or appointed officer or employee or agent of the State or any political

subdivision whether in a temporary or permanent capacity and includes but is not limited to legislators, judges, and law enforcement officers."

{¶70} Based on the parties' stipulation there is sufficient evidence to support Kelly's convictions for theft in office on Counts 11 and 12, which involve the period of time in 2008 when he was a candidate for sheriff, but was not sheriff.

{¶71} Kelly was in the office of sheriff and acting as a law enforcement officer employed by the county when he directed his campaign manager to redraft a check to his campaign to him personally and when he cashed it. Consequently, there was sufficient evidence to support his theft-in-office conviction for Count 13.

{¶72} We overrule Kelly's second assignment of error because sufficient evidence supported his theft-in-office convictions.

C. Failure to Maintain a Cashbook: Sufficiency of the Evidence

{¶73} In his third assignment of error Kelly contends that there was insufficient evidence to prove that he failed to maintain a cashbook. R.C. 311.13 provides that "[n]o sheriff shall willfully fail to comply with * * * section 311.11 of the Revised Code." R.C. 311.11 states "[t]here shall be kept in the office of the sheriff a cashbook, to be furnished by the county, in which, on receipt by him of any money in his official capacity, the sheriff shall make an entry of the date, the amount thereof, the title of the cause, and the name and number of the writ or process on which such money was received."

{¶74} Kelly argues that insufficient evidence supported his conviction for failure to keep a cashbook because the state incorrectly argued at trial that the statute required that the sheriff's office keep an actual physical book, rather than a computerized program to record office cash transactions. We reject Kelly's argument because it is

based on an erroneous premise. In fact, during the state's closing argument, one of the special prosecutors argued that Kelly's R.C. 311.11 offense consisted of failing to account for the scrap yard sales proceeds from the first eight theft-in-office counts:

> Failure to keep a cash book, count eighteen. This is pretty simple. Nowhere did the Defendant account for the scrap sale proceeds in counts one through eight of the indictment until July 1st of 2013. He doesn't keep an accurate log until that point when he's forced to because BCI discovered his activity. So he failed to keep a cash book in those instances.

{¶75} We agree that R.C. 311.11 is not violated simply by failing to have a physical cashbook, e.g. an electronic form would be sufficient. But the statute clearly requires a sheriff to make an official record of the receipt of money in his official capacity. The state introduced evidence that Kelly, in his capacity as sheriff, received proceeds from McKee Auto Parts for the sale of county property, but failed to contemporaneously document the proceeds in any form in accordance with the procedures he was taught and that he required of his own employees. The jury could reasonably conclude that Kelly willfully failed to comply with R.C. 311.11 because he wanted to avoid a paper trail of his receipt of the proceeds of the scrap yard sales. We overrule his third assignment of error.

D. Perjury: Sufficiency of the Evidence

{¶76} In his fourth assignment of error Kelly argues that there was insufficient evidence to convict him of perjury. R.C. 2921.11(A) prohibits knowingly making, swearing, or affirming the truth of a false statement when the statement is material.

{¶77} The state presented evidence that at a pretrial hearing to determine Kelly's compliance with a subpoena, Kelly had testified repeatedly under oath that he had provided all documents in the sheriff's office's possession. But notwithstanding his

sworn representations, Kelly failed to provide an electronic document on his office desktop computer that purported to document his payments to confidential informants.

{¶78} Kelly initially claims that his testimony at the pretrial hearing that he had provided all of his records concerning payments to confidential informants was made only "to the best of his knowledge." Because of that qualifier he argues he could not be convicted of perjury.

{¶79} We reject Kelly's claim. First, only one of his sworn statements at the pretrial hearing was prefaced by the qualifying language "[t]o the best of my knowledge." In two other statements made during his sworn testimony, Kelly testified without that qualifying language that he did not have any other documents or files concerning payments of public money to confidential informants in his possession. Second, Kelly cites no authority and we are aware of none that the prefatory language "to the best of my knowledge" insulates a person from a subsequent perjury conviction. *See, e.g., Annotation, Statement of Belief or Opinion as Perjury*, 66 A.L.R.2d 791, Section 2 (1959) ("The law will not permit one to shield himself against criminal liability for a statement which is knowingly and corruptly false by making it ostensibly as a matter of belief or opinion"); *see also State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014-Ohio-3389, ¶ 4, 34, citing App.R. 16(A)(7) (court can summarily reject argument in assignment of error that is not supported by any legal authority). Third, the jury was free to determine that Kelly lied in the pretrial hearing when he testified that to the best of his knowledge he had provided all the requested records he had i.e., the jury was free to discredit any claim of an innocent mistake due to the large number of documents involved. The jury could have reasonably inferred that even though the document was

not damaging to him, he had a reason to withhold it, e.g. in spite of being warned by the court not to have surprise documents "magically appear" later, Kelly intended to do just that.

{¶80} Kelly next claims that his statements were not material because he had already provided two other documents that, when combined, contained the same information as that contained on the document he failed to disclose.

{¶81} "A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding." R.C. 2921.11(B). The proceeding before the trial court was to gauge the sheriff's compliance with a subpoena for these records so Kelly's false statements affected the course of the proceeding. If he had accurately informed the trial court that he had failed to provide the "list.pdf" document at that proceeding, the court could have found him in contempt or ordered that he provide the state with immediate access to it. Kelly's subsequent argument that he had provided the same type of information in two separate documents would thus not necessarily render his false statements immaterial. "It is no defense to a charge under this section that the offender mistakenly believed a falsification to be immaterial." R.C. 2921.11(B).

{¶82} In addition the evidence was conflicting at trial about whether the information in the "list.pdf" document was contained in two other documents that had been provided by Kelly to the state. Although Kelly cites the testimony of BCI agent Cooper that the list.pdf document contained the same information as the other two documents, BCI forensic analyst Kaizar testified otherwise. The jury could properly credit Kaizar's testimony in this regard. Our own review of the list.pdf document

establishes that it includes some information that is not contained in either of the other two documents provided by Kelly to the state.

{¶83} Therefore, Kelly's perjury conviction was supported by sufficient evidence. We overrule his fourth assignment of error.

E. Requested Jury Instruction for

Engaging in a Pattern of Corrupt Activity

{¶84} Kelly's fifth and sixth assignments of error contest his conviction for engaging in a pattern of corrupt activity, with the former focusing on the propriety of a jury instruction in response to a question and the latter addressing the sufficiency of the evidence to sustain his conviction.

{¶85} In his fifth assignment of error Kelly claims that the trial court erred in instructing the jury in response to the jury's question. Kelly argues that the trial court erred in rejecting his request to instruct the jury that acting alone, he could not constitute an "enterprise" for purposes of the crime of engaging in a pattern of corrupt activity. Instead the trial court reiterated its instruction that the legislative definition of "enterprise" for engaging in a pattern of corrupt activity included any individual, organization, or association.

{¶86} A jury instruction must present a correct, pertinent statement of the law that is appropriate to the facts. *State v. Barry*, 145 Ohio St.3d 354, 2015-Ohio-5449, 49 N.E.3d 1248, ¶ 25. Thus, "[r]equested jury instructions should ordinarily be given if they are correct statements of law, if they are applicable to the facts in the case, and if reasonable minds might reach the conclusion sought by the requested instruction." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240. "Our

review concerning whether jury instructions correctly state the law is de novo." *State v. Kulchar*, 4th Dist. Athens No. 10CA6, 2015-Ohio-3703, ¶ 15.

{¶87} Engaging in a pattern of corrupt activity is defined in R.C. 2923.32(A), which provides in subsection (1) that "[n]o 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 * * *." " '*Enterprise'* includes *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." (Emphasis added.) R.C. 2923.31(C).

{¶88} "The definition of 'enterprise' is remarkably open-ended." *State v. Beverly*, 145 Ohio St.3d 258, 2015-Ohio-219, 37 N.E.3d 116, ¶ 8. From its plain statutory definition, the General Assembly defined "enterprise" broadly to encompass even a single individual. *See State v. Sands*, 11th Dist. Lake No. 2007-L-003, 2008-Ohio-6981, ¶ 148; *State v. Francis*, 3d Dist. Mercer No. 10-08-02, 2008-Ohio-2605, ¶ 10; *State v. Kersey*, 2d Dist. Miami No. 98 CA 13, 1999 WL 22652, *4 (Jan. 22, 1999); *State v. Habash*, 9th Dist. Summit No. 17071, 1996 WL 37747, *5 (Jan. 31, 1996). Because it was not a correct statement of the law, the trial court correctly rejected Kelly's requested instruction that he could not by himself constitute an "enterprise" for purposes of engaging in a pattern of corrupt activity. We overrule Kelly's fifth assignment of error.

F. Engaging in a Pattern of Corrupt Activity:

Sufficiency of the Evidence

{¶89} In his sixth assignment of error Kelly asserts that there was insufficient evidence to convict him of the crime of engaging in a pattern of corrupt activity. Kelly claims that the state's theory at trial was that he engaged in a pattern of corrupt activity with Pearl Graham and McKee Auto Parts for selling county property to McKee, but that there was no evidence that Graham and McKee were operating with the same common illicit purpose as Kelly. Thus, Kelly argues that the state failed to establish beyond a reasonable doubt that he was associated with any enterprise that was engaging in a pattern of corrupt activity.

{¶90} Kelly is correct that in its closing argument the state contended that Kelly had engaged in a pattern of corrupt activity with Pearl Graham and McKee Auto Parts. And the trial court instructed the jury that the state so alleged. However, we reject Kelly's contention for several reasons.

{¶91} First, a reviewing court's limited determination in a sufficiency-of-the-evidence challenge is not dependent upon what the parties argued at trial or how the jury was instructed. Instead, we consider only the legal question of whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Musacchio*, __ U.S. __, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 ("A reviewing court's limited determination on sufficiency review thus does not rest on how the jury was instructed").

{¶92} Second, any error in the state's argument was corrected by the trial court's instruction that the arguments of counsel were not evidence. *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, 25 N.E.3d 1023, ¶ 120. The jury was not restricted to

the content of the state's closing argument. As the trial court explained in discussing its answer to the jury question concerning the definition of "enterprise," Kelly's association with his office of sheriff or his campaign committee could reasonably support the crime of engaging in a pattern of corrupt activity. *See State v. Agner*, 135 Ohio App.3d 286, 291, 733 N.E.2d 676 (3d Dist.1999) ("although we acknowledge that the definition of enterprise includes an individual or sole proprietorship, we also find it equally significant that the crime of engaging in a pattern of corrupt activity requires that *the offender be employed by or associated with* such an entity" [emphasis added]); *State v. Weiss*, 3d Dist. Union No. 14-03-24, 2004-Ohio-1948, ¶ 29. There was sufficient evidence that Kelly acted in association with his official capacity as sheriff and his campaign committee for the jury to find him guilty of this crime. *See State v. Clayton*, 2d Dist. Montgomery No. 22937, ¶ 40-45 (rejecting defendant's argument that he could not be convicted of engaging in a pattern of corrupt activity when he was merely associating with himself because he acted through a separate and distinct entity in his role as president and owner of a real estate title agency).

{¶93} Third, the "pattern of corrupt activity" required for this offense is "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 place that they constitute a single event." R.C. 2923.31(E). In its verdict finding Kelly guilty of this offense, the jury did not limit its findings to those that involved the scrap yard sales involving Graham and McKee Auto Parts. Rather, it included all of the offenses it found him guilty of.

{¶94} Finally, because the term "enterprise" includes an individual, the potential innocence of Graham or McKee Auto Parts would not necessarily preclude Kelly's conviction of the crime. However, the evidence, which included Graham's declaration that he would help hide the body if Kelly killed someone, as well as Graham's storage of county property on his land and his theft of copper wire, were sufficient evidence for the jury to infer that Kelly and Graham were involved in an illicit scheme to obtain money from the sale of county property.

{¶95} Therefore, there was sufficient evidence to support Kelly's conviction for engaging in a pattern of corrupt activity. We overrule his sixth assignment of error.

IV. CONCLUSION

{¶96} Having fully addressed Kelly's claims, we dismiss his appeal from his contempt conviction on the basis of mootness. Having overruled Kelly's remaining assignments of error on the merits, we affirm his remaining convictions and sentence.

APPEAL DISMISSED IN PART
AND JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the APPEAL IS DISMISSED IN PART and the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J. & * Ringland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

* Robert P. Ringland, Judge of the Twelfth Appellate District, sitting by assignment of The Supreme Court of Ohio in the Fourth Appellate District.