

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

IN THE MATTER OF: T.R.J.,
DELINQUENT CHILD

O P I N I O N

CASE NO. 2016-L-010

Appeal from the Lake County Court of Common Pleas, Juvenile Division.
Case No. 2015 DL 01244.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee, the state of Ohio).

Charles R. Grieshammer, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Appellant, T.R.J., a minor).

TIMOTHY P. CANNON, J.

{¶1} Appellant, T.R.J., was alleged to be a delinquent child as a result of charges filed in the Lake County Court of Common Pleas, Juvenile Division. It was alleged that appellant committed criminal trespass in violation of R.C. 2911.21(A)(2), a misdemeanor of the fourth degree if committed by an adult; possession of marijuana in violation of R.C. 2925.11, a minor misdemeanor if committed by an adult; illegal use or possession of marijuana drug paraphernalia in violation of R.C. 2925.141(C), a minor misdemeanor if committed by an adult; and tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree if committed by an adult. He now appeals

the denial of his motion for acquittal pursuant to Crim.R. 29 on the charge of tampering with evidence.

{¶2} A trial to the court was held on November 18, 2015. The testimony included the following:

{¶3} On July 8, 2015, appellant and three other juvenile boys climbed through a window to enter the Morse Avenue Community Center (“the building”) in Painesville, Ohio. The building has only one door. The boys did not have permission to be in the building.

{¶4} Police officers were dispatched to the building in response to a report that some teenagers had climbed through a window and were breaking into the building. Officers arrived at the building around 4:00 p.m. and surrounded its exterior.

{¶5} Sergeant Bailey and Officer Thompson occupied the south side of the exterior of the building, near a window. Sergeant Bailey testified that looking through the window he observed approximately four to five juveniles “kind of running about like they were confused.”

{¶6} Through the window, Sergeant Bailey and Officer Thompson also saw appellant approach a garbage can and manipulate the trash bag within the can. Officer Thompson testified it appeared appellant was putting something between the can and its liner. Sergeant Bailey testified to seeing appellant run back to the same garbage can a second time and manipulate the bag.

{¶7} Police stopped appellant and the other boys as they exited the building. The juveniles were arrested for trespassing and they were searched. Officers found suspected drug paraphernalia inside appellant’s backpack. A blue lighter that had been modified for smoking marijuana had an odor of burnt marijuana and tested positive for

marijuana residue. Police found the other juveniles in possession of a baggie of suspected marijuana and a second lighter modified in a similar manner as appellant's lighter. This baggie tested positive for marijuana, and the second lighter tested positive for marijuana residue.

{¶8} As the boys were being searched, Sergeant Bailey entered the building to check the garbage bag he had seen appellant manipulate. He retrieved a bag of suspected marijuana.

{¶9} Officer Thompson testified that he was not one of the officers who had entered the building, but he stated that the officers who had entered the building said it smelled like burnt marijuana.

{¶10} Both Sergeant Bailey and Officer Thompson testified that at the time they arrived on the scene the investigation was about breaking and entering. The investigation did not focus on marijuana use or possession until police found suspected marijuana.

{¶11} Appellant was charged with criminal trespass, a fourth-degree misdemeanor if committed by an adult; possession of marijuana, a minor misdemeanor if committed by an adult; and possession of drug paraphernalia, a minor misdemeanor if committed by an adult. He was also charged with tampering with evidence, in violation of R.C. 2921.12(A)(1), a third-degree felony if committed by an adult.

{¶12} During trial, at the close of the state's evidence, defense counsel moved for a Crim.R. 29 acquittal on the charges of tampering with evidence and possession of marijuana. The court denied the Crim.R. 29 motion and made a finding of true on all four charges.

{¶13} A notice of appeal was filed on January 14, 2016.

{¶14} Appellant assigns the following error on appeal:

The trial court erred to the prejudice of the delinquent child-appellant when it denied his Crim.R. 29(A) motion for judgment of acquittal, in violation of his rights to fair trial and due process as guaranteed by the fifth and fourteenth amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

{¶15} Appellant asserts the trial court erred in denying his motion for acquittal on the charge of tampering with evidence because the state failed to provide sufficient evidence that appellant concealed evidence knowing of an ongoing or likely investigation into his possession of marijuana.

{¶16} Crim.R. 29(A) provides, in pertinent part: “[t]he court * * * shall order the entry of a judgment of acquittal of one or more offenses charged * * * if the evidence is insufficient to sustain a conviction of such offense or offenses.” *See also State v. Hall*, 11th Dist. Trumbull No. 2011-T-0115, 2012-Ohio-4336, ¶7. A “sufficiency” argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. Lake No. 2010-L-033, 2011-Ohio-4171, ¶25. “In essence, sufficiency is a test of adequacy.” *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). “[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Troisi*, 179 Ohio App.3d 326, 2008-Ohio-6062, ¶9 (11th Dist.).

{¶17} The allegation against appellant was found to be true on the charge of tampering with evidence in violation of R.C. 2921.12(A)(1). That section provides that “[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * conceal, or remove any * * * thing, with

purpose to impair its value or availability as evidence in such proceeding or investigation[.]”

{¶18} The Supreme Court of Ohio has identified three elements of the offense of tampering with evidence: “(1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence’s availability or value in such proceeding or investigation.” *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, ¶11. The evidence tampered with must have some relevance to the investigation defendant knows is ongoing or is likely to be instituted. *Id.* at ¶16.

{¶19} At issue in the present case is whether, viewing the evidence in the light most favorable to the prosecution, the state presented sufficient evidence to prove beyond a reasonable doubt that, at the time appellant concealed the marijuana, he had knowledge that an investigation into his possession of marijuana and drug paraphernalia was likely to be instituted.

{¶20} “A person has knowledge of circumstances when the person is aware that such circumstances probably exist.” R.C. 2901.22(B). “[T]his definition does not encompass knowledge that a reasonably diligent person should, but does not have. Rather, the statute requires the accused to be *aware* that * * * circumstances probably exist.” *State v. Barry*, 145 Ohio St.3d 354, 2015-Ohio-5449, ¶24 (emphasis sic). A person can only be charged with knowledge of a particular fact if that person “‘*subjectively believes* that there is a high probability of its existence[.]’” *Id.* (emphasis sic), quoting R.C. 2901.22(B).

{¶21} Appellant argues that at the time he put the marijuana in the garbage can, he had no knowledge of a likely investigation into possession of marijuana and marijuana paraphernalia. Appellant asserts he had no knowledge police were observing him through a window. Appellant argues that without knowledge that police were at the building and observing him, he had no reason to believe an investigation related to the marijuana was likely to ensue.

{¶22} Appellee argues it introduced adequate circumstantial evidence that appellant had knowledge of a likely investigation into possession of marijuana and marijuana paraphernalia at the time he concealed the bag of marijuana. It asserts that even though there was no direct evidence that appellant had knowledge, the surrounding circumstances would allow a rational trier of fact to conclude he had knowledge of a likely investigation. In support, appellee points out that appellant's friends were running around inside the building, the inside of the building smelled like marijuana, and appellant knew he and his friends were in possession of marijuana and marijuana paraphernalia.

{¶23} In determining sufficiency of the evidence, circumstantial evidence possesses the same probative value as direct evidence. *State v. Hendrix*, 11th Dist. No. 2011-L-043, 2012-Ohio-2832, ¶137, citing *State v. Jenks*, 61 Ohio St.3d. 259, 272 (1991). "Circumstantial evidence has been defined as testimony not grounded on actual personal knowledge or observation of the facts in controversy, but of other facts from which inferences are drawn, showing indirectly the facts sought to be established." *Windle, supra*, at ¶34, citing *State v. Nicely*, 39 Ohio St.3d 147, 150 (1988). An inference is "a conclusion which, by means of data founded upon common experience, natural reason draws from facts which are proven." *Ensel v. Lumber Ins. Co.*, 88 Ohio

St. 269, 282 (1913). “[W]hen circumstantial evidence forms the basis of a conviction, that evidence must prove collateral facts and circumstances, from which the existence of a primary fact may be rationally inferred according to common experience.” *Windle*, *supra*, at ¶34.

{¶24} In *Straley*, the state argued the following:

[T]he Second District Court of Appeals misinterpreted R.C. 2921.12(A)(1) by unduly limiting the definition of ‘investigation’ to require that the evidence tampered with be related to the investigation of only those charges of which law enforcement was then aware or likely to be aware. The state contends that an investigation involves the process of gathering facts and information and may grow beyond the scope of initial charges. Accordingly, the state reasons that if law enforcement investigates a suspect for possible criminal conduct, that investigation necessarily encompasses all criminal conduct that law enforcement may discover.

Straley, *supra*, at ¶12. That is essentially what the state is arguing in this case. In *Straley*, however, the Ohio Supreme Court soundly rejected that argument. *Id.* at ¶16.

{¶25} Here, the evidence fails to establish adequate facts from which a reasonable mind could infer the ultimate fact that appellant had knowledge that an investigation into possession of marijuana and marijuana paraphernalia was likely to ensue *at the time he concealed the marijuana*.

{¶26} Sergeant Bailey’s testimony that he saw juveniles running around inside the building did not explain why this behavior would give appellant reason to believe that an investigation into possession of marijuana and drug paraphernalia was likely to ensue. There was no evidence to indicate that the juveniles knew police were in close proximity to the building and that was why the juveniles were running around inside the building. Therefore, the state failed to provide sufficient evidence from which a reasonable mind could infer the juveniles were running around because they knew

police were nearby and that based upon the knowledge that police were nearby, appellant had knowledge that an investigation related to the marijuana he was concealing was likely.

{¶27} Additionally, Officer Thompson's testimony that other officers stated the inside of the building had an odor of burnt marijuana is insufficient to support that appellant, while he was concealing the marijuana, had reason to believe the police would enter the building and discover the scent. At trial, the state discussed that appellant knew at the time he was being arrested that it was likely police would find the modified lighter in his backpack, enter the building, smell the marijuana, and likely investigate the juveniles for possession of marijuana; however, with regard to tampering with evidence, the likelihood of an official investigation or proceeding is measured at the time of the alleged tampering. *Straley, supra*, at ¶19. In the present case the alleged tampering occurred when appellant concealed the marijuana in the garbage can, not when he was arrested, and before any officer had entered the building. The state failed to provide sufficient evidence from which a reasonable mind could infer that, at the time appellant concealed the marijuana in the garbage can, he had reason to believe officers were going to enter the building, discover it smelled like marijuana, and that as a result of his knowledge of those circumstances, develop the knowledge that an investigation related to the marijuana was likely to ensue.

{¶28} Furthermore, "Ohio law does not impute constructive knowledge of an impending investigation based solely on the commission of an offense[.]" *Barry, supra*, at ¶2. Appellant's knowledge that he and his friends were in possession of marijuana and marijuana paraphernalia and that possession of those items is a crime cannot be used alone to prove appellant had knowledge of an impending investigation.

{¶29} We are also mindful in our analysis that we are reviewing the state's efforts to prosecute a third-degree felony by claiming appellant tampered with evidence of a minor misdemeanor.

{¶30} Viewing the evidence in the light most favorable to the prosecution, the collateral facts introduced by the state are insufficient to support the inference that, at the time appellant concealed marijuana, he had knowledge that an investigation related to the marijuana was likely to ensue. Therefore, reasonable minds could not have found all of the elements of tampering with evidence proven beyond a reasonable doubt.

{¶31} For the foregoing reasons, appellant's assignment of error is sustained. Accordingly, we reverse the trial court's denial of appellant's motion for acquittal pursuant to Crim.R. 29 on the charge of tampering with evidence and remand the case to the trial court with instructions to vacate the finding of true to the charge of tampering with evidence.

THOMAS R. WRIGHT, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

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{¶32} I concur with the majority's well-reasoned opinion. I write separately to note my dismay over the attempt by the state to bootstrap a third-degree felony charge of tampering with evidence to a minor-misdemeanor charge of possession of marijuana. This is a classic case of the tail wagging the dog.

{¶33} *Barry, supra*, envisions that the intent to commit the offense of tampering with evidence is separate and distinct from the commission of the crime to be investigated. Otherwise any defendant who tries to avoid arrest by hiding evidence of their crime, contemporaneous with the commission of the underlying offense, faces a dilemma: incriminate yourself by leaving the evidence as it is—or face being charged with a felony for hiding it. The tampering with evidence statute does not apply to acts of hiding evidence, simultaneously with the underlying offense, which do not involve a separate animus or intent.

{¶34} This case wherein the state chose to take a juvenile minor misdemeanor charge of possession of marijuana and bootstrap it into a third-degree felony is both contrary to the precepts and purposes of the juvenile law (treating children as children and not adults). Such actions erode the confidence the public has in the police, prosecutors and judiciary to treat, protect and serve its citizens. These actions are contrary to the justice system's core competency: to administer justice through fairness and a level playing-field. The sustainability and integrity of our justice system relies upon the support of the public. The support of the public is maintained by a justice system that is fair, transparent and reasonable. The crime charged should be consistent with reasonableness and the public's understanding of fair treatment and transparency. In this writer's opinion, the charge of tampering with evidence was unreasonable given the underlying offense and the facts of this case as well as inconsistent with the holding of *Barry*.