[Cite as *State v. Fasline*, 2015-Ohio-715.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-T-0004**
- vs -	:	
FRANCIS M. FASLINE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2012 CR 749.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

David L. Doughten, 4403 St. Clair Avenue, Cleveland, OH 44103 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Francis M. Fasline, appeals from the January 9, 2014 judgment of the Trumbull County Court of Common Pleas, sentencing him for felonious assault and tampering with evidence following a jury trial. On appeal, appellant challenges the sufficiency and manifest weight of the evidence. For the reasons that follow, we affirm.

{¶2} On November 28, 2012, appellant was indicted by the Trumbull County Grand Jury on three counts: count one, felonious assault, a felony of the second

degree, in violation of R.C. 2903.11(A)(2) and (D)(1)(a); count two, failure to stop after a nonpublic road accident, a felony of the fifth degree, in violation of R.C. 4549.021(A) and (B); and count three, tampering with evidence, a felony of the third degree, in violation of R.C. 2921.12(A)(1) and (B). Appellant pleaded not guilty to all charges. He also waived his right to a speedy trial.

{¶3} Prior to the October 15, 2013 jury trial, appellee, the state of Ohio, elected to not go forward on count two. As a result, that count was dismissed and the matter proceeded on counts one and three.

{¶4} The state presented eight witnesses. They collectively established that on September 28, 2012, appellant knowingly ran his mother's SUV into the victim, James Capperes ("James"), following altercations in two different bars. Appellant fled the scene before police arrived. The SUV was later found in a secluded wooded area.

{¶5} James and his wife, Jamie Mullins-Capperes ("Jamie"), Pennsylvania residents, testified they were visiting James' parents in Hubbard, Trumbull County, Ohio. They left their children with James' parents, borrowed their 2007 Dodge Caliber, and went on a "date night."

{¶6} The couple began their evening at the Downtown Café. The Café was crowded with about 60 patrons, including appellant and some of his friends. While James and Jamie were enjoying their drinks at the bar, appellant called James outside and attempted to sell him steroids and heroin. James declined the drugs and suggested to appellant, who was smaller in stature than himself, that he "should do the steroids." Appellant came back inside and began yelling unintelligibly.

{¶7} A Café bartender, Michelle McCale ("McCale"), testified that appellant continued bothering James. McCale got in between both men and stated, "'Stop coming back to each other. Stop talking or you guys got to go.'" James then pushed appellant into some barstools. A bar patron ended up taking appellant outside. James and Jamie waited around until they were sure that appellant had left the area.

{¶8} Shortly thereafter, the couple went to Michael's Bar, another local establishment. Because the parking lot was full, James parked his parents' car on a grassy area in a narrow alleyway behind the bar. Once inside, they told a bartender, JoAnne Vargo ("Vargo"), about the run-in they had with appellant earlier that evening at the Café. About 15 minutes after they arrived at Michael's, appellant showed up with his friends. Vargo told appellant not to cause any further problems at her establishment. Appellant promised to behave himself.

{¶9} However, Vargo was later alerted that there was a problem on the patio. As she checked outside, Vargo overheard appellant trying to sell drugs to James. Vargo heard James respond, "'I don't do drugs. You need to quit asking me if I want to purchase drugs.'" Appellant did not accept James' response and "'wasn't backing down.'" Because appellant was becoming more confrontational, Vargo asked appellant and James to leave. The men complied with Vargo's order, left Michael's, and headed for their cars.

{¶10} James was standing outside his parents' Caliber with the driver's side door open while he was texting his father. Jamie was seated in the passenger seat. Appellant, without warning, smashed his mother's SUV into James. James' face hit the top of the door. James was pinned between the Caliber's driver's side door and the

front passenger side of the SUV. The driver's side door of the Caliber was completely crushed into the fender. James testified he saw appellant in the SUV and was 100 percent sure that appellant was the driver. James also said that appellant's friend, Shane Pagnatta ("Pagnatta"), was in the passenger seat. As appellant began to leave, James said appellant ran the SUV over James' legs.

{¶11} Bar patrons heard the loud impact of the colliding vehicles. Two of the patrons testified at trial. The first patron, Jeffrey Liposky ("Liposky"), testified he was outside the front of the bar smoking when he heard the crash coming from the alleyway. He ran around back to see what had happened. Liposky saw James and said James was hurt pretty bad. Liposky also observed a dark-colored SUV, with the passenger side mirror hanging off, speed away.

{¶12} The second patron, Christopher Saccomen ("Saccomen"), testified that he also heard the crash. Saccomen saw the SUV come up, slow down, then tear off down the road. Saccomen and Vargo helped James, who was in considerable pain, to the front of the bar. Saccomen indicated that James thought his hip was broken and that James felt he was going to pass out from all of the pain. Vargo called for help.

{¶13} Sergeant William Fisher ("Sergeant Fisher") with the Hubbard Police Department responded to Michael's Bar. When he arrived, Sergeant Fisher found a "very chaotic" scene. Jamie was screaming hysterically for help and James was yelling that he could not feel his legs. Sergeant Fisher heard Jamie say, "'[Appellant] Frankie Fasline did it. He did it on purpose.'" Sergeant Fisher put out a "be on the lookout" alert, i.e., BOLO, for the dark-colored SUV. He also took several witness statements.

{¶14} During that time period, an ambulance arrived and transported James to Sharon Regional Hospital. However, due to the severity of James' injuries, he was transferred to St. Elizabeth's Hospital in Youngstown. James was treated for injuries he sustained to his legs. He was also treated for injuries he suffered to his back, including one bulging disk and four herniated discs. James received an epidural because his pain was so severe. James also chipped two teeth as a result from the incident. He subsequently required extensive physical therapy. At the time of trial, James indicated that he still had not fully recovered.

{¶15} Following the incident at Michael's, officers tried locating the SUV. They went to appellant's mother's residence but had no luck. As they had received information that Pagnatta was the SUV passenger, officers went to the home of Adam Howe ("Howe"), where Pagnatta was staying. Both Pagnatta and Howe were seen earlier that evening with appellant.

{¶16} When officers arrived at the Howe residence, appellant's other friend, Brandon Struble ("Struble"), was standing in the driveway. Sergeant Fisher stated that Struble was very reluctant to speak. Following a brief conversation, Sergeant Fisher located a dark-colored 2002 Ford Explorer SUV, registered to appellant's mother, Michelle Fasline, abandoned in a secluded wooded area about 100 yards behind the Howe residence. Sergeant Fisher photographed "fresh damage" to the right front end of the SUV and damage to the passenger side mirror. The photographs were admitted as exhibits at trial. Also at trial, Struble testified that he had told police that appellant admitted hitting a guy.

{¶17} At the close of the state's case, appellant's counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶18} Appellant presented two witnesses and took the stand in his own defense. The first to testify was appellant's friend, Howe. Howe stated that he never met James before the night at issue. Howe indicated that James picked a fight with him in the restroom at Michael's. The two men did not engage in an altercation but Howe later told his friends what had happened. Howe heard the "accident" take place in the alleyway. Howe saw an SUV leave the scene but did not see who was in the vehicle.

{¶19} The second to testify was appellant's friend, Pagnatta. Pagnatta stated that he also never met James before the night at issue. Pagnatta claimed that as he and appellant were leaving Michael's, James began screaming, "'Get over here you mother fuckers. I'm going to beat your ass. Don't run.'" Pagnatta said that he and appellant were scared. They jumped in the SUV and locked the doors. Appellant was in the driver's seat and Pagnatta was in the passenger's seat. Pagnatta claimed that James started pounding his fist on the SUV and screaming for them to get out of the vehicle. Pagnatta felt a "bump," did not know if the SUV struck James because Pagnatta had his eyes closed, and said that appellant just drove away. They went to the Howe residence, where Pagnatta was staying. Pagnatta said that appellant parked the SUV in the driveway.

{¶20} Lastly, appellant testified that he picked up his friend, Cameron Christopher, in appellant's mother's SUV, and went to Michael's bar. The two men met other friends. Because not much was happening at Michael's, they left and went to the Café. At the Café, appellant claimed that James approached him because appellant

was talking to James' "baby mama," i.e., Jamie. Appellant left the Café and went back to Michael's with his friend, Pagnatta. Later that night, appellant offered to drive Pagnatta home. As they were walking to the SUV, appellant stated that James ran toward them screaming obscenities. Appellant and Pagnatta jumped in the SUV and locked the doors. The men claimed they were scared because James was bigger than them. Appellant said James began pounding his fist on the vehicle in an effort to engage in a fight.

{¶21} Appellant started the SUV and began driving away. He said he tried to veer left to avoid hitting James. However, the SUV hit James' open driver's side door. Appellant said he did not intend to hurt James and that it was merely an accident. Appellant just wanted to get out of there because he was scared. Appellant drove to the Howe residence to drop off Pagnatta. Appellant said he parked the SUV in the front yard and left the car keys inside the house on a coffee table. Appellant called his neighbor to pick him up and take him home. Appellant denied moving the SUV into the woods.

{¶22} At the close of the defense's case, appellant's counsel renewed the Crim.R. 29 motion, which was overruled by the trial court.

{¶23} Following trial, the jury found appellant guilty of felonious assault and tampering with evidence. On January 9, 2014, the trial court sentenced appellant to a total prison term of five years, ordered him to pay $1,329 in restitution, and notified him regarding post-release control. Appellant timely appealed. He asserts the following two assignments of error:

{¶24} "[1.] The evidence is insufficient to sustain a conviction of Tampering With Evidence in violation of R.C. 2921.12(A).

{¶25} "[2.] The conviction is against the weight of the evidence."

{¶26} Preliminarily, we note that appellant does not take issue with his sentence. Rather, appellant's appeal centers around issues related to his trial. Appellant's two assignments of error focus on sufficiency and manifest weight of the evidence. Appellant's sufficiency argument deals with his conviction for tampering with evidence. His manifest weight contention focuses on his felonious assault conviction.

{¶27} In his first assignment of error, appellant argues the evidence was not sufficient to sustain his conviction for tampering with evidence under R.C. 2921.12(A).

{¶28} With regard to sufficiency, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Ohio Supreme Court established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id*. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, ¶18.

{¶29} As this court stated in *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13-14 (Dec. 23, 1994):

{¶30} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶31} "'"The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*."'

{¶32} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.'" (Emphasis sic.) (Citations omitted.)

{¶33} "[A] reviewing court must look to the evidence presented * * * to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March*, 11th Dist. Lake No. 98-L-065, 1999 Ohio App. LEXIS 3333, *8 (July 16, 1999). The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus (1991). Further, the verdict will not be disturbed on appeal unless

the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis*, 79 Ohio St.3d 421, 430 (1997).

{¶34} At oral arguments, appellant's counsel made a broad reference to "general" versus "specific" crimes, alluding to the fact that the evidence presented does not support the specific crime of tampering with evidence. "'It is a well settled rule of statutory construction that where a statute couched in general terms conflicts with a specific statute on the same subject, the latter must control.'" *State v. Taylor*, 113 Ohio St.3d 297, 2007-Ohio-1950, ¶12, quoting *Humphrys v. Winous Co.*, 165 Ohio St. 45, 48 (1956). Here, appellant was charged with tampering with evidence in violation of R.C. 2921.12(A)(1), a specific statute, which states in part:

{¶35} "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * *:

{¶36} "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]"

{¶37} Based on the facts presented, we fail to see, as appellant suggests, that the foregoing statute does not specifically apply. It is undisputed that appellant struck James with the SUV. It is also undisputed that appellant drove away from the scene of the incident. In fact, appellant testified and acknowledged that he had done so. However, appellant alleges there is no direct evidence that he "hid" or directed someone else to hide the SUV afterward by parking it in the woods behind the Howe residence.

{¶38} The instant matter is similar to a case this court decided in *State v. Russ*, 11th Dist. Trumbull No. 2007-T-0045, 2008-Ohio-1897. In *Russ,* the appellant asserted

there was not enough evidence to support his tampering with evidence conviction, alleging the state failed to prove that he "hid" the vehicle afterward. In that case, the evidence reflected that appellant, after striking the victim with an SUV, *removed* the vehicle from the scene and ultimately succeeded in attempting to *conceal* it by functionally endorsing another's decision to store the vehicle in a garage. *Id.* at ¶77. Under the circumstances in that case, this court held that the state put forth sufficient, credible evidence to support a conviction on the tampering charge beyond a reasonable doubt. *Id.* at ¶77. (O'Toole, J., dissenting on other grounds). Specifically, this court pointed out that R.C. 2921.12(A)(1), the tampering with evidence statute, "does not require an offender to 'hide' a piece of evidence in order to be convicted. [Rather] [t]he statute is worded in the alternative so that an individual may be convicted if he or she alters, destroys, conceals, or removes evidence with the purpose to impair its evidentiary value or availability." *Id.*

{¶39} The Ohio Supreme Court has held that circumstantial evidence and direct evidence inherently possess the same probative value. *State v. Biros*, 78 Ohio St.3d 426, 447 (1997), citing *Jenks, supra*, at paragraph one of the syllabus. Contrary to appellant's position, R.C. 2921.12(A)(1) and *Russ, supra,* do not require that an offender hide a piece of evidence in order to be convicted. Rather, as stated in *Russ,* the statute is worded in the alternative so that a defendant may be convicted if he alters, destroys, conceals, *or* removes evidence with the purpose to impair its evidentiary value or availability. *Russ, supra,* at ¶77.

{¶40} The state correctly noted at oral arguments that a tampering charge is subject to the unique facts and circumstances of each case. In this case, the evidence

establishes that appellant, after striking James with the SUV, *removed* the vehicle from the scene. By appellant's own admission, the SUV became a "thing" which was likely to be needed in the investigation of the crash which occurred in the alleyway behind Michael's. Thus, appellant had knowledge that an investigation would ensue. Nevertheless, appellant knowingly sped away from the crime scene. Thus, it is uncontroverted that the state proved beyond a reasonable doubt that appellant *removed* a thing of value to the crash investigation, i.e., the SUV, which struck and injured James.

{¶41} In addition, we note that the evidence presented by the state further reveals an attempt to *conceal* the SUV**,** which was found by authorities parked in a wooded area behind the Howe residence. Thus, this case involves more than just leaving the scene of a crime. Although there is no direct evidence that appellant himself parked the SUV in the woods, or directed another to do so, the circumstances establish a link involving appellant. *See Jenks, supra*, at paragraph one of the syllabus (holding that circumstantial evidence and direct evidence inherently possess the same probative value.) A reasonable juror could logically question why appellant called a neighbor for a ride home from the Howe residence when he had his own transportation, i.e., his mother's SUV which was in proper mechanical working order. Also, a reasonable juror could logically conclude that appellant had a motive to hide the vehicle. A reasonable juror could conclude that appellant, either by himself or through a friend, deliberately tried to conceal the SUV in the woods afterward in an attempt to hide it from authorities as there was "fresh damage" to the body of the vehicle.

{¶42} Pursuant to *Schlee, supra*, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of tampering with evidence were proven. Thus, the trial court did not err in overruling appellant's Crim.R. 29 motion.

{¶43} Appellant's first assignment of error is without merit.

{¶44} In his second assignment of error, appellant contends his conviction for felonious assault is against the manifest weight of the evidence.

{¶45} With regard to manifest weight, this court stated in *Schlee, supra*, at *14-15:

{¶46} "'[M]anifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶47} "'In determining whether the verdict was against the manifest weight of the evidence, "(* * *) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (* * *)"' (Citations omitted.) * * *" (Emphasis sic.)

{¶48} A judgment of a trial court should be reversed as being against the manifest weight of the evidence "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997).

{¶49} With respect to the manifest weight of the evidence, we note that the jury is in the best position to assess the credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967).

{¶50} Appellant was charged with felonious assault in violation of R.C. 2903.11(A)(2), which states in part:

{¶51} "(A) No person shall knowingly * * *:

{¶52} "* * *

{¶53} "(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶54} The term "knowingly" is defined in R.C. 2901.22(B):

{¶55} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶56} In the case before us, the jury was presented with a story involving an altercation between two men at two different bars over the course of an evening. The altercation escalated and came to an end in a back alleyway when James was severely injured by an SUV driven by appellant.

{¶57} The state presented evidence that appellant knowingly caused physical harm to James. The state's witnesses collectively established that appellant was the aggressor, became belligerent, was thrown out of a bar, got behind the wheel of an SUV, rammed the SUV into James (who was standing outside his parents' Caliber with the driver's side door open), and then sped away from the scene. As a result, both

vehicles, the Caliber driven by James and the SUV driven by appellant, sustained **bodily** damage. As stated, the driver's side door of the Caliber was completely crushed to the fender. The SUV received damage to the right front end and damage to the passenger side mirror.

{¶58} In addition, James sustained severe physical injuries. Again, the first strike pinned James between the Caliber's driver's side door and the front of the passenger side of the SUV. Furthermore, as appellant began to leave, James indicated appellant ran the SUV over his legs. James was transported by ambulance to Sharon Regional Hospital, and then transferred to St. Elizabeth's due to the severity of his injuries. He was treated for injuries he sustained to his legs, back, and mouth. He underwent extensive physical therapy and still had not fully recovered at the time of trial.

{¶59} The defense presented the testimony of two of appellant's friends. As stated, the first, Howe, testified that he heard the accident take place in the alleyway and saw the SUV leave the scene. The second, Pagnatta, testified that James was the aggressor in the alleyway. Again, appellant was the driver of the SUV and Pagnatta was the passenger. Pagnatta felt a "bump" but claimed he did not know if the SUV struck James because Pagnatta had his eyes closed as he was scared. After Pagnatta felt the "bump," he testified that appellant did not stop the SUV, but rather just drove away. Appellant also took the stand and claimed that James was the aggressor. Appellant said he never meant to hurt James and that the whole thing was an accident.

{¶60} In the face of these diametrically opposed versions and in consideration of the credibility of the witnesses and the evidence, the jury found the state's version of events to be more credible. *DeHass, supra,* at paragraph one of the syllabus. The jury

obviously chose not to believe the evidence appellant introduced and, thus, discredited it.

{¶61} Based on the evidence presented, as previously stated, there was substantial evidence upon which the jury could logically find that appellant acted "knowingly," i.e., the mens rea for felonious assault. *See* R.C. 2903.11(A)(2). Thus, we cannot say that the jury clearly lost its way in finding appellant guilty of felonious assault. *Schlee, supra*, at *14-15; *Thompkins, supra*, at 387.

{¶62} Appellant's second assignment of error is without merit.

{¶63} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in part and concurs in judgment only in part with a Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring in part and concurring in judgment only in part.

{¶64} I concur with the judgment and opinion as it pertains to appellant's second assignment of error. However, I concur in judgment only as to his first assignment of error, in which appellant argues there was insufficient evidence to convict him of tampering with evidence.

{¶65} R.C. 2921.12(A) provides, in pertinent part: "No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be

instituted, shall * * * (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]"

{¶66} The majority focuses on the fact that the vehicle was "removed" from the scene of the accident, but fails to address the "purpose" for which it was removed. There was no evidence presented to establish that appellant "removed" the vehicle from the scene with a "purpose to impair [the vehicle's] value or availability as evidence." Nothing suggests that the "purpose" of fleeing the scene of the accident was anything more than to get away. Under the majority opinion, every misdemeanor case of leaving the scene of an accident could also be prosecuted for felony tampering with evidence.

{¶67} Sufficient circumstantial evidence was presented, however, to establish that appellant, or someone under his direction or control, "concealed" the vehicle in a wooded area with a "purpose to impair its value or availability as evidence." On that basis, I would affirm appellant's conviction of tampering with evidence and respectfully concur in judgment only.