

IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO

CASE NO. 2018 TR 54

STATE OF OHIO, )  
)  
Plaintiff-Appellee )  
)  
vs. )  
)  
RALPH INFANTE, )  
)  
Defendant-Appellant )

FILED  
COURT OF APPEALS

JAN 24 2019

TRUMBULL COUNTY, OH  
KAREN INFANTE ALLEN, CLERK

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BRIEF OF APPELLEE, STATE OF OHIO

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Appeal from Trumbull County Common Pleas Court, Case Number 2017TR00489

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ORIGINAL

## TABLE OF CONTENTS

ASSIGNMENTS OF ERROR.....	viii
STATEMENT OF THE CASE.....	1
LAW AND ARGUMENT.....	21
<b>AUTHORITIES</b>	
<b>Cases</b>	
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781.....	21
<i>Musacchio v. United States</i> , __U.S.__, 136 S. Ct. 709, 193 L.Ed.2d 639 (2016).....	21
<i>State v. DeHass</i> , 10 Ohio St. 2d 230, 227 N.E.2d 212 (1967).....	21
<i>State v. Dennison</i> , 4th Dist. Washington No. 06CA48, 2007-Ohio-4623.....	21
<i>State v. Jenks</i> , 61 Ohio St. 3d 259, 574 N.E. 2d 492 (1991).....	21
<i>State v. Kelly</i> , 4th Dist. No. Athens No. 15CA11, 2016-Ohio-8582, 77 N.E.3d 389.....	22
<i>State v. Koon</i> , 4th Dist. Hocking No. 15CA 17, 2016-Ohio-416.....	21
<i>State v. Maxwell</i> , 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930.....	21
<i>State v. Nicely</i> , 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988).....	21
<i>State v. Ogle</i> , 4th Dist. Nos. 11CA29, 11CA32, 12CA2, 12CA 11, 12CA12 & 12CA 19, 2013-Ohio-3240.....	21
<i>State v. Scott</i> , 4th Dist. Washington No. 15CA2, 2015-Ohio-4170.....	22

FIRST ASSIGNMENT OF ERROR.....22

The evidence is insufficient to convict Infante of Engaging in a Pattern of Corrupt Activity, R.C. 2923.32(A)(1)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

Does ‘an association-in-fact enterprise exist if the evidence fails to establish that the defendant’s actions are part of a continuing unit that functions with a “common purpose?

**AUTHORITIES**

**Cases**

*Musacchio v. United States*,  
\_\_U.S.\_\_, 136 S. Ct. 709, 193 L.Ed.2d 639 (2016)..... 24

*State v. Beverly*,  
143 Ohio St.3d 258, 2015-Ohio-219, 37 N.E.3d 116 ..... 22

*State v. Clayton*,  
2nd Dist. Montgomery No. 22937, 2009-Ohio-7040..... 22

*State v. Habash*,  
9th Dist. Summit No. 17073, 1996 WL 37752 (Jan. 31, 1996) ..... 22

*State v. Kelly*,  
4th Dist. No. Athens No. 15CA11, 2016-Ohio-8582, 77 N.E.3d 389 ..... 22, 23

*State v. Kersey*,  
2nd Dist. Miami No. 98 CA 13, 1999 WL 22652 (Jan. 22, 1999)..... 22

*State v. Silverman*,  
10th Dist. Franklin No. 05AP-837, -838, & -839, 2006-Ohio-3826..... 22

**Statutes**

Ohio Revised Code 2923.31 ..... 23

SECOND ASSIGNMENT OF ERROR.....25

The evidence is insufficient to sustain a conviction of Tampering With Records in violation of R.C. 2913.42

ISSUE PRESENTED FOR REVIEW ARGUMENT

Does a material omission from a required ethics disclosure violate the Tampering with Records statute, which seems to require an affirmative action by the defendant?

**AUTHORITIES**

**Cases**

*Department of Public Safety v. Garrett*,  
1995 Ohio App LEXIS 2861 (4th Dist. June 13, 1995)..... 25

*State v. Burge*,  
Case No. 16CA010936, 2017-Ohio-5836 (9th Dist.) ..... 26

*State v. Luna*,  
94 Ohio App 3d 653 (6th Dist. 1994) ..... 26

*State v. McNeeley*,  
48 Ohio App. 3d 73 (8th Dist. 1988) ..... 26

*State v. Nicely*,  
39 Ohio St.3d 147, 529 N.E.2d 1236 (1988) ..... 27

**Statutes**

Ohio Revised Code 102.02 ..... 27

Ohio Revised Code 2913.01 ..... 26

Ohio Revised Code 2913.42 ..... 25, 26

THIRD ASSIGNMENT OF ERROR.....28

The convictions of Tampering With Records, R.C. 2913.42, violate Ohio’s prohibition of the use of general criminal law provisions over specific statutory prohibitions of a lesser degree

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

May the prosecutor obtain an indictment on a general charge for which the legislature has passed a statute of a lesser import which specifically addresses the proscribed action?

**AUTHORITIES**

**Cases**

*Humphrys v. Winous Co.*,  
165 Ohio St. 45 (1956)..... 28

*State v. Chippendale*,  
52 Ohio St. 3d 118 (1990)..... 28

*State v. Rance*,  
85 Ohio St. 3d 632 ..... 28

**Statutes**

Ohio Revised Code 1.51 ..... 28

Ohio Revised Code 102.02 ..... 28

Ohio Revised Code 2913.42 ..... 28

**FOURTH ASSIGNMENT OF ERROR.....29**

The trial court denied the appellant due process of law and a fair trial by allowing improper lay opinion testimony to be considered by the jury to determine if the appellant profited from a game of chance

**ISSUE PRESENTED FOR REVIEW AND ARGUMENT**

Does Evidence Rule permit a witness to offer a lay opinion if the foundation is inadequate to establish that the testimony is little more the speculative and not based upon a full investigation?

**AUTHORITIES**

**Cases**

*State v. Johnson*,  
2002-Ohio-6957 (10th Dist.)..... 31

*State v. King*,  
1995 Ohio App. LEXIS (2d Dist. May 17, 1995)..... 29, 30, 31

*State v. McKee*,  
91 Ohio St. 3d 292 (2001)..... 29

*State v. Sayre*,  
2013-Ohio-4108 (3d Dist.)..... 29

<i>State v. Slade,</i> 2018-Ohio-2767 (2d Dist.).....	29
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FIFTH ASSIGNMENT OF ERROR.....32

The finding of guilt by the jury of R.C. 2923.31(A)(1) [sic], Theft in Office is violative of the Due Process Clause as the jury was not required to unanimously find the appellant guilty of each material element of the offense

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

May a charge for Theft of Office, which transpired over a number of years, list a series of possible incidents of theft as the basis of the offense without requiring a unanimous finding for any of the underlying allegations?

**AUTHORITIES**

**Cases**

<i>State v. Roberts,</i> 110 Ohio St. 3d 71 (2006).....	32
--	----

**Statutes**

Ohio Revised Code 2913.61 .....	32
Ohio Revised Code 2921.41 .....	32

SIXTH ASSIGNMENT OF ERROR.....33

The state lacked jurisdiction to charge the appellant for Tampering with Records, convictions based upon violations of federal tax reporting laws

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

May that state charge a defendant with Tampering with Records for failing to properly file a federal tax return?

**AUTHORITIES**

**Statutes**

Ohio Revised Code 2901.11 .....	33, 34
Ohio Revised Code 2913.01 .....	34
Ohio Revised Code 2913.42 .....	34

SEVENTH ASSIGNMENT OF ERROR.....35

The trial court erred by failing to merge the offenses underlying the conviction of Engaging in Pattern of Corrupt Activity, R.C. 2923.32(A)(1)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

When a defendant is convicted of individual offenses that are specifically listed as over acts for the charge of Engaging in Pattern of Corrupt Activity, R.C. 2923.32(A)(1)

**AUTHORITIES**

**Cases**

*State v. Miranda*,  
138 Ohio St 3d 184, 2014-Ohio-451, 5 N.E.3d 603 ..... 35

**Statutes**

Ohio Revised Code 2941.25 ..... 35

CONCLUSION.....35

SERVICE.....36

## ASSIGNMENTS OF ERROR

### FIRST ASSIGNMENT OF ERROR

The evidence is insufficient to convict Infante of Engaging in a Pattern of Corrupt Activity, R.C. 2923.32(A)(1)

### SECOND ASSIGNMENT OF ERROR

The evidence is insufficient to sustain a conviction of Tampering With Records in violation of R.C. 2913.42

### THIRD ASSIGNMENT OF ERROR

The convictions of Tampering With Records, R.C. 2913.42, violate Ohio's prohibition of the use of general criminal law provisions over specific statutory prohibitions of a lesser degree

### FOURTH ASSIGNMENT OF ERROR

The trial court denied the appellant due process of law and a fair trial by allowing improper lay opinion testimony to be considered by the jury to determine if the appellant profited from a game of chance

### FIFTH ASSIGNMENT OF ERROR

The finding of guilt by the jury of R.C. 2923.31(A)(1) [sic], Theft in Office is violative of the Due Process Clause as the jury was not required to unanimously find the appellant guilty of each material element of the offense

### SIXTH ASSIGNMENT OF ERROR

The state lacked jurisdiction to charge the appellant for Tampering with Records, convictions based upon violations of federal tax reporting laws

### SEVENTH ASSIGNMENT OF ERROR

The trial court erred by failing to merge the offenses underlying the conviction of Engaging in Pattern of Corrupt Activity, R.C. 2923.32(A)(1)



## STATEMENT OF THE CASE

Defendant-Appellant Ralph Infante (“Appellant”) was indicted by a Trumbull County Grand Jury in May of 2017 on 41 separate counts of Tampering with Records, Gambling, Running a Gambling House, Possessing Criminal Tools, Soliciting Improper Compensation, Theft in Office, Having an Unlawful Interest in a Public Contract, Bribery, Engaging in a Pattern of Corrupt Activity, and Falsification.

The Appellant was arraigned on August 1, 2017 and entered a not guilty plea to all of the charges. On April, 23, 2018, the case proceeded to jury trial where the State of Ohio called the following witnesses:

Deane Hassman	FBI Special Agent	Vol III Page 413-463
Bruce Zoldan	Phantom Fireworks-Owner	Vol III Page 465-484
Paul Nick	Executive Director Ohio Ethics Commission	Vol III Page 490-536
John Moliterno	Pegasus Printer Group-part owner	Vol III Page 538-546
Joseph Infante	City of Niles-Foreman Light Department (Brother of Def.)	Vol III Page 550-560
Brian Paridon	City of Niles-laborer in the Water Department	Vol III Page 565-584
April Strickland	Forensic Audit Manager-State of Ohio Auditor	Vol IV Page 607-658
Benjamin Sunderlin	Metalica-Manager (Metal Scrap Yard)	Vol IV Page 659-669
Carmen Vivolo	Retired City of Niles-Parks & Rec Department	Vol IV Page 675-687
Joseph Dull	Retired City of Niles-Law Director	Vol IV Page 694-745
Charles Nader	Retired City of Niles-Auditor’s Office	Vol IV Page 747-795
Anthony Vigorito	City of Niles-Building Inspector	Vol V Page 797-865
Mark Hess	Retired City of Niles-Engineering Dept.(Grants & Development)	Vol V Page 866-884
Stephanie Ford	City of Niles-Utility Billing Manager	Vol V Page 892-924
John Norman	Retired City of Niles-Water Department (Meter Reader)	Vol V Page 925-941
Robert Marino	Retired City of Niles-Council At Large	Vol V Page 968-993
Gabriel Marchionte	Father-in-Law of Bonnie Marchionte (Defendant’s Secretary)	Vol V Page 968-993
Stephen Papalas	Retired City of Niles-Council At Large	Vol VI Page 998-1039
Joseph Calabria	GBS Document Imaging-Vice President	Vol VI Page 1040-1058
Robert Swauger	Retired City of Niles-Treasurer	Vol VI Page 1062-1078
Christopher O’Malley	City of Niles-Sewer Department (laborer)	Vol VI Page 1078-1086
Giovanna Merlo	Retired City of Niles-Auditor	Vol VI Page 1094-1124
Maurice Guarino	Retired City of Niles-Councilman	Vol VI Page 1125-1135
Jeannie Lee	Retired City of Niles-Light Department/Billings & Complaints	Vol VI Page 659-669
Joe Cella	City of Niles-Light Department	Vol VI Page 1181-1188
David DeChristofaro	City of Niles-Engineering Department (Karen DeChristofaro is sister-in-law)	Vol VI Page 1190-1239
Robert Dellimuti	Dilucia’s Banquet Room-Owner	Vol VII Page 1249-1252
Cara Yoder	Forensic Audit Manager-Ohio Auditor’s Office	Vol VII Page 1257-1333

Pete Kozup	City of Niles-Custodian	Vol VII Page 1341-1354
Karen DeChristofaro	City of Niles-Payroll Clerk	Vol VII Page 1356-1385
Michael Dobransky	Accountant- Ralph & Judy Infante	Vol VIII Page 1393-1420
Scott Shaffer	City of Niles-Water Department	Vol VIII Page 1422-1526
Chris Rudy	Investigator- State Auditor's Office	Vol VIII Page 1528-1623
Janeen Cesta	Vernon's Café-Owner	Vol IX Page 1624-1631
Chris Rudy	Investigator-State Auditor's Office	Vol IX Page 1631-1676
Terry Clay*	Retired City of Niles- Light Department	*Video Depo. Introduced
Neal Buccino*	Retired City of Niles-Safety Service Director	*Video Depo. Introduced
Denise Danielson*	ITAM-employee	*Video Depo. Introduced

The Appellant was charged and convicted on the following counts:

Count(s)	Charge	Offense Level	Statute	Original Count	Conviction
1-9	Tampering with Records	Third-degree felony	R.C. 2913.42	10-18	1-8
10-16	Tampering with Records-Tax	Third-degree felony	R.C. 2913.42	19-25	10, 11, 13, 14, 16
17-18	Gambling	First-degree misdemeanor	R.C. 2915.02	26-27	17-18
19-20	Operating a Gambling House	First-degree misdemeanor	R.C. 2915.03	28-29	19-20
21-22	Soliciting Improper Compensation	First-degree misdemeanor	R.C. 2921.43	34, 37	
23-24	Theft in Office	Fifth-degree felony	R.C. 2921.41	38-39	23-24
25	Unlawful Interest Public Contract	Fourth-degree felony	R.C. 2921.42	40	25
26-30	Bribery	Third-degree felony	R.C. 2921.02	41-45	
31	Engaging in a Pattern of Corrupt Activity	First-degree felony	R.C. 2923.22	46	31
50	Falsification	First-degree misdemeanor	R.C. 2921.13	50	50

On May 11, 2018, Appellant was sentenced to ten years for the EPCA conviction with concurrent terms for the remaining convictions. Appellant was also sentenced to a mandatory five year term of post-release control for the EPCA conviction with a three year term of post-release control on the remaining convictions. This appeal follows from those convictions and sentences.

## STATEMENT OF THE FACTS:

### Ralph Infante, Judy Infante & ITAM Summary:

Appellant and Judy Infante are husband and wife. Infante, Vol. IX, T.p. 1811. Appellant became involved in politics in the City of Niles when he was elected to a City Council at Large position in 1983. *Id.*, Vol IX, T.p. 1801-1802. Appellant served on Niles City Council for eight additional years before running for and being elected Mayor in 1991. *Id.*, Vol IX, T.p. 1802-1803. Appellant served as the Mayor of Niles for six additional terms until 2015 when he lost his re-election bid. *Id.*, Vol IX, T.p. 1804. While serving as Mayor, Appellant was also in charge of the Board of Control. As the Mayor of Niles, Appellant earned a salary over \$16,000.00. *Id.*, Vol X, T.p. 1881. Appellant was also appointed to the Board of Elections for four to six years and earned a monthly salary of \$1000.00. Exh. 5C, audio recorded interview of Appellant, 12/3/2015 at 26:41-26:57.

In 1984, Appellant and Judy Infante purchased a home located at 2101 Robbins Avenue in the City of Niles, County of Trumbull, State of Ohio. Infante, Vol IX, T.p. 1811. Appellant and Judy Infante moved into a residence located at 560 Rhodes Avenue and placed the Robbins Avenue home on the market. *Id.*, Vol IX, T.p. 1811. The Robbins home did not sell and in 2007, was offered on a land contract in an effort to sell the home. *Id.*, Vol IX, T.p. 1812. The Robbins home remained under land contract until approximately 2009 when the purchaser could not obtain a loan for full performance under the contract and the home reverted to a rental unit with the purchaser remaining as a tenant. *Id.*, Vol IX, T.p. 1812. The monthly rent for the unit was \$800.00. *Id.*

In 1985, Appellant and Judy Infante purchased a bar named JR's Lounge which was located on Route 422 in Weathersfield Township. *Id.*, Vol X, T.p. 1875. JR's Lounge would evolve into the Italian American War Veteran's Club ("ITAM"). *Id.*, Vol IX, T.p. 1807, 1808;

Vol X, T.p. 1875. Both Appellant and Judy owned, operated and were employed at the ITAM. *Id.*, Vol. IX, T.p. 1808, 1813; Vol. X, T.p. 1876, 1879, 1880; Exh. 20, 21 page 6. Both Appellant and Judy handled the money, receipts and were authorized signatories on the ITAM checking account. Exh. 5C, audio recorded interview of Appellant, 12/3/2015 at 35:00; 35:45-35:52. Neither Appellant or Judy maintained books, logs or ledgers for ITAM and “would just throw cash into the checking account to pay rent and taxes.” Exh. 5C, audio recorded interview of Appellant, 12/3/2015 at 40:17-40:22. Judy Infante was paid in cash every week from a drawer underneath the cash register. Exh. 5C, audio recorded interview of Appellant, 12/3/2015 at 41:45; 1:15:12. Besides rent and utilities which were paid by check and auto-pay, often other expenses were paid via cash. Exh. 5C, audio recorded Interview of Appellant, 12/3/2015 at 1:13:00-1:14:50.

ITAM served food and alcohol, conducted betting and had gambling machines. Exh. 5C, audio recorded interview of Appellant, 12/3/2015 at 33:21-36:57; Hassman, Vol III, T.p. 459. According to Appellant, for approximately thirty-two years ITAM never made money from the food, alcohol or gambling machines. Exh. 5C, audio recorded interview of Ralph Infante, 12/3/2015 at 47:39. ITAM ceased to operate and was eventually sold in January 2017. Infante, Vol IX, T.p. 1808; Vol X, T.p. 1876.

**The problem of ITAM operating as a front for licit and illicit activity:**

(a) Within the scope of this enterprise and to further its affairs, Ralph Infante did, being the owner having custody, control and supervision of ITAM, use the premises for gambling and as a gambling house.

(b) Within the scope of this enterprise and to further its affairs, Ralph Infante, for profit, collected money on sporting events in the amount of thousands of dollars from persons so that persons could bet on sporting events from 1987 to February 2016.

Bank records for ITAM were examined for the years 2009 through 2016 by Cara Yoder, a forensic audit manager with the Ohio Auditor’s Office as part of a Public Integrity Assurance

Team. Yoder, Vol VII, T.p. 1269; Exh. 3J6. ITAM financial records examined included all banking statements including check images, deposit images and banking activity. *Id.*, Vol VII, T.p. 1270; Exh. 3J6. Bank records for the personal accounts of Appellant and Judy Infante were examined for December 2012, and years 2013 and 2014 by Yoder. *Id.*, Vol VII, T.p. 1275; Exh. 3J7. Bank records for the personal accounts of Appellant and Judy Infante were examined from July 2007 through July 2014 by April Strickland, another forensic audit manager with the Ohio Auditor's Office. Strickland, Vol IV, T.p. 618; Yoder, Vol VII, T.p. 1275; Exh. 3J7. There were unaccounted cash deposits of \$103,604.55 deposited into the personal accounts of Appellant and Judy Infante. Strickland, Vol IV, T.p. 622; Rudy, Vol X, T.p. 1957; Exh. 3L.

Multiple transfers were made between the ITAM bank account and the personal bank account of Appellant and Judy Infante. Yoder, Vol VII, T.p. 1272; Exh. 3J6, 3J7. Yoder and Strickland noted that monies were moving consistently out of the ITAM bank account into the personal account of Appellant and Judy Infante and then back into the ITAM bank account. *Id.*, Vol VI, T.p. 1280.

Gambling took place at ITAM. The Gambling was operated by Appellant. Exh. 22 Video Deposition of Neal Buccino, page 59. Gambling records were recovered by Investigator Chris Rudy and examined by forensic account manager Cara Yoder. Yoder, Vol VII, T.p. 1311-1315; Exh. 9A- 9D, 9G- 9J, 9M, 9O, 9V, 9W, 9W(1), 9X, 9Y, BB, BB(1), CC, DD, EE, FF, HH, HH(1), II, JJ, MM, QQ, RR, UU- ZZ, BBB-FFF(6), HHH, JJJ-KKK(10), MMM- MMM(7), NNN, OOO, TTT, VVV; Rudy, Vol VIII, T.p. 1588-1592; Exh. 12M37CC, 12M37HH, 12M37JJ, 12M37KK, 12M37EE, 9XXX, 12M22, XXX, 9XXX1-9XXX9, 9XX. The records are in the form of writings on charts and envelopes.

Denise Danielson, a long-term employee of ITAM testified via video deposition, that the majority of the aforementioned exhibits were authored and contained the handwritten notes of

Appellant. Exh. 20, 21. In his own handwriting, Appellant kept track of income coming from betting on sports and the amount of money he was paying out on \$10.00 bets to \$300.00 bets on sporting events. Daniels, who worked at ITAM for approximately 12 years for 20-25 hours a week, testified in her deposition that during the annual Super Bowls customers participated in block gambling pools to bet on different aspects of the game, such as quarter scores, half time scores and final scores. Exh. 20, 21. Bets ranged from as low as \$30.00 per block up to \$300.00 per block. Exh. 20, 21.

Examining the envelopes and boards in the handwriting of Appellant, forensic account manager Cara Yoder was able to subtract what was paid out to the winners and what Infante received in profit over and above the “payouts.” Yoder, Vol VI, T.p. 1287-1289. From 1992 through 2015, Appellant profited approximately \$59,620.00 for the annual Super Bowl event alone. *Id.*, Vol VI, T.p. 1290, 1295-1300.

**The problem of the cash and/or property given to Ralph Infante at ITAM:**

Scott Shaffer testified at trial that in the Spring of 2012, he gave an envelope containing \$3000.00 in cash to Appellant at ITAM. Shaffer, Vol VIII, T.p. 1455. Shaffer testified at trial that in 2014 he “went down to HH Greg’s and bought a flat screen TV. And I went down to either Home Depot or Lowe’s and bought the air conditioner.” *Id.*, Vol VIII, T.p. 1459. He proceeded to build a shelf with his brother Rich and with the help of Pete Kozup installed the flat screen TV and air conditioner at ITAM. *Id.*, Vol. VIII, T.p. 1460. Shaffer spent “a little less than \$2000.00 for the TV, shelf material and air conditioner.” *Id.*, Vol VIII, T.p. 1464. Appellant admitted that Shaffer gave him the TV, built the shelf and installed the air conditioner. Infante, Vol X, T.p. 1956. Shaffer testified at trial that in the Spring of 2015, he gave an envelope to Appellant at ITAM, containing \$1500.00 in cash. Shaffer, Vol VIII, T.p. 1470-1472.

Despite receiving the envelopes with cash, the flat screen TV, shelving unit and air conditioner, Appellant failed to report the items as sources of income on the 2012, 2014 and 2015 Financial Disclosure Statement. Exh. 1F, IH, 1K. Neither Appellant nor Judy Infante reported the aforementioned items as sources of income on their taxes for years 2012 and 2014.

**The problem of failure to disclose on financial disclosure forms & tax forms:**

(a) Monies and gifts were received by Ralph Infante and Judy Infante and were hidden from regulatory agencies and taxing authorities.

- (1) Ohio State University Football National Championship Bowl tickets given to Ralph and Judy Infante:

During the course of his investigation, FBI Special Agent Deane Hassman of Youngstown recorded two interviews with Appellant at the City of Niles Mayor's Office. Hassman, Vol III, T.p. 430; Exh. 1A1,5C. On several occasions in the May 19, 2009 recorded interview, Appellant lied about how he received two tickets to the January 8, 2007 National College Championship football game between the Ohio State Buckeyes and the Florida Gators. Ex. 5A. Appellant initially stated that he never takes gifts from anyone: "I'm pretty good at that." Exh. 5A. Later in the 2009 recording, Appellant admitted that Anthony Caffaro Sr. and his son, Anthony Caffaro Jr. may have purchased tickets to his re-election campaign's \$10.00 chicken roast, but otherwise he had not accepted anything from the Cafaros or Cafaro Company. Hassman, Vol III, T.p. 420, Exh. 5A at 16:06-18:15. After repeated questioning, Appellant recalled asking Anthony Cafaro Jr. if he could obtain tickets for the 2007 National College Championship game. Exh. 5A. When questioned by Agent Hassman whether he was given the tickets by Cafaro, Appellant initially denied the gift, but later changed his statement and admitted that "I think he just gave them to us." Hassman, Vol III, T.p. 423; Exh. 1A1. Agent Hassman further testified at trial that: "after the initial denials about no gifts, no games, no tickets, then the following information largely corroborated that he received game tickets, that they were in the

loge which would be like an upper level box area of the stadium, that he did not pay for them. He offered to pay but never did. Has no recollection of paying. And that he did not list them as gifts on the financial disclosure form.” *Id.*, Vol III, T.p. 423; Exh. 1A1.

In the follow-up interview that took place on December 3, 2015, Appellant contradicted his statements in the previous 2009 interview and claimed that his wife Judy Infante purchased the tickets when they were in Arizona. *Id.*, Vol III, T.p. 430, 433; Exh. 5C at 26:13. “My wife brought them for me for my Birthday.” Appellant further stated that she paid for the tickets in the lobby of the Phoenician Hotel. Exh. 5C.

Bruce Zoldan, president and owner of Phantom Fireworks testified that he spent \$75,000.00 for tickets and a loge to the 2007 National Championship game for himself, Anthony Cafaro, Sr. and his family and friends. Zoldan, Vol III, T.p. 468, 470, 477, 481; Exh. 4A, 4B, 4G; Vol. III, Tr. 429. Zoldan further testified that the bulk of the tickets were for Cafaro, Sr. and his entourage. *Id.*, Vol III, T.p. 472. Zoldan testified that Cafaro reimbursed Zoldan \$43,421.00 for the costs of the tickets he purchased. *Id.*, Vol III, T.p. 429, 478; Exh. 4A; Hassman, Vol. III, T.p. 429. Special Agent Hassman estimated the loge seat tickets had a value of \$4000.00 each. *Id.*

Paul Nick, Executive Director of the Ohio Ethics Commission, testified that Appellant did not report receiving gifts on his calendar year 2007 Financial Disclosure Form filed on February 29, 2008. Nick, Vol III, T.p. 501; Exh. 1A1. “No. In fact, there’s a box that says, ‘I have no sources of gifts that I am required to list.’ And that box was X’d on this form.” *Id.*, Vol III, T.p. 501.

Appellant, when confronted during the 2009 interview with his 2007 Financial Disclosure Form admitted that he “didn’t” disclose any gifts. Hassman, Vol III, T.p. 422; Exh. 1A1 at



36:14. At trial, Appellant admitted prior to the calendar year 2015 Financial Disclosure Form he had *not* claimed any gifts. Infante, Vol IX, T.p. 1842.

- (2) Unaccounted cash deposits into the personal accounts of Ralph and Judy Infante not reported:

Strickland found unaccounted cash deposits of \$103,604.55 deposited into the personal accounts of Appellant and Judy Infante. Strickland, Vol IV, T.p. 643; Yoder, Vol VII, T.p. 1280, 1294-1306; Ex. 3I, 10B Rudy, Vol X, T.p. 1957; Exh. 3L. Special Agent Hassman questioned Appellant during the 2015 follow-up interview regarding the “repeated and regular and routine cash deposits to Ralph and Judy’s personal bank accounts.” Hassman, Vol III, T.p. 433; Exh. 5C at 56:13; Rudy, Vol VIII, T.p. 1539-1540; Exh. 3L.

Paul Nick testified that the only sources of income reported on the Financial Disclosure Forms by Appellant for years 2009-2014 were the Mayor’s salary, the Board of Elections’ salary and PERS, when he began to draw from his retirement. Nick, Vol III, T.p. 509, 514-16, 518; Exh.1A1, 1B, 1C1, 1D1, 1E, 1F, 1G. Further, Nick testified there were no gambling profits listed and that “[i]f somebody had received income from gambling, that would be considered income. And that would be required to be disclosed....” *Id.*, Vol III, T.p. 505; Exh. 1A1, 1B;,1C1, 1D1, 1E, 1F, 1G.

- (3) ITAM was not reported as a business nor income reported therefrom:

Paul Nick testified that the Financial Disclosure Form “requires...you have to list the names under which you or members of your immediate family listed...do business.” *Id.*, Vol III, T.p. 502. Nick specifically testified that if a bar was a business that was owned by the filer then they would have to disclose the name of the business. *Id.*, Vol III, T.p. 502. Further, Nick testified if a filer received income from gambling, that would be considered income and must be

reported. *Id.*, Vol III, T.p. 505. No gambling income was ever reported on Appellant's Financial Disclosure forms. Exh. 1A1, 1B, 1C1, 1D1, 1E, 1F, 1G.

At trial, Appellant admitted that he owned and operated ITAM since approximately 1985. Infante, Vol X, T.p. 1875-1876. Cara Yoder testified that her examination of the ITAM financial records and the personal financial records of Appellant and Judy Infante revealed multiple transfers made between the ITAM bank account and the personal bank account of Appellant and Judy Infante. Yoder, Vol VII, T.p. 1272; Exh. 3J6, 3J7. The total amount coming out of the ITAM account going into Appellant and Judy Infante's personal accounts was \$16,215.00. *Id.*, Vol VII, T.p. 1280. The total amount coming out of Appellant and Judy Infante's personal account into the ITAM account was \$11,640.55. *Id.*, Vol VII, T.p. 1280.

Despite owning and operating ITAM since 1985, Appellant admitted that he did not report ITAM as a business that he owned or operated on his 2009, 2010, 2011, 2012, 2013 and 2014 Financial Disclosure Forms. Infante, Vol X, T.p. 1878-1882; Exh.1A1, 1B, 1C1, 1D1, 1E, 1F, 1G.

Ironically, ITAM was never listed as a business on Appellant's Financial Disclosure Statements until calendar year 2015, signed 05/11/2016 and filed on 05/13/2016. Nick, Vol III, T.p. 519-520; Exh. 1K. Said 2015 Financial Disclosure Statement was the first statement filed *after* the follow-up interview of Special Agent Deane Hassman. *Id.*, Vol III, T.p. 519-520; Exh. 1K.

Accountant Michael Dobransky testified that he prepared the federal, state and local forms for years 2009-2013 based on information provided by Appellant and Judy Infante. Dobransky, Vol VIII, T.p. 1393, 1395, 1397; Exh. 11A2-11A6. The *only* source of income reported by Appellant and Judy Infante for tax years 2009 through 2013 was W-2 wage income; in 2012 pension and annuity income; and a tax refund received in 2012. *Id.*, Vol III, T.p. 1398-

1408; Exh. 11A2-11A6. Neither tip income nor gambling income was reported by Appellant or Judy Infante for tax years 2009-2013. *Id.*, Vol VIII, T.p. 1398-1408; Exh. 11A2-11A6.

(4) Gift Cards, gratis work and annual \$1000.00 Dechristofaro cash not reported:

Scott Shaffer testified at trial that he gave two \$100.00 gift certificates for Vernon's Café to Appellant in 2012 and 2014. Shaffer, Vol VIII, T.p. 1476. Two gift certificates for Vernon's Café were seized from the residence of Appellant. Rudy, Vol IX, Tr. 1658. Janeen Cesta, owner of Vernon's Café testified at trial that two gift cards were purchased by Scott Shaffer. Cesta, Vol IX, T.p. 1627-1630; Exh. 8A, 8C1, 8C2.

Scott Shaffer testified at trial that Appellant requested that he plow snow at his personal residence, ITAM and Appellant's mother's residence. Shaffer, Vol VIII, T.p. 1474-1475. Shaffer testified that he plowed "every time it needed plowed" from 2010 through 2014. *Id.*, Vol VIII, T.p. 1474. Shaffer further testified that he "never charged" nor did Appellant offer to pay. *Id.*, Vol VIII, T.p. 1474-1475.

Karen Dechristofaro, payroll clerk for the City of Niles testified that every December, commencing 2009 through 2014, she presented the Appellant with an envelope or Christmas card containing \$1000.00 cash in denominations of 50's and 100's, allegedly for his grandchildren. Dechristofaro, Vol VII, T.p. 1365-1370. The Appellant testified that he received cash from Karen Dechristofaro however denied putting the monies in his bank account. Infante, Vol IX. T.p. 1819. Strickland reviewed the Charter One financial statements of the Appellant from July 2007 - July 18, 2014. Strickland, Vol IV, T.p. 613, 618; Exh. 3J7, 3L. Strickland and Rudy testified at Trial to the following unaccounted December cash deposits: (1) \$1000.00 December 16, 2009; (2) \$1100 December 2, 2010; (3) \$1100.00 December 16, 2011; (4) \$540.00 December 17, 2013. *Id.*, Vol IV, T.p. 631, 632, 635, 641; Rudy, Vol VIII, T.p. 1572-1573; Exh. 3J7, 3L. Paul Nick testified that the receipt of the \$1000.00 in cash would have to be disclosed

on the Financial Disclosure Forms and that the purpose of the gift is irrelevant for disclosure purposes. Nick, Vol III, T.p. 505.

At trial, Appellant admitted prior to the calendar year 2015 Financial Disclosure Form he had *not* claimed any gifts on his Financial Disclosure forms. Infante, Vol IX, T.p. 1842.

Accountant Michael Dobransky testified that no gifts were listed as sources of income by Appellant or Judy Infante for their tax returns from 2009-2013. Dobransky, Vol III, T.p. 1398-1408; Exh. 11A2-11A6.

(5) Land Contract & Rental Payments not reported:

Appellant testified at trial that Judy and Ralph moved into a residence located on 560 Rhodes Avenue and placed the Robbins Avenue home on the market. Infante, Vol IX, T.p. 1811. Appellant testified that the Robbins home did not sell and in 2007, was offered on a land contract in an effort to sell the home. *Id.*, Vol IX, T.p. 1812. Appellant further testified that the Robbins home remained under land contract until approximately 2009 when the purchaser could not obtain a loan for full performance under the contract and the home reverted to a rental unit with the purchaser remaining as a tenant. *Id.* The monthly rent for the unit was \$800.00. *Id.*

Despite Appellant's testimony, there were *never* any disclosures made in his Financial Disclosure Statements of land contract payments, a debtor, or rent payments. Exh.1A1, 1B, 1C1, 1D1, 1E, 1F, 1G.

Despite Appellant's testimony, there is no reporting of schedule E rental income or a form 4562 until tax year 2012. Further, Accountant Michael Dobransky testified at trial that he had no knowledge that the Robbins property was used for rental income prior to year 2012, when the property was placed into service. Dobransky, Vol III, T.p. 1420; Exh. 11A3-11A6.

**Ralph Infante while a public official used the influence of his office to commit theft in office:**

(a) Ralph Infante while Mayor and using the influence of his office did commit the unlawful disposal of city property.

(b) Ralph Infante while Mayor and using the influence of his office received cash from the sale of city scrap and failed to remit the proceeds to the City Treasurer.

(c) Ralph Infante while Mayor and using the influence of his office permitted city of Niles employees to receive cash for the sale of city property then permitted the spending of such funds without remitting said funds to the City of Niles Auditor.

Scrap metal is generated in the process of removing and installing water lines, Shaffer, Vol VIII, T.p. 1479. The scrap that is generated includes cast iron pipe, lead from lead services going from the main water line to the curb box, aluminum from broken equipment, brass and copper from copper water lines. *Id.* The scrap metal that was removed by Niles Water Department employees was collected on the back porch of the Niles Water Department where it would be separated and then taken to the Burton Street bailer, known as Metalico. *Id.*, Vol VIII, T.p. 1480. Metalico would weigh the materials by compound source and then a ticket would be generated for cash. Sunderlin, Vol IV, T.p. 660. Any weight that generated a ticket in excess of \$500.00 would be paid in cash. *Id.* Water Department Employee Scott Shaffer was known to management at Metalico for bringing in scrap for the City of Niles. *Id.*, Vol IV, T.p. 661. Shaffer would arrive at Metalico in a City of Niles vehicle. *Id.* Scrap would be removed from the City of Niles vehicle, the nonferrous, copper and aluminum would be weighed and a ticket issued to Shaffer for the Metalico cashier. *Id.*, Vol IV, T.p. 662; Vol IV Tr. 668; Shaffer, Vol VIII T.p. 1513; Exh. 12B2B & 12B2D. From October 1, 2011 through August 22, 2014 Shaffer made thirty-four trips to Metalico for a total of \$3292.18. Sunderlin, Vol IV, T.p. 672-673; Exh. 12B2B ,12B2D. Thirty-three of those transactions/loads were paid in cash to Shaffer, one transaction/load was paid by check to Shaffer in Shaffer's name. *Id.*, Vol IV, T.p. 672; Exh. 12B2D. Shaffer would then bring the cash back in a Ziploc bag with the receipt and give it to

Mayor Infante at the Niles City Hall as ordered by Appellant. Shaffer, Vol VII, T.p. 1481, 1484-1485.

City Water Department employee Brian Paridon testified that he also sold recycled scrap at Niles Iron & Metal and Metalico. Paridon, Vol III, T.p. 578. Paridon would give the cash he received from the scrap yards to Shaffer who took the cash to Mayor Infante at City Hall. *Id.*, Vol III, T.p. 580; Shaffer, Vol VIII, T.p. 1484.

The Niles Lighting Department and other utility departments also generated scrap metals which were sorted and taken to Metalico. Sunderlin, Vol IV, T.p. 662-664; Exh. 12B2, 12B2A. In fact, Chris Rudy an investigator with the State of Ohio's Auditor's Office, testified that his investigation revealed that "the water department, the light department the park and recreation, and the street" departments sold city owned scrap for cash." Rudy, Vol IX, T.p. 1672. Further Rudy testified that there were 20 employees and four to five City departments involved. *Id.*

The Niles City Treasurer never received any cash that was generated from the sale of city owned recycled scrap metal to Metalico. Nader, Vol IV, T.p. 759. In fact, receipts generated from Metalico did not match records with the Auditor's office. Merlo, Vol VI, T.p. 1098; Vol VI Tr. 1120. Per the Auditor, cash proceeds generated by scrap metal sales should not be utilized for departmental Christmas parties as the monies generated *are* City property. Nader Vol. IV, T.p. 759-760. Appellant gave some city monies generated from scrap sales of city property to the Niles Water Department to be utilized for a department Christmas party. Paridon, Vol III, T.p. 580.

Appellant committed theft in office when he took monies from the sale of city property to Metalico without the consent of the city council and did not deposit the cash proceeds into any of the office's accounts. When Appellant took the cash proceeds derived from the sale of city property he exerted control over this cash beyond the express or implied consent of the owner,

City of Niles, and thereby committed a theft offense. But for Appellant's position as Mayor, he would not have had access to the monies generated from the sale of property owned by the City of Niles, nor would he have had the means to hide the transactions. Thus, Appellant used his office to aid the commission of the thefts.

(d) Ralph Infante while Mayor and using the influence of his office provided free city property including water, city employee services, and other city property to a private company in Niles, Ohio without authority and/or City Council authority.

(1) Eastwood (Cafaro) Field-Free Ballfield Water:

Eastwood Field is a minor league baseball stadium located in Niles, Ohio and is the home of the Mahoning Valley Scrappers a Cleveland Indians affiliate in the New-York Penn League. From 1999-2003, Eastwood Field was known as Cafaro Field, named after William M. Cafaro, founder of the Cafaro Company real estate development company. The owner of the field is the City of Niles. The operator of the field is Cafaro Company.

John Norman, an employee of the Niles meter department, testified at trial that he would read electric and water meters along a set monthly route in the City of Niles. Norman, Vol V, T.p. 926. Norman would utilize a gun that would read the meters as he performed his monthly route. Exh. 17. The water meter is a little box and Norman would open the lid of the meter box, plug the reader into the box and a reading would appear on the screen. Norman, Vol V, T.p. 928. When he was done with his route for the day, the device would "say zero unread accounts." *Id.* If Norman accidentally skipped a meter box, that would show up on the meter reader device as an unread meter. *Id.*, Vol V, T.p. 929. While reading meters at Eastwood Field, Norman discovered that the meter feeding the ball fields was not in the Niles water meter system. *Id.* "The whole thing wasn't on—in the system. It wasn't being billed." *Id.*, Vol V, T.p. 941. Norman reported the issue to Ted Telego, the utility billing manager. *Id.*, Vol V, T.p. 934. When he returned to the ball field the next month for meter reading, Norman discovered the

meter still was not programmed into his gun. *Id.*, Vol V, T.p. 933. Norman repeatedly reported the issue however the problem persisted for another three to four months. *Id.*

Stephanie Ford replaced Ted Telego in 2015 as the Niles utility billing manager. Ford, Vol V, T.p. 903. She testified to the account history for the Eastwood Field. *Id.*, Vol V, T.p. 909; Exh. 12A67. Ford testified that “[t]he location number on the account is linked to a particular address or building that never changes.” Ford testified that there were two accounts for the stadium office/clubhouse. *Id.*, Vol V, T.p. 908; Exh 12A68, 12A67. Ford further testified that there was another account for the second base. *Id.*, Vol V, T.p. 909-910; Exh 12A70 The second base account is the meter for the sprinkler system for the field. *Id.*, Vol V, T.p. 909. From January 19, 2010 to October 11, 2014, Eastwood Field had not been billed for watering the ballfields. *Id.*, Vol V, T.p. 910; Exh. 12A70. Billing for the “second base” and the sprinkler system did not commence until January of 2015. *Id.*, Vol V, T.p. 911.

Niles billing clerk Jeanne Lee testified that she discovered hundreds of billing mistakes when Niles was switching to a new billing system. She started to keep a log of every account with errors. Lee, Vol VI, T.p. 1144; Exh. 18. The most notable account was brought to her attention in 2012 by Norman and involved Eastwood Field and the meter watering the field. *Id.*, Vol VI, T.p 1142-1143. Lee reported the problem with the meter not being hooked up to the system to several people, including Appellant. *Id.*, Vol VI, T.p. 114, 1147, 1151. Lee estimated that going back all the years the meter account had not been billed anywhere from \$60,000.00 to \$65,000.00. *Id.*, Vol VI, T.p. 1159.

(2) Eastwood (Cafaro) Mall-Free City Employee Services:

Eastwood Mall is an indoor shopping center located in Niles, Ohio that originally opened in 1969. The developer and owner is the Cafaro Company. Eastwood Mall construction began



on a Residence Inn by Marriott in 2012. In late 2016, Cafaro Management opened their main office on site, along with a new Hampton Inn & Suites.

Appellant ordered the Niles City Water Department employees to perform work for free on private property, the Eastwood Mall complex located in the city of Niles costing the city of Niles thousands of dollars in overtime and other charges for work that should have been done by the property owner and paid for by the property owner. Paridon, Vol III, T.p. 598-600. Although the water department billed other private property owners for work performed on private property, the owners of the complex were *never* billed for services rendered because “he was a big property guy...he was a bigwig when it came to property.” *Id.*, Vol III, T.p. 599-600.

(3) Eastwood (Cafaro) Mall Free Fire Hydrants:

Appellant called and led a meeting at City Hall attended by all the City of Niles foremen and supervisors. The purpose of that meeting regarded the building of a hotel located next to Eastwood Mall, and the departmental heads were specifically asked by Appellant what assistance they could give to help the property owner. *Id.*, Vol III, T.p. 575-576; Hess, Vol V, T.p. 874-875. As a result of this meeting, city property, in the form of fire hydrants valued at \$3000.00 were taken to the private contractor to be utilized on private property for free. Paridon, Vol III, T.p. 576-57.; Hess, Vol V, T.p. 874-875.

(e) Ralph Infante while Mayor and using the influence of his office permitted the use of city property for a private purpose by city employees including use of city owned vehicles, use of city computers for campaign purposes and landscaping work at a former city councilman’s house when he was a sitting councilman:

Shaffer testified that he would utilize city vehicles for private use. Shaffer, Vol VII, T.p. 1489-1490. This included landscape work for retired councilman Reggie Geneincola. *Id.* Shaffer testified that Appellant had knowledge and told Shaffer “[d]on’t wreck the truck.” *Id.*, Vol VII, T.p.1492-1494.

Chris Rudy testified that the Mayor's computer, his secretary's computer and the city server were seized and or searched. Rudy, Vol IX, T.p. 1535. When a copy of Bonnie Marchionte's hard drive was examined it revealed a treasure trove of correspondence and documents regarding Mayor Infante's campaigns. *Id.*, Vol IX, T.p. 1633-1635. Maurice Guarino testified that he would go to the Mayor's office, pick up a voter signature petition and circulate the petition to City employees during City hours. Guarino, Vol VI, T.p. 1133-1135.

(f) Ralph Infante while Mayor and using the influence of his office and other uses and/or depriving the City of Niles of money by waiving fees when he had no authority.

Law Director Joseph Dull testified regarding building permit fees which are "fees that the city charges for different projects." Dull, Vol IV, T.p. 704. Usually it's a construction project or remodeling project. *Id.* "It's based on the value of the project itself, and the fees go to help operate the building department." *Id.* The City Council is the only political entity that has authority to waive fees. *Id.*

Auditor Charles Nader testified that he became aware of a request by Cafaro Company to have the city waive fees when they were going to relocate their corporate offices to Niles. Nader, Vol IV, T.p. 787. Other city officials complained to Nader that the fees should not be waived; however the Mayor was in favor of waiving the fees. *Id.*

The three voting members of the Niles Board of Control are the Mayor, the service director and the safety director. Dull, Vol IV, T.p. 703; Exh 22, Video Deposition of Neal Buccino, page 9. Appellant, as chairman of the Board of Control voted to and spearheaded the waiving of building fees for a local company (Cafaro) without authority or consent of City Council. Dull, Vol IV, T.p. 704; Exh. 22 Video Deposition of Neal Buccino, page 10. Project fees were waived for the Cafaro Offices, the Marriott Hotel and the Banquet Center. Vigorito, Vol V, T.p. 803.

- (g) Ralph Infante while Mayor and using the influence of his office to orchestrate the Pegasus contract for the benefit of a friend and to the detriment of GBS, an alternative bidder:

Niles city councilman Steve Papalas testified that he was approached by Appellant, and that Appellant expressed that the city could save money if a private contractor was hired to bill for city services. Papalas, Vol VI, T.p. 1002-1003. Papalas noted that the city already had employees that performed that function however, the “mayor felt we could save money by going to a private contractor, a private entity.” *Id.*, Vol VI, T.p. 1003. Papalas “never believed that we could save money by doing that.” *Id.*, Vol VI, T.p. 1003, 1005. Despite Papalas’ reservations, Appellant brought this to the attention of City Council and Council passed an emergency ordinance that a bid could be put out for the billing and printing services. *Id.*, Vol VI, T.p. 1003. The ordinance that was passed by council was *only* to put out a request for bid *not* authority to accept a bid. *Id.*, Vol VI, T.p. 1008. Papalas testified that council specifically chose to write the ordinance limiting the action to requesting bids and *not* to enter into contract. *Id.* Thereafter, Papalas became aware that a contract had been awarded to Pegasus despite council not putting language into the ordinance to proceed with contract on the outsourcing of the billing and printing services. *Id.*, Vol VI, T.p. 1010. Papalas confronted Tom Telego about the contract and testified at trial that Tom was not happy about the situation. *Id.* Papalas confronted the Mayor and demanded to know why the city had contracted with Pegasus without council approval and without ordinance. *Id.*, Vol VI, T.p. 1012. Papalas also demanded to see the bids, which Appellant could not locate. *Id.*

Pegasus Printing was a printing group that did large and small scale printing throughout a four state region. Moliterno, Vol III, T.p. 538. It was founded by Tim Cearfoss, John Moliterno, Urban Olmi and minority partner Thomas Harwood. *Id.*, Vol III, T.p. 539. Tom Harwood is on

the Civil Service Commission within the City of Niles and was also the sales representative for Pegasus. Papalas, Vol VI, T.p. 1014.

Joseph Calabria, Vice President of GBS printing testified at trial the request for proposal put out by Niles was unusual due to its vagueness and no pre-bid meeting. Calabria, Vol IV, T.p. 1046-1049; 1053-1055. Nonetheless, GBS submitted a proposal that reflected different options that GBS could perform for Niles at different price points. *Id.*, Vol IV, T.p. 1046-1049. When examining the price comparison reflected in Exhibit 12A10 Calabria found that the cost comparison utilized by the City did not reflect a fair printing cost comparison between Pegasus and GBS. *Id.* The price the City used in the alleged comparison included an option for GBS. *Id.* When performing a like comparison between the Pegasus bid and the GBS bid for the same work, the GBS bid was lower than the Pegasus bid *Id.*, Vol IV, T.p. 1057.

(h) Ralph Infante while Mayor and using the influence of his office to orchestrate the rehiring of his brother with preferential employment terms:

Joe Infante is Appellant's brother. Joseph Infante, Vol III, T.p. 550-551; Exh 22, Video Deposition of Neal Buccino, page 30. Appellant hired/rehired his brother back after Joe Infante had retired as an hourly employee. Exh. 12C1. Ralph Infante signed an agreement agreeing to rehire his brother Joseph after Joseph had retired and further provided him with overtime pay based upon a rate higher than Joe Infante's normal rate of pay. Joseph Infante, Vol III, T.p. 555-556, 558-559; Exh 22, Deposition of Neal Buccino, page 35.

Nader discovered the overtime pay issue. Nader, Vol IV, T.p. 769. Joe Infante's overtime rate of pay was more than his regular rate of pay and Charles Nader had never seen that before with any of the employees employed by the City of Niles. *Id.* Nader demanded an explanation from Mayor Infante regarding this anomaly. *Id.*, Vol IV, T.p. 770. Appellant produced an agreement dated January 2, 2013 setting forth an agreed overtime pay rate for Joe

Infante signed by the Mayor, Safety Service Director Neil Buccino and Joe Infante. *Id.*, Vol IV, T.p. 770-771. Nader “didn’t think that one person should be...compensated differently than other people.” *Id.*, Vol IV, T.p. 771.

## LAW AND ARGUMENT

### Sufficiency Standard:

A challenge to the sufficiency of the evidence “tests whether the state’s case is legally adequate to satisfy the requirement that it contain prima facia evidence of all elements of the charged offense.” *State v. Dennison*, 4<sup>th</sup> Dist. Washington No. 06CA48, 2007-Ohio-4623, ¶10. The reviewing court determines whether “after reviewing 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.E.2d 560 (1979); *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E. 2d 492 (1991), at paragraph two of the syllabus, *see also State v. Maxwell*, 139 Ohio St. 3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶146, quoting *Jenks*, 61 Ohio St. 3d at syl. 2.

A sufficiency assignment of error is rooted in “a test of legal adequacy, rather than a test of rational persuasiveness.” *State v. Ogle*, 4<sup>th</sup> Dist. Nos. 11CA29, 11CA32, 12CA2, 12CA 11, 12CA12 & 12CA 19, 2013-Ohio-3240, ¶24, citing *Dennison* at ¶9; *State v. Koon*, 4<sup>th</sup> Dist. Hocking No. 15CA 17, 2016-Ohio-416, ¶17. “[T]he weight to be given evidence and the credibility of the witnesses are jury functions.” *State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E.2d 212 (1967), syllabus. Direct evidence, circumstantial evidence and testimonial evidence all have equal probative value, and a defendant may be convicted solely on the basis of circumstantial evidence. *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236 (1988). A reviewing court must “give full play to the responsibility of the trier of fact fairly to resolve conflicts in the 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*, 443 U.S. at 319. In performing its role a jury is free to believe all, some or none of any witness’s testimony. *State v. Kelly*, 4<sup>th</sup> Dist. No. Athens No. 15CA11, 2016-Ohio-8582, 77 N.E.3d 389, ¶48, see also *State v. Scott*, 4<sup>th</sup> Dist. Washington No. 15CA2, 2015-Ohio-4170, ¶25

## **FIRST ASSIGNMENT OF ERROR**

**The evidence is insufficient to convict Infante of Engaging in a Pattern of Corrupt Activity, R.C. 2923.32(A)(1)**

### **ISSUE PRESENTED FOR REVIEW AND ARGUMENT**

Does ‘an association-in-fact enterprise exist if the evidence fails to establish that the defendant’s actions are part of a continuing unit that functions with a “common purpose?”

An individual can be part of an enterprise that consists of himself, as an individual, and a business of which he is the president and sole shareholder. *State v. Clayton*, 2<sup>nd</sup> Dist. Montgomery No. 22937, 2009-Ohio-7040, ¶45, see also *State v. Silverman*, 10<sup>th</sup> Dist. Franklin No. 05AP-837, -838, & -839, 2006-Ohio-3826, ¶¶117-19 (attorney and his legal professional association were sufficiently distinct to constitute an “enterprise”); *Kelly*, 2016-Ohio-8582 at ¶88. The Supreme Court of Ohio has also noted that the enterprise definition is “remarkably open-ended.” *State v. Beverly*, 143 Ohio St.3d 258, 2015-Ohio-219, 37 N.E.3d 116, ¶8. “[T]he legislature defined this term broadly to encompass even a single individual.” *State v. Habash*, 9<sup>th</sup> Dist. Summit No. 17073, 1996 WL 37752, \*6 (Jan. 31, 1996); and see *State v. Kersey*, 2<sup>nd</sup> Dist. Miami No. 98 CA 13, 1999 WL 22652 \*4 (Jan. 22, 1999) (“the legislature’s definition \*\*\* makes it possible for an enterprise to be composed of a single person.”). In addition, the existence of an enterprise “can be established without proving that the enterprise is a structure

separate from a pattern of corrupt activity.” *Beverly*, at ¶13. Evidence proving the pattern of corrupt activity can also be used to prove that an enterprise existed. *Id.* at ¶7.

An enterprise had been shown by the State because Appellant had worked with or associated himself with his campaign, the office of Mayor, his wife, Scott Shaffer and ITAM. Appellant was convicted of engaging in a pattern of corrupt activity, a violation of R.C. 2923.32 (A)(1). The State provided sufficient evidence to convince a rational trier of fact that Appellant, being employed by or associated with an enterprise, conducted or participated in the affairs of the enterprise through a pattern of corrupt activity. The State presented ample evidence to establish that Appellant engaged in “corrupt activity” because it proved the underlying offenses, as detailed above, and demonstrated that Appellant received more than \$1,000.00 in proceeds from these offenses. R.C. 2923.31(I).

The State also presented ample evidence that these offenses constituted a “pattern of corrupt activity,” in other words, that Ralph Infante committed “two or more incidents of corrupt activity \*\*\*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).

The evidence presented by the State was sufficient for a rational trier of fact to find that Appellant committed multiple incidents of corrupt activity to steal money and property that belonged to the City of Niles, hid licit and illicit monies and gifts from regulatory agencies and taxing authorities and used the influence of his office to allow others to commit theft in office. Appellant, as an individual, was separate and distinct from ITAM, and from his position as the City of Niles Mayor.

The State presented evidence that Scott Shaffer participated in the enterprise by assisting Appellant in improperly converting city-owned property into cash. *See also Kelly*, 2016-Ohio-

8582 at ¶19 (Sheriff sold county property to a scrap yard, received cash from the scrap yard, and did not deposit the receipts into the county general fund). The State presented evidence that multiple city employees utilized city property for personal use and for the benefit of Appellant. The State presented evidence that Niles Water Department employees Brian Paridon, Chuck Drummond and Scott Shaffer were ordered by Appellant to perform work for free on private property at Eastwood Mall, costing the city of Niles thousands of dollars in overtime and other charges for work that should have been done by the property owner and paid for by the property owner. Paridon, Vol III, T.p. 573-575; Shaffer, Vol VII, T.p. 1477-1478;

The State presented evidence that Appellant led a meeting at City Hall attended by all the City of Niles department heads. Appellant specifically asked the departmental heads what concessions they could give to the Cafaros. Paridon, Vol III, T.p. 575-576; Hess, Vol. V, T.p. 874-875. As a result of this meeting, city property, in the form of fire hydrants valued at \$3000.00 were taken to the private contractor to be utilized on private property for free. Paridon, Vol III, T.p. 576-57.; Hess, Vol. V, T.p. 874-875.

Appellant acted through these entities when he engaged in a pattern of corrupt activity consisting of the theft in office, gambling, operating a gambling house, tampering with records and having an unlawful interest in a public contract.

The reviewing court assesses a sufficiency challenge “against the elements of the crime charged.” *Musacchio*, 136 S. Ct. at 715. The sufficiency review is “a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a ‘meaningful opportunity to defend’ against the charge against him and a jury finding of guilt ‘beyond a reasonable doubt.’” *Id.*, quoting *Jackson*, 443 U.S. at 314-15. Ralph Infante received this. The State provided sufficient evidence of each of the elements of Engaging in a Pattern of Corrupt Activity for a rational trier to fact to find him guilty of that crime by presenting evidence that



Appellant used his elected office and the business of ITAM to commit multiple acts of corrupt activity. This assignment lacks merit and should be overruled.

## **SECOND ASSIGNMENT OF ERROR**

**The evidence is insufficient to sustain a conviction of Tampering with Records in violation of R.C. 2913.42**

### **ISSUE PRESENTED FOR REVIEW AND ARGUMENT**

Does a material omission from a required ethics disclosure violate the Tampering with Records statute, which seems to require an affirmative action by the defendant?

Appellant claims that his failure to report required information does not meet the standard to support a finding the he violated R.C. 2913.42 due to ambiguity in the terms used in the statute. Appellant is mistaken. The statute states that “no person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall...falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record.” R.C. 2913.42(A)(1) Appellant’s reading of the statute requires one to adopt a definition of falsify restricted only to instances of placing inaccurate information. This narrow definition is contrary to the accepted usage of the word falsify. *Department of Public Safety v. Garrett*, 1995 Ohio App LEXIS 2861, \*7 (4<sup>th</sup> Dist. June 13, 1995) (“‘falsify’ has been defined as ‘to state untruthfully or alter in order to deceive.’”) (Emphasis added, citation omitted) It was established in the trial below that Appellant falsified his ethics reports and his federal tax returns by stating untruthfully the amount and sources of his income in order to deceive the Ohio Ethics Commission and the Internal Revenue Service. Nick, Vol III, T.p. 501-505, 507-510, 513-515, 517-518, 520-21; Dobransky, Vol VIII, T.p. 1398-1402, 1406, 1408; Ex. 1A1-1H. The Ohio Revised Code also makes it clear that Appellant’s action in omitting required information from his ethics reports and income tax returns constitutes Tampering with Records.

The statute prohibits a person with intent to defraud from tampering with records. “Defraud” is defined as “knowingly [obtaining], by deception, some benefit for oneself or another, or...knowingly [causing], by deception, some detriment to another.” R.C. 2913.01(B) Further, “deception” is defined as “knowingly deceiving another or causing another to be deceived by any false or misleading representation, **by withholding information**, by preventing another from acquiring information, or by any other conduct, act, or **omission** that creates, confirms, or perpetuates a false impression in another....” R.C. 2913.01(A) (emphasis added)

Appellant’s actions meet the statutory requirements set forth in R.C. 2913.01(A) and (B) and R.C. 2913.42(A)(1). By failing to disclose the sources and amounts of gifts he had received from others on the ethics reports provided to the Ohio Ethics Commission he withheld information from the Commission. Hassman, Vol III, T.p. 423; Infante, Vol IX, T.p. 1842, 1868. He also omitted gambling and rental income on his federal income tax returns. Yoder, Vol VII, T.p. 1280, 1294-1306; Dobransky, Vol VIII, T.p. 1398-1402, 1406, 1408; Infante, Vol IX, T.p. 1812; Ex. 11A2-11A6. Those actions constitute withholding information and omissions as defined in R.C. 2913.01(A). Courts in Ohio have upheld the convictions of defendants who failed to disclose required information. *State v. Burge*, Case No. 16CA010936, 2017-Ohio-5836, ¶36 (9<sup>th</sup> Dist.) (judge who failed to disclose his interest in a business and in real estate properly convicted of tampering with records); *State v. Luna*, 94 Ohio App 3d 653, 661 (6<sup>th</sup> Dist. 1994) (affirmed the conviction of a defendant who had failed to disclose that he was a vendee in a land contract in an application for assistance); *State v. McNeeley*, 48 Ohio App. 3d 73, 77 (8<sup>th</sup> Dist. 1988) (police officer who filed duty report that omitted his partner’s illegal activities while on duty was guilty of tampering with records).

Appellant appears to argue that his failure to report required information was a minor failure and as such does not rise to the level of a criminal offense. Even if it was true,

“omissions can serve as a basis for criminal liability if a person has a duty to act.” *Id.* As an elected official, Appellant had a duty to file ethics reports with the Ohio Ethics Commission. R.C. 102.02 At the trial of this matter, Paul Nick testified at length regarding Appellant’s financial disclosures. For the years 2007-2015, Appellant repeatedly failed to disclose interest in businesses and real estate as well as income received from gambling, cash gifts and other sources. Nick, Vol III, T.p. 502, 504, 505, 508, 514, 520-21; Strickland, Vol IV, T.p. 624-625, 630-632, 635, 641; Yoder, Vol VII, T.p. 1280, 1294-1306; Infante, Vol IX, T.p. 1879; Ex. 3I, 3J7, 3L, 10B. In addition to the above omissions, Appellant made affirmative statements on his financial disclosures regarding gifts received, income received, and businesses in which he had an interest. Hassman, Vol III, T.p. 423; Nick, Vol III, T.p. 501, 503, 507, 509, 510, 513-515, 517-518; Infante, Vol IX, T.p. 1842, 1870-1871, 1882, 1889; Ex. 1A-1H. Evidence presented at trial showed that, at the time Appellant was asserting to the Ohio Ethics Commission that he had no gifts, other income, or business interests to report, Appellant in fact had received over \$100,000 in gifts, gambling income, and income from businesses and rental property. Strickland, Vol IV, T.p. 643; Yoder, Vol VII, T.p. 1280, 1294-1306; Ex. 3I, 10B; Rudy, Vol X, T.p. 1957; Exh 3L. As shown by the cited testimony and exhibits, Appellant deliberately falsified his financial disclosures and federal income tax returns in order to hide his illegal activities and to avoid paying taxes on the income from those activities, taking his actions from a “mere omission” to those with a purpose to defraud. When a jury’s verdict is supported by substantial credible evidence, a reviewing court should not substitute its judgment. *Nicely*, 39 Ohio St. 3d at 156

### THIRD ASSIGNMENT OF ERROR

The convictions of Tampering with Records, R.C. 2913.42, violate Ohio's prohibition of the use of general criminal law provisions over specific statutory prohibitions of a lesser degree.

#### ISSUE PRESENTED FOR REVIEW AND ARGUMENT

May the prosecutor obtain an indictment on a general charge for which the legislature has passed a statute of a lesser import which specifically addresses the proscribed action?

Appellant correctly states that the rule of statutory construction holds that where a general statute conflicts with a specific statute on the same subject, the specific statute must control. But, as the Court in *Humphrys v. Winous Co.*, 165 Ohio St. 45, 49 (1956) said “[t]he rule, however, often is much easier stated than applied....” This case is certainly one of those instances.

The provisions of R.C. 1.51 cited by Appellant apply when the general and specific statutes constitute allied offense of similar import. *State v. Chippendale*, 52 Ohio St. 3d 118, 120 (1990) In order to make that determination, the court must compare each element of the statutes in the abstract. *State v. Rance*, 85 Ohio St. 3d 632, syl. 1 (1999) When comparing R.C. 2913.42 to the ethics violations under R.C. 102.02, it is readily apparent that the statutes do not cover allied offenses of similar import. Under R.C. 102.02(C) and (D), it is a misdemeanor to “knowingly fail to file...a statement that is required by this section,” or to “knowingly file a false statement that is required to be filed under this section.” In contrast, R.C. 2913.42 includes an element of intent missing from R.C. 102.02. That statute states that “no person, **knowing the person has no privilege to do so, and with purpose to defraud** or knowing that the person is facilitating a fraud, shall...falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record.” (Emphasis added) Under this examination, it is clear that Appellant was properly charged and convicted under the general statute.

As set forth above in the response to assignment of error 2, Appellant engaged in a course of conduct for nine years with the purpose to defraud the State of Ohio and the citizens of Niles, Ohio.

#### **FOURTH ASSIGNMENT OF ERROR**

**The trial court denied the appellant due process of law and a fair trial by allowing improper lay opinion testimony to be considered by the jury to determine if the appellant profited from a game of chance**

#### **ISSUE PRESENTED FOR REVIEW AND ARGUMENT**

Does Evidence Rule permit a witness to offer a lay opinion if the foundation is inadequate to establish that the testimony is little more the speculative and not based upon a full investigation?

Appellant argues that the trial court improperly allowed Cara Yoder to offer lay opinion testimony regarding the transfer of money into and out of various bank accounts. Yoder's testimony was properly admitted pursuant to Evid. R. 701, which states that a lay witness is permitted to offer opinion testimony "which [is] (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Yoder's testimony clearly met the standard set by Evid. R. 701.

In her direct testimony, Yoder described her work as a forensic audit manager for the Ohio Auditor of State and testified regarding her education and work experience that qualified her to perform such work. Yoder, Vol VII, T.p. 1258-1259). Courts in Ohio have allowed police officers and others to offer lay opinion testimony when their education, training, and experience give them a reasonable basis for arriving at the opinion expressed. *State v. McKee*, 91 Ohio St. 3d 292, 296-7 (2001); *State v. Slade*, 2018-Ohio-2767, ¶25 (2d Dist.) (Police officer's opinion based on training and experience was helpful to determine a fact in issue and would be admissible under Evid. R. 701); *State v. Sayre*, 2013-Ohio-4108, ¶8 (3d Dist.) (Police officer permitted to testify to his own observations and what he learned from them); *State v. King*, 1995

Ohio App. LEXIS, \*6 (2d Dist. May 17, 1995) (testimony regarding accounting procedures, tracing of funds, and reconciliation of financial records assisted the trier of fact).

In *King*, the defendant was convicted of Grand Theft based upon allegations that she had embezzled money from her employer, a Residence Inn hotel. At trial, the State introduced testimony from the supervisor for front office support for Residence Inn, who had audited the hotel's financial records. *Id.* at \*2. The audit showed numerous discrepancies in the financial records which led the auditor to conclude that someone had stolen money from the hotel. *Id.* at \*3. In that case, as in the instant one, the evidence "was voluminous, technical, and confusing." *Id.* at \*6. The witness's testimony "concerned accounting procedures, the tracing of funds, and the reconciliation of various financial records," and was "beyond the ken of ordinary jurors." *Id.*

Here, in a situation almost identical to *King*, Yoder reviewed bank records for Appellant, ITAM, and Michelle and John Sudzina (Yoder, Vol VII, T.p. 1269-1283; Exh. 3I, 3J6, 3J7, 3M, 3N, 3O, 3, P, 3Q) in order to track transactions between the parties. The trial court allowed her testimony because she was not testifying as an expert but was instead "talking about the procedures that she followed and the calculations that she's found as a result of the Excel spreadsheet she created from the bank records." *Id.* In addition, Yoder reviewed documents obtained via search warrants to create a spreadsheet showing the proceeds of the "block pools" hosted by Appellant at ITAM. *Id.*, Vol VII, T.p. 1294-1306; Exh. 10B. In her testimony regarding the bank account records and the "block pools" records, Yoder simply testified as to the difference between what ITAM paid out to Appellant and what Appellant paid into ITAM (*Id.*, Vol VII, T.p. 1280; Exh. 3I), the amount of cash withdrawals from the Sudzina's account and the amount of cash deposits into Appellant's account during the same time period (*Id.*, Vol VII, T.p. 1283; Exh. 3P), and the difference between what was received from the "block pools" and what was paid out to the winners. *Id.*, Vol VII, T.p. 1289; Exh. 10B. This testimony is

consistent with that of the witness in *King*, who performed similar analysis of voluminous financial records. The court in *King* found that the witness's testimony "assisted the trier of fact in understanding the complicated financial evidence and in determining the ultimate issue to be decided," and that "the mere fact that [the witness's] testimony touched upon the ultimate issue to be decided...[did] not render that testimony inadmissible." 1995 Ohio App. LEXIS 2218 at \*6

Contrary to Appellant's assertion, this case is nothing like *State v. Johnson*, 2002-Ohio-6957 (10<sup>th</sup> Dist.). In *Johnson*, the officers testified that, in their opinion, the defendant was not in immediate fear for his or another's well-being and was therefore not justified in his use of deadly force. *Id.* at ¶¶12, 13, 17. The appellate court found that the trial court had improperly admitted the officers' testimony as the opinions they expressed were "opinions calculated to instruct the jury as to their verdict." *Id.* at ¶36 (citing *Bensen v. American Ultramar Ltd.*, 1996 U.S. Dist. LEXIS10647 (SD NY 1996) In this case, Yoder testified regarding the voluminous financial records she reviewed and the spreadsheets that were created to show the flow of money between Infante and others. She offered no opinions on whether or not any laws had been violated, she merely tracked the money.

The trial court did not commit an abuse of discretion in allowing the testimony of Yoder to be admitted, and this court should not disturb that ruling.

## **FIFTH ASSIGNMENT OF ERROR**

**The finding of guilt by the jury of R.C. 2923.31(A)(1) [sic], Theft in Office is violative of the Due Process Clause as the jury was not required to unanimously find the appellant guilty of each material element of the offense**

### **ISSUE PRESENTED FOR REVIEW AND ARGUMENT**

May a charge for Theft of Office, which transpired over a number of years, list a series of possible incidents of theft as the basis of the offense without requiring a unanimous finding for any of the underlying allegations?

Appellant appeals his convictions of Theft in Office, pursuant to R.C. 2921.41(A)(1), by alleging that the court failed to instruct the jury that it must unanimously agree on the specific acts committed by Appellant which violated R.C. 2921.41(A)(1). This assertion is incorrect, as R.C. 2913.61(C)(3) states that “[w]hen a series of two or more offenses under section...2921.41 of the Revised Code is committed by the offender in the offender’s same employment, capacity, or relationship to another, all of those offenses may be tried as a single offense.” Appellant committed all of the acts in his same employment as mayor of Niles, Ohio. All of the instances of theft in office, having an unlawful interest in a public contract, gambling, operating a gambling house and tampering with records, were properly charged and tried as single offenses.

Additionally, Appellant had the opportunity to object to the jury instructions and failed to do so. In fact, when asked if he was satisfied with the jury instructions, counsel for Appellant stated “yes, your Honor.” *Infante*, Vol X, T.p. 2086. Failing to object to the jury instructions is a waiver of the issue on appeal. *State v. Roberts*, 110 Ohio St. 3d 71, 88 (2006) The court’s actions can only be reviewed for plain error and none can be shown here, as Appellant was properly charged, tried, and convicted pursuant to R.C. 2921.41(A)(1) and R.C. 2913.61(C)(3). Appellant’s attempt to revive the issue with a Crim. R. 29(C) motion is of no avail as the jury was properly instructed and returned a unanimous verdict.



## SIXTH ASSIGNMENT OF ERROR

**The state lacked jurisdiction to charge the appellant for Tampering with Records, convictions based upon violations of federal tax reporting laws**

### ISSUE PRESENTED FOR REVIEW AND ARGUMENT

May that state charge a defendant with Tampering with Records for failing to properly file a federal tax return?

Appellant and Judy Infante reside in Trumbull County, Ohio. In the preparation for their *personal* federal, state and local taxes for tax years 2009, 2010, 2011, 2012 and 2013, they gathered their documents and in a continuous course of conduct each year traveled to the office of Michael Dobransky. Dobransky, Vol. X, T.p. 1890. Dobransky operates a tax preparation and financial planning business. *Id.*, Vol VIII, T.p. 1393. Dobransky met with both Appellant and Judy Infante when he prepared the returns. *Id.*, Vol VIII, T.p. 1398. Dobransky prepared the taxes based upon the information that he received from Appellant and Judy Infante. *Id.*, Vol VIII, T.p. 1421. “I met with them, discussed their W-2’s, whether they have any other taxable income. I went over expenses with them and did all the calculations and completed the returns.” *Id.*, Vol. VIII, T.p. 1397. Dobransky received supporting documentation in preparation of the taxes from both Appellant and Judy Infante. “W-2s, if there are interest or dividend statements from bank, credit union, investment companies, any state and local tax refund statements, usually mortgage interest statements, property tax statements. Those were all brought to me.” *Id.* Dobransky interacted with both Appellant and Judy Infante in the preparation of their *personal* tax returns for years 2009, 2010, 2011, 2012 and 2013. *Id.*, Vol VIII, T.p. 1394-1395; Exh. A2-A6, 11, 11A2-11A6.

Pursuant to R.C. 2901.11(A)(1), a person is subject to criminal prosecution and punishment in the state of Ohio if a person commits an offense under the law of the State *any* element of which takes place in this state. (Emphasis added). Further, R.C. 2901.11(A)(1) shall

be liberally construed to allow the state the broadest possible jurisdiction over offenses and persons committing offenses in this state. R.C. 2901.11(G).

The Ohio Revised Code makes it clear that Appellant's and Judy's action in omitting required information from their income tax returns constitutes Tampering with Records. The statute prohibits a person with an intent to defraud from tampering with records. "Defraud" is defined as "knowingly [obtaining], by deception, some benefit for oneself or another, or...knowingly [causing], by deception, some detriment to another." R.C. 2913.01(B) Further, "deception" is defined as "knowingly deceiving another or causing another to be deceived by any false or misleading representation, **by withholding information**, by preventing another from acquiring information, or by any other conduct, act, or **omission** that creates, confirms, or perpetuates a false impression in another...." R.C. 2913.01(A) (emphasis added)

Appellant's actions meet the statutory requirements set forth in R.C. 2913.01(A) and (B) and R.C. 2913.42(A)(1). By failing to disclose the amounts of income and gifts Ralph and Judy had received from others to Dobransky, Appellant and Judy also withheld information from the government.

There is no question that Appellant and Judy Infante committed multiple elements of tampering with records within the territorial state of Ohio. The intention or knowledge of wrongdoing that constitutes part of the crime took place in Ohio. The action or conduct that is a constituent element of the crime took place in Ohio. Appellant and Judy provided false information and/or concealed information from Dobransky at their tax preparation meeting. The meeting took place within the state of Ohio. Both mens rea and actus reus reside within the state of Ohio. Therefore, the Appellant's argument is insufficient to sustain reversal on this issue.

## SEVENTH ASSIGNMENT OF ERROR

**The trial court erred by failing to merge the offenses underlying the conviction of Engaging in Pattern of Corrupt Activity, R.C. 2923.32(A)(1)**

### ISSUE PRESENTED FOR REVIEW AND ARGUMENT

When a defendant is convicted of individual offenses that are specifically listed as over acts for the charge of Engaging in Pattern of Corrupt Activity, R.C. 2923.32(A)(1)

The Appellant argues that the trial court's imposition of consecutive prison sentences for the engaging in corrupt activity offenses and the predicate offenses of tampering with records violates the Double Jeopardy clauses of the United States and the Ohio Constitution. He contends that the offenses were allied offenses of similar import and should have been merged for purposes of sentencing under R.C. 2941.25(A).

The Ohio Supreme Court has rejected this argument and it is well settled law that R.C. 2941.25(A) and the *Johnson* allied test do not apply to engaging in pattern of corrupt activity offenses under R.C. 2923.32(A)(1). *State v. Miranda*, 138 Ohio St 3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 20. Therefore, Appellant can be separately sentenced for each count.

It is not necessary to apply the allied offense test when the legislature's intent is clear from the language of the statute. *Id.* at ¶19. Therefore, the multiple punishments in this case do not violate the constitutional prohibition against double jeopardy or the provisions of the Ohio allied offenses statute and Appellant's argument is insufficient to sustain reversal on this issue.

### CONCLUSION

For the reasons stated herein, the State asks that this Honorable Court affirm the judgment of the Trumbull County Court of Common Pleas and deny each and every one of the Appellant's assignments of error.

Respectfully submitted,

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**Certificate of Service**

This is to certify that a copy of Response Brief of Appellee was sent by regular U.S. mail on this 23<sup>rd</sup> day of January 2019, to Attorney David L. Doughton, at 4403 St. Clair Avenue, Cleveland, Ohio 44103.

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