[Cite as *State v. Dodson*, 2011-Ohio-6222.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-08-191
	:	O P I N I O N
- vs -		12/5/2011
	:	
DAMON DODSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. 2009-07-1147

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

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RINGLAND, J.

{¶1} Defendant-appellant, Damon Dodson, appeals from his conviction in the Butler County Court of Common Pleas for one count of engaging in a pattern of corrupt activity and one count of trafficking in marijuana. For the reasons outlined below, we affirm.

{¶2} As a result of appellant's prior trafficking in marijuana conviction, on July 15, 2009, the Butler County Grand Jury returned an indictment against appellant charging him with one count of engaging in a pattern of corrupt activity in violation of R.C. 2923.32(A)(1),

as well as one count of trafficking in marijuana in violation of R.C. 2925.03(A)(2), and one count of possession in violation of R.C. 2925.11. The counts of engaging in a pattern of corrupt activity and trafficking in marijuana also contained several forfeiture specifications, including a specification seeking the forfeiture of $136,340 in cash.

{¶3} On June 16, 2010, after overruling appellant's motion to dismiss, and following a bench trial, the trial court found appellant not guilty of the possession, but guilty of engaging in a pattern of corrupt activity and trafficking in marijuana. The trial court also found the specification seeking the forfeiture of $136,340 in cash proved by a preponderance of the evidence. As a result of his convictions, appellant was sentenced to serve a total of seven years in prison.

{¶4} Appellant now appeals from his conviction and sentence, raising six assignments of error for review. For ease of discussion, we will address appellant's assignments of error out of order.

{¶5} Assignment of Error No. 3:

{¶6} "THE TRIAL COURT VIOLATED [APPELLANT'S] RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THE TRIAL COURT FOUND [APPELLANT] GUILTY."

{¶7} In his third assignment of error, appellant argues that his convictions for trafficking in marijuana and engaging in a pattern of corrupt activity are based on insufficient evidence. We disagree.

{¶8} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Coleman*, Butler App. No. CA2010-12-329, 2011-Ohio-4564, ¶7; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence, "[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. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶113, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(E).

Trafficking

{¶9} As it relates to appellant's trafficking in marijuana conviction, appellant argues that there was insufficient evidence to support his conviction for aiding and abetting in trafficking in marijuana. We disagree.

{¶10} Appellant was found guilty of trafficking in marijuana following the trial court's ruling that he aided and abetted Larry Silas in violation of R.C. 2925.03(A)(2).

{¶11} To support a conviction for complicity by aiding and abetting, "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Gragg*, 173 Ohio App.3d 270, 2007-Ohio-4731, ¶ 20, quoting *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus. Evidence of aiding and abetting may be shown by direct or circumstantial evidence, and participation in criminal intent may be inferred from presence, companionship, and conduct before or after the offense is committed. *State v. Israel*, Butler App. No. CA2010-07-170, 2011-Ohio-1474, ¶33, citing *Gragg* at ¶21; *State v. Mota*, Warren App. No. CA2007-06-082, 2008-Ohio-4163, ¶19. However, "the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor." *State v. Widner* (1982), 69 Ohio St.2d 267, 269. Instead, "there must be some level of active participation by way of providing assistance or encouragement." *State v. Nievas* (1997), 121 Ohio App.3d 451, 456; *State v. Rader*, Butler App. No. CA2010-11-310, 2011-Ohio-5084, ¶34.

{¶12} At trial, the state presented evidence that the Missouri State Highway Patrol conducted a traffic stop of a Ford Focus driven by Silas and recovered marijuana from the vehicle. The marijuana was found in a duffle bag and separated into one gallon zip-lock bags. As a result of the stop, the Missouri State Police contacted Detective Dan Schweitzer in the Warren County Drug Task Force to conduct a controlled delivery of the marijuana. Based on information obtained from a phone conversation between Silas and another individual, the drug task force used Silas to attempt a controlled delivery in Middletown on September 19, 2008. However, the attempt was unsuccessful because no one arrived to retrieve the marijuana. As a result of information obtained, the police scheduled an interview with appellant.

{¶13} Detective Larry Fultz, a 22-year veteran with the Middletown Police Department and a 19-year veteran of the special operations unit that encompasses all drug crimes, testified at trial that he interviewed appellant regarding his prior history dealing marijuana and events culminating on September 19, 2008. According to Detective Fultz's testimony, at the interview, appellant stated that this was Silas' second trip to Arizona; previously, Silas picked up a package of marijuana in Arizona and brought it back to Middletown, where appellant paid Silas $2,000 for the delivery. Detective Fultz further testified that appellant stated he paid $575 to $625 per pound of marijuana in Arizona, and later sold it for $1,200 to $1,400 per pound. Detective Fultz's testimony also revealed that appellant referenced "grinding it out," meaning he would sell the marijuana in smaller amounts to recover a larger profit. In addition, according to Detective Fultz's testimony, appellant admitted to selling marijuana since 1998 and stated that he had several suppliers, including Red, a former Middletown resident who now lives in Detroit, Pooch, from Cincinnati, and Nathaniel Williams, from Arizona.

{¶14} Regarding the events of the attempted controlled drop on September 19, 2008,

also according to Detective Fultz's testimony, appellant stated that he had hired Silas to drive to Arizona to bring back marijuana, that he had taken Silas to a rental car agency to rent a vehicle, that Silas used a debit card to pay for the rental, and that Silas was going to drive to Arizona to pick up marijuana. According to Detective Fultz's testimony, appellant stated that after several unsuccessful attempts to contact Silas, he eventually communicated with Silas around 7:00 p.m. Detective Fultz testified that appellant became uncomfortable with the situation and told Silas to take the package to Silas' residence, and that after calling Williams in Arizona, appellant turned his phone off for the evening and no longer accepted phone calls because he was concerned law enforcement might be involved. Detective Fultz also testified that marijuana is typically priced per pound in one gallon zip-lock bags when sold in bulk.

{¶15} After obtaining a warrant, a second interview of appellant was conducted by Agent Aaron Sorrell from the Butler County Sheriff's Department at appellant's residence. According to Agent Sorrell's testimony, appellant admitted to: dealing marijuana for 10 to 15 years, making $10,000 to $15,000 per month dealing marijuana, paying half of his mortgage with drug proceeds, and having a safety deposit box at Fifth-Third Bank with over $100,000 in cash, which he gave consent to the police to search. The police ultimately executed a search warrant on the safety deposit box and found approximately $116,000 in cash.

{¶16} After a thorough review of the record, we find the evidence, when viewed in a light most favorable to the state, was sufficient to support appellant's conviction for complicity to trafficking in marijuana. The state presented evidence that appellant had taken Silas to a rental car agency to rent a vehicle, that Silas used a debit card to pay for the rental, and that Silas was going to drive to Arizona to pick up marijuana. The state also presented evidence that appellant directed Silas to take the package of marijuana to Silas' house after he became concerned that law enforcement might be involved. The marijuana was separated into one gallon zip-lock bags, which according to Detective Fultz, indicated the marijuana was

sold in bulk. In addition, the officers' testimony revealed appellant's admissions to previously selling marijuana and purchasing marijuana in Arizona for $575 to $625 per pound and reselling it for $1,200 to $1,400 per pound, resulting in $10,000 to $15,000 per month in income for appellant.

{¶17} While some of the evidence supporting the element to prepare for distribution is circumstantial, its probative value is not diminished, and is sufficient to support the finding that appellant aided and abetted Silas in trafficking marijuana. See *State v. Barnett*, Butler App. No. CA2008-03-069, 2009-Ohio-2196, ¶53 (holding "[a] conviction based on circumstantial evidence is no less sound than one based on direct evidence"). In addition, we have held in the past that reviewing courts are able to consider the evidence from well-trained and reliable sources familiar with drugs and drug-related activity. See *State v. Graham*, Warren App. No. CA2008-07-095, 2009-Ohio-2814 (stating an agent's testimony based on his education, training, and experience, as well as his personal knowledge of the case, was proper and further allowed the jury to determine whether the defendant possessed or trafficked in marijuana). Viewing this evidence in a light most favorable to the state, we conclude a rational trier of fact could find that the elements of trafficking in marijuana were proved beyond a reasonable doubt.

Engaging in a Pattern of Corrupt Activity

{¶18} Regarding appellant's conviction for engaging in a pattern of corrupt activity, he argues that there was no evidence presented to support a distinct organization as he claims is required by the definition of enterprise. This argument lacks merit.

{¶19} R.C. 2923.32(A)(1), regarding engaging in a pattern of corrupt activity, states: "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." "'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. 'Enterprise' includes illicit as well as licit enterprises." R.C. 2923.31(C).

{¶20} Appellant asserts that we should adopt the test set forth in the Tenth Appellate District decision *State v. Teasley* (May 14, 2002), Franklin App. Nos. 00AP-1322, 00AP-1323, 2002 WL 977278, which requires a showing of a structure separate and distinct from the pattern of corrupt activity to establish the existence of an enterprise. The test utilized by the Tenth Appellate District requiring a separate structure for an enterprise relies on the United States Supreme Court decision *United States v. Turkette* (1981), 42 U.S. 576, 101 S.Ct. 2524. However, the United States Supreme Court clarified its ruling in *Turkette* in *Boyle v. United States* (2009), 556 U.S. 938, 129 S.Ct. 2237. *Boyle* states that in order to have an association-in-fact enterprise, which is utilized in the R.C. 2923.31(C) definition of "enterprise," there must be: "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." Id. at 938. *Boyle* further explains that an association-in-fact enterprise does not need a hierarchical structure or regular meetings. Id. Different members may play different roles at various times. Id. "While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO [Racketeer Influenced and Corrupt Organizations Act] exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." Id.

{¶21} When applying the test outlined in *Boyle*, there is sufficient evidence to support the existence of an enterprise. There was a purpose to retrieve drugs from Arizona and bring them to Ohio. Relationships were formed between appellant and different suppliers, including Williams in Arizona, to provide marijuana. Appellant directed and compensated Silas for transporting marijuana from Arizona to Ohio. Regarding longevity, appellant's

relationship with Silas and Williams lasted long enough to transport marijuana from Arizona to Ohio on at least two occasions, once in April of 2008 and once in September of 2008.

{¶22} While this may constitute more of an enterprise "whose associates engage in spurts of activity punctuated by periods of quiescence," when applying the test outlined in *Boyle* and viewing the evidence in a light most favorable to the state, there is nonetheless sufficient evidence for a rational trier of fact to find evidence to support an enterprise beyond a reasonable doubt. Therefore, we also find appellant's conviction for engaging in a pattern of corrupt activity was based on sufficient evidence.

{¶23} Having found the state presented sufficient evidence to support appellant's convictions for trafficking in marijuana and engaging in a pattern of corrupt activity, appellant's third assignment of error is overruled.

{¶24} Assignment of Error No. 1:

{¶25} "THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE BY OVERRULING HIS MOTION TO DISMISS AND CONVICTING [APPELLANT] DESPITE SUCCESSIVE PROSECUTIONS."

{¶26} In his first assignment of error, appellant argues that the trial court erred by overruling his motion to dismiss because the indictment included his previous conviction for trafficking in marijuana as a predicate offense of engaging in a pattern of corrupt activity. According to appellant, this subjected him to double jeopardy and violated the doctrine of collateral estoppel. We disagree.

{¶27} The double jeopardy clause of the Fifth Amendment of the United States Constitution provides that, "[n]o person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Section 10, Article I, Ohio Constitution provides, "No person shall be twice put in jeopardy for the same offense."

{¶28} To determine if a prior conviction is a bar to a subsequent prosecution, a court

applies the test set forth in *Blockburger v. United States* (1932), 284 U.S. 299, 52 S.Ct. 180. See *State v. Wagerman*, Warren App. No. CA2006-05-054, 2007-Ohio-2299, ¶9.

{¶29} In applying *Blockburger*, "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not." Id. at 304. "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Id.

{¶30} The *Blockburger* test, however, is "merely a rule of statutory construction that serves to discern the intent of the legislature when such is not otherwise cognizable." *State v. Lorenz* (July 6, 1992), Clermont App. No. CA91-10-086, at 4, citing *Albernaz v. United States* (1981), 450 U.S. 333, 340, 101 S.Ct. 1137. In turn, whether multiple convictions can arise from the same conduct must be based on whether the legislature intended the relevant statutes to authorize multiple convictions. *State v. Conley* (July 15, 1991), Preble App. No. CA90-11-023, at 5. Therefore, if it is evident that a state legislature intended to authorize cumulative punishments, then a court's inquiry is at an end. Id.

{¶31} The doctrine of collateral estoppel, which prevents the relitigation of an ultimate fact once it has been determined by a final judgment, is embodied in the double jeopardy clause. *State v. Mobus*, Butler App. No. CA2005-01-004, 2005-Ohio-6164, ¶8; *State v. Varney* (1995), 105 Ohio App.3d 195, 197; *Dowling v. United States* (1990), 493 U.S. 342, 347, 110 S.Ct. 668. Under this doctrine, "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *State v. Tolbert* (1991), 60 Ohio St.3d 89, 91, citing *Brown v.*

Ohio (1977), 432 U.S. 161, 166-167, fn. 6, 97 S.Ct. 2221. "[A] mere overlap in proof between two prosecutions does not establish a double jeopardy violation." *Mobus* at ¶8, citing *United States v. Felix* (1992), 503 U.S. 378, 386, 112 S.Ct. 1377.

{¶32} In this case, when considering the elements of trafficking in marijuana in violation of R.C. 2925.03(A)(2) and engaging in a pattern of corrupt activity in violation of R.C. 2923.32, there is no overlap of individual elements. Moreover, by evaluating the intent of the General Assembly, we find it clear that the enactment of R.C. 2923.32 was to criminalize the pattern of criminal activity, and not the underlying predicate acts. See *State v. Dudas*, Lake App. Nos. 2008-L-109, 2008-L-110, 2009-Ohio-1001 (holding that conviction of the predicate acts of tampering with records, theft, uttering, securing writings by deception, and telecommunications fraud and conviction under R.C. 2923.32 did not violate double jeopardy); see, also, *State v. Moulton*, Cuyahoga App. No. 93726, 2010-Ohio-4484 (finding the General Assembly's intent was to permit separate punishments for the commission of a pattern of corrupt activity and its predicate crimes). This finding is further reinforced by analyzing the purpose articulated in the federal RICO act, which R.C. 2923.31 et seq. is patterned after. See *Conley*, Preble App. No. CA90-11-023, at 6-7 (stating the purpose of the federal RICO statute includes "providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime").

{¶33} Despite this, appellant relies on the recent Eighth Appellate District decision *State v. Edwards*, Cuyahoga App. Nos. 94568, 94929, 2011-Ohio-95. In *Edwards*, following a traffic stop, two defendants were arrested based on drugs found in their vehicle. Id. at ¶7, 10. Following the defendants' guilty pleas, the state sought to initiate a new case against the defendants after the police found an additional amount of drugs in the defendants' impounded vehicle. Id. at ¶12. The state presented a new indictment that mirrored the initial indictment, except for the quantity of drugs at issue. Id. at ¶12. The court affirmed the trial

court's decision dismissing the new indictment finding the charge constituted a successive prosecution barred by double jeopardy and collateral estoppel. Id. at ¶17, 21.

{¶34} As can be seen, *Edwards* involved a single incident where the police could have found the entire amount of drugs in the impounded car and charged the defendants accordingly in the first indictment, but failed to do so. Id. at ¶17, 21. In this case, however, unlike *Edwards*, instead of a single incident, there are two different acts constituting two separate charges of trafficking in marijuana. The first instance of trafficking in marijuana, for which appellant pled guilty, was only used to show that appellant was engaged in a pattern of criminal activity and was not relitigated on the merits. *Edwards*, therefore, is distinguishable from the case at bar.

{¶35} Accordingly, appellant's first assignment of error is overruled.

{¶36} Assignment of Error No. 2:

{¶37} "THE TRIAL COURT VIOLATED [APPELLANT'S] DUE PROCESS RIGHTS WHEN IT FOUND HIM GUILTY OF TRAFFICKING BASED ON FACTS NOT IN THE INDICTMENT PRESENTED TO THE GRAND JURY."

{¶38} In his second assignment of error, appellant argues that the trial court violated his due process rights by relying on events that occurred prior to September 19, 2008, the date alleged in the indictment, to convict appellant of trafficking in marijuana. We disagree.

{¶39} Before addressing the merits, we note there was no objection to the trial court's reliance on facts prior to the date set forth in the indictment, and therefore, plain error is the proper standard of review. See *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Pursuant to Crim.R. 52(B), plain error exists where there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings. *State v. Wyatt*, Butler App. No. CA2010-07-171, 2011-Ohio-3427, ¶23, citing *Barnes* at 27. Notice of plain error must be taken with utmost caution, under exceptional

circumstances and only to prevent a manifest miscarriage of justice. *State v. Bai*, Butler App. No. CA2010-05-116, 2011-Ohio-2206, ¶117, citing *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. An appellate court will not reverse a trial court's decision on plain error grounds unless the outcome of the trial would have been different. *State v. Stout*, Warren App. No. CA2010-04-039, 2010-Ohio-4799, ¶56.

{¶40} That said, the time and date of an offense is ordinarily not required in an indictment. *State v. Wagers*, Preble App. No. CA2009-06-018, 2010-Ohio-2311, ¶17, citing *State v. Sellards* (1985), 17 Ohio St.3d 169, 171; see *Tesca v. State* (1923), 108 Ohio St. 287 (holding an indictment is not invalid for failing to state a date or stating the date imperfectly when time is not an essential element of the offense). In turn, it is not necessary for the state to provide proof that the "offense occurred at the specific time alleged, provided the offense charged is established as having occurred within a reasonable time in relation to the dates fixed in the indictment." (Internal quotations omitted.) *State v. Barnhill* (Sept. 3, 1996), Fayette App. No. CA96-01-001, at 8-9. An indictment is sufficient if it states that the offense occurred at some time prior to the filing of the indictment. *Sellards* at 171; R.C. 2941.03. An exception to this general rule exists, however, when the failure to allege a specific date results in material detriment to a defendant's ability to fairly defend himself. *Wagers* at ¶19; *State v. Bell*, 176 Ohio App.3d 378, 2008-Ohio-2578, ¶96.

{¶41} In this case, the indictment provided a date of "on or about September 19, 2008." To convict appellant of trafficking in marijuana, the trial court relied on appellant's statements that he hired Silas to drive to Arizona to bring back marijuana, that appellant transported Silas to the rental car agency to rent a vehicle, and that appellant stated Silas was going to drive to Arizona to retrieve a package of marijuana. Although these events relied upon by the trial court to convict appellant of trafficking in marijuana may have included conduct that that occurred in the days leading up to September 19, 2008, we find these

events occurred within a reasonable time of the date stated in the indictment. See *Barnhill*, Fayette App. No. CA96-01-001(holding that the time alleged in the indictment and the occurrence of the offense was a within a reasonable time when the difference in time amounted to a few days and involved a single series of communications).

{¶42} In addition, nowhere does the statute concerning trafficking in marijuana, R.C. 2925.03(A)(2), indicate that the specific date or time is an essential element of the charge, nor is there any evidence that appellant's ability to defend himself was in any way effected. See *Wagers*, 2010-Ohio-2311 at ¶20; see, also, *State v. Persinger*, Morrow App. No. 08-CA-14, 2009-Ohio-5849, ¶34. Therefore, we find no error, let alone plain error, indicating the trial court violated appellant's due process rights by relying on events occurring prior to the date alleged in the indictment to support his trafficking in marijuana conviction. Appellant's second assignment of error is overruled.

{¶43} Assignment of Error No. 4:

{¶44} "THE TRIAL COURT VIOLATED [APPELLANT'S] RIGHT TO DUE PROCESS BY ENTERING VERDICTS OF GUILTY AS THE COURT'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶45} In his fourth assignment of error, appellant argues that both his trafficking in marijuana conviction and his engaging in a pattern of corrupt activity conviction were against the manifest weight of the evidence. We disagree.

{¶46} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Rader*, Butler App. No. CA2010-11-310, 2011-Ohio-5084, ¶32; *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶19. Although a verdict is supported by sufficient evidence, an appellate court may nevertheless conclude that the verdict is against the manifest weight of the evidence because the test under the manifest weight standard is

much broader than that for sufficiency of the evidence. *State v. Davidson*, Preble App. No. CA2009-05-014, 2009-Ohio-6750, ¶5.

{¶47} A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester*, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide because it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Therefore, the question upon review is whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶48} Initially, appellant argues that his conviction for trafficking in marijuana was against the manifest weight of the evidence because the trial court convicted him based on events outside of the indictment. However, as we stated in appellant's second assignment of error, dates and times are not essential elements of trafficking in marijuana and the trial court's reliance on events that occurred in the days preceding the date stated in the indictment did not prejudice appellant's ability to defend himself. Therefore, we cannot say the trier of fact clearly lost his way and created a manifest miscarriage of justice in relying on events that occurred in the days prior to the date stated in the indictment. Appellant's first argument is overruled.

{¶49} Next, appellant argues that because there was no direct testimony as to appellant's conduct and that by the state's own admission the controlled drop was "unsuccessful," his conviction for trafficking in marijuana was against the manifest weight of the evidence. However, after a thorough review of the record, we find that appellant's conviction for trafficking in marijuana was supported by the manifest weight of the evidence.

{¶50} As discussed in appellant's third assignment of error, the state presented competent, credible evidence indicating appellant, at a minimum, assisted, supported, and advised Silas in trafficking in marijuana by taking Silas to a rental car agency to rent a vehicle, hiring Silas to drive to Arizona to pick up marijuana, and directing Silas to take the package of marijuana to Silas' house after appellant became concerned that law enforcement might be involved. The fact that the marijuana was packaged in one gallon zip-lock bags and appellant's admissions to selling marijuana provided additional circumstantial evidence to convict appellant of trafficking in marijuana. In turn, while Silas' personal testimony would have provided some direct evidence regarding appellant's involvement, proof of guilt may be based on circumstantial evidence. See *State v. Mota*, Warren App. No. CA2007-06-082, 2008-Ohio-4163 (stating "proof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence * * * and circumstantial evidence has no less value than the others"). The trial court, therefore, did not clearly lose its way so as to create such a manifest miscarriage of justice as to require appellant's trafficking in marijuana conviction reversed. Appellant's second argument is overruled.

{¶51} Finally, appellant argues that his conviction for engaging in a pattern of corrupt activity was against the manifest weight of the evidence because the state failed to prove that an organization existed separate and apart from the alleged corrupt activity. As we stated in appellant's third assignment of error, however, the elements of enterprise are met when

applying the test outlined in *Boyle*, which does not require a showing that an organization existed separate and apart from the alleged corrupt activity. Therefore, when applying *Boyle*, we cannot say the evidence weighs heavily against the conviction of engaging in a pattern of corrupt activity or that a manifest miscarriage of justice occurred. Appellant's final argument is overruled.

{¶52} In light of the foregoing, having found that appellant's convictions for trafficking in marijuana and engaging in a pattern of corrupt activity were not against the manifest weight of the evidence, appellant's fourth assignment of error is overruled.

{¶53} Assignment of Error No. 5:

{¶54} "THE TRIAL COURT ERRED WHEN IT ADMITTED UNAUTHENTICATED FINANCIAL DOCUMENTS AND FOUND THE STATE MET ITS BURDEN WITH REGARD TO THE FORFEITURE SPECIFICATION."

{¶55} In his fifth assignment of error, appellant argues the trial court erred by admitting unauthenticated financial documents, including, but not limited to, Middletown income tax returns, seized from appellant's residence pursuant to a search warrant executed on October 31, 2008. While we agree the trial court may have committed error in admitting some of the financial documents, we find any error was harmless.

{¶56} Evid.R. 901 governs the authentication of writings that are not self-authenticating. To authenticate a writing, a witness with knowledge may testify that the "matter is what it is claimed to be." Evid.R. 901(B)(1); *State v. Jackson*, Fayette App. No. CA2011-01-001, 2011-Ohio-5593, ¶15. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by introducing "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Bettis*, Butler App. No. CA2004-02-034, 2005-Ohio-2917, ¶26. This threshold requirement for authentication of evidence is low and does not require conclusive proof of

authenticity. *State v. Easter* (1991), 75 Ohio App.3d 22, 25. Instead, the state must only demonstrate a "reasonable likelihood" that the evidence is authentic. *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶30.

{¶57} A trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion. *Moshos* at ¶10. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *State v. Pringle*, Butler App. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶17.

{¶58} In this case, appellant's trial counsel objected to the admission of all of the financial documents. However, while appellant's trial counsel objected to the admission of the Middletown income tax returns due to a lack of personal knowledge, appellant concedes that the state offered to have the Middletown tax returns authenticated by a Middletown tax department custodian. In turn, because he waived the offer of the state, we find that any error the trial court may have made in its decision admitting the Middletown tax returns was induced by appellant. Under the invited error doctrine, which is applied when defense counsel is "actively responsible" for the trial court's alleged error, a litigant is not entitled to "take advantage of an error which he himself invited or induced" the court to make. *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, ¶27. Therefore, we find, under the invited error doctrine, that the admission of the Middletown income tax returns is not reversible. See *State v. Williams*, Butler App. No. CA2006-03-067, 2007-Ohio-2699, ¶27.

{¶59} Regarding the remaining evidence in question, Detective Schweitzer identified the financial documents as items seized from appellant's residence during the execution of a search warrant. However, while Detective Schweizter possessed personal knowledge that

these documents were seized from appellant's residence, he did not possess personal knowledge as to the contents of the financial documents. Without such personal knowledge, Detective Schweizter was unable to properly authenticate the documents as required by Evid.R. 901. See *In re Estate of Kemp*, 189 Ohio App.3d 232, 2010-Ohio-4073 (holding that testimony of person without personal knowledge of the contents of the financial document could not properly authenticate the financial document for the purpose of admitting it into evidence).

{¶60} That said, while the trial court may have erred in admitting the financial documents into evidence without proper authentication, the Middletown income tax returns were sufficient to show appellant's annual income and the unlikelihood of appellant legitimately earning the money subject to forfeiture. Given the Middletown income tax returns, in addition to appellant's own statements that he made approximately $10,000 to $15,000 per month selling marijuana, the state provided sufficient evidence that the cash was proceeds derived from or acquired through the commission of trafficking in marijuana. See *Dayton Police Dept. v. Byrd*, 189 Ohio App.3d 461, 2010-Ohio-4529, ¶10. Therefore, because appellant was not prejudiced by the admission of the unauthenticated financial documents, we find any error in the trial court's admission harmless. Crim.R. 52(A); see *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761. Accordingly, appellant's fifth assignment of error is overruled.

{¶61} Assignment of Error No. 6:

{¶62} "THE TRIAL COURT ERRED WHEN IT FAILED TO MERGE THE [APPELLANT'S] TWO CONVICTIONS."

{¶63} In his sixth assignment of error, appellant argues that the trial court erred by failing to merge the charges of trafficking in marijuana and engaging in a pattern of corrupt activity. We disagree.

{¶64} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, the Ohio Supreme Court established a two-part test to determine whether offenses are allied offenses of similar import. Id. at ¶46-52; *State v. Rivarde*, Butler App. No. CA2010-10-259, 2011-Ohio-5354, ¶16. Under this test, courts must first determine "whether it is possible to commit one offense and commit the other with the same conduct." *Johnson* at ¶48; *State v. McCullough*, Fayette App. Nos. CA2010-04-006, CA2010-04-008, 2011-Ohio-992, ¶14. In making this determination, it is not necessary that the commission of one offense would always result in the commission of the other, but instead, the question is simply "whether it is *possible* for both offenses to be committed by the same conduct." (Emphasis sic.) *State v. Craycraft*, Clermont App. Nos. CA2009-02-013, CA2009-02-014, 2011-Ohio-413, ¶11, citing *Johnson* at ¶48.

{¶65} If it is found that the offenses can be committed by the same conduct, courts must then determine "whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.'" *Johnson* at ¶49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶50. If both questions are answered in the affirmative, the offenses are allied offenses of similar import. *State v. Blanda*, Butler App. No. CA2010-03-050, 2011-Ohio-411, ¶15, citing *Johnson* at ¶50. However, if the commission of one offense will never result in the commission of the other, "or if the offenses are committed separately, or if the defendant has separate animus for each offense," then, according to *Johnson*, the offenses are not allied offenses of similar import subject to merger. *Johnson* at ¶51.

{¶66} Applying the *Johnson* analysis to the case at bar, the state concedes, and we agree, that it is possible to commit both offenses with the same conduct. However, although possible, under the facts of this case, we find appellant committed the acts of trafficking in marijuana and engaging in a pattern of corrupt activity with a separate animus.

{¶67} Engaging in a pattern of corrupt activity requires an additional state of mind from trafficking in marijuana to form an enterprise. Appellant possessed the intent to traffic in drugs, which does not require him to form an enterprise. However, as stated in the third assignment of error, in addition to having a purpose to transport marijuana from Arizona to Ohio, appellant also intentionally formed relationships between Silas and different suppliers and maintained these relationships long enough to transport marijuana from Arizona to Ohio on at least two occasions.

{¶68} In addition, as discussed in appellant's first assignment of error, when looking at the intent of the General Assembly, the enactment of R.C. 2923.32 was to criminalize the pattern of criminal activity, not the underlying predicate acts. *State v. Dudas*, 2009-Ohio-1001 at ¶47. This intent is further reinforced by the purpose articulated in the federal RICO statute, which R.C. 2923.31 et seq. is patterned after. *State v. Thrower* (1989), 62 Ohio App. 3d 359, 369. The purpose of the federal RICO statute includes "providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Id. at 377, citing Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922-23, reprinted in [1970] U.S. Code Cong. & Admin. News, at 1073. If the purpose of the statute is to provide enhanced sanctions, this purpose is furthered by not merging trafficking in marijuana and engaging in a pattern of corrupt activity in order to provide an enhanced sanction.

{¶69} With the separate animus for trafficking in marijuana and engaging in a pattern of corrupt activity and considering the intent of the General Assembly in the enactment of R.C. 2923.32, under the facts and circumstances of this case, we find that trafficking in marijuana and engaging in a pattern of corrupt activity are not allied offenses of similar import subject to merger under *Johnson*. Therefore, because the trial court did not err in failing to merge appellant's convictions for trafficking in marijuana and engaging in a pattern of corrupt

activity, appellant's sixth assignment of error is overruled.

{¶70} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.