IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-02-038
	:	O P I N I O N
- vs -		4/19/2010
	:	
ROBERT B. SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2006-10-1803

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YOUNG, P.J.

{¶1} Defendant-appellant, Robert B. Smith, Jr., appeals his conviction for obstruction of justice following a retrial in the Butler County Court of Common Pleas.

{¶2} Appellant was indicted in 2006 on one count of obstruction of justice, a felony of the third degree, in violation of R.C. 2921.32(A)(5) and (C)(4). The charge stemmed from allegations that when police were attempting to ascertain the identity of

one of his employees, appellant told police that his employee's name was Charles Williams when it was Charles Martin and that this same employee had left the building shortly before he was found by police hiding inside the building. Authorities later discovered a felony charge pending against the employee in another county.

{¶3} In 2007, a jury acquitted appellant of third-degree felony obstruction of justice, but found him guilty of fifth-degree felony obstruction of justice, in violation of R.C. 2921.32(A)(5) and (C)(3). We reversed appellant's conviction on the grounds of prosecutorial misconduct and ineffective assistance of counsel and remanded the case to the trial court for further proceedings. *State v. Smith*, Butler App. No. CA2007-05-133, 2008-Ohio-2499. Finding appellant's third assignment of error (sufficiency and manifest weight of the evidence) to be moot, we declined to address it.

{¶4} Appellant subsequently moved to dismiss the 2006 indictment (the original indictment). Appellant argued that given his acquittal at trial, to retry him on the third-degree felony obstruction of justice, the *only* count in the original indictment, would violate double jeopardy. Appellant also argued the original indictment did not contain all the elements of obstruction of justice (of either a third or fifth-degree felony) because it failed to allege the person aided "committed" a felony.

{¶5} By decision filed November 13, 2008, the trial court granted appellant's motion to dismiss. The trial court agreed that in light of his acquittal, to prosecute appellant on third-degree felony obstruction of justice, as charged in the original indictment, would violate double jeopardy. The trial court found, however, that because appellant's conviction was reversed due to trial error (prosecutorial misconduct) and not based upon the sufficiency of the evidence, appellant could be retried on a fifth-degree felony obstruction of justice charge.

{¶6} Appellant subsequently moved the trial court to clarify its decision.

Appellant pointed out that he was never indicted for fifth-degree felony obstruction of justice; the only indictment issued was the original third-degree felony indictment; and because the trial court had dismissed that indictment, there was no charge or indictment pending against him "to go forward on."

{¶7} By decision filed November 21, 2008, the trial court reiterated that because double jeopardy does not bar the state from retrying a defendant who was found guilty of an offense that was later reversed on trial error grounds, "the State may retry Defendant on the lesser-included offense of Obstruction of Justice, a felony of the fifth degree."

{¶8} Then, by journal entry filed November 26, 2008, the trial court granted appellant's motion to dismiss the original indictment "insofar as the State of Ohio is barred from further prosecution on the offense of Obstructing Justice, a third degree felony in violation of R.C. 2921.32(A)(5) as charged in the indictment ***." Finding, however, that the state could retry appellant "on the lesser included offense of Obstructing Justice, a fifth degree felony in violation of R.C. 2921.32(A)(5)," the trial court sua sponte amended the original indictment to charge appellant with one count of fifth-degree felony obstruction of justice.

{¶9} Appellant moved to dismiss the amended indictment but was unsuccessful. On December 12, 2008, a jury found him guilty of fifth-degree felony obstruction of justice, in violation of R.C. 2921.32(A)(5), as charged in the amended indictment.

{¶10} Appellant now appeals, raising six assignments of error. We will consider the third assignment of error out of order.

{¶11} Assignment of Error No. 3:

{¶12} "THE TRIAL COURT ERRED IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, WHEN IT FAILED TO GIVE A JURY INSTRUCTION

WHICH REQUIRED THE JURY TO FIND APPELLANT GUILTY BEYOND A REASONABLE DOUBT OF EACH AND EVERY ELEMENT OF THE OFFENSE OF OBSTRUCTION OF JUSTICE – SPECIFICALLY, THE TRIAL COURT DID NOT REQUIRE THE JURY TO FIND THAT THE PERSON AIDED COMMITTED A FELONY."

{¶13} Appellant challenges the trial court's jury instructions for obstruction of justice on the ground they do not require the jury to find that the person aided *committed* a felony, in violation of R.C. 2921.32 and in deviation from 3 Ohio Jury Instructions (2009) 92, Section 521.32.[1] At trial, finding it was sufficient to show the person aided had been *charged* with a crime at the time of the defendant's conduct, based on this court's decision in *State v. Mootispaw* (1985), 23 Ohio App.3d 142, the trial court declined to instruct the jury under Section 521.32.

{¶14} Jury instructions are matters which are left to the sound discretion of the trial court. *State v. Guster* (1981), 66 Ohio St.2d 266, 271. Ordinarily, requested instructions should be given if they are correct statements of the law, applicable to the facts in the case, and reasonable minds could reach the conclusion sought by the specific instruction. *State v. Lawson* (Apr. 30, 2001), Butler App. No. CA99-12-226, at 18, citing *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585. Ohio Jury Instructions are standard instructions and are not binding legal authority. *State v. Goff*, Lawrence App. No. 07CA17, 2009-Ohio-4914, ¶76. Strict compliance with OJI is not mandatory; deviation from OJI does not necessarily constitute error by a trial court. *State v. Miller*, Montgomery App. No. 22433, 2009-Ohio-4607, ¶14.

1. 3 Ohio Jury Instructions (2009) 92, Section 521.32(1) states in relevant part that "[b]efore you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the – day of –, and in – (County), Ohio, the defendant, with purpose to (hinder the [discovery] [apprehension] [prosecution] [conviction] [punishment] of another for) (*insert name of offense*) ***." 3 Ohio Jury Instructions (2009) 93, Section 521.32(6) refers to "offense committed by another" and states that "To find that (*insert name of offense*) was committed by (another), you must find beyond a reasonable doubt that the other person (*describe the essential elements of the charged offense*)."

{¶15} The trial court instructed the jury that "[1] before you can find the defendant guilty, you must find beyond a reasonable doubt that *** the defendant, did communicate false information to another person with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for a crime or to assist another to benefit from the commission of a felony crime; [2] it is not necessary that the State prove that the person aided by the defendant be actually convicted of a crime. Rather, it is sufficient to show that he had been charged with a crime at the time of the defendant's conduct; and [3] if you find the defendant guilty of obstruction of justice, you must separately determine beyond a reasonable doubt whether Charles Martin had the charge of robbery, a felony of the second degree, pending against him."

{¶16} In *Mootispaw*, we held it was not necessary to show that the person aided was actually convicted of a crime. Rather, it was sufficient to show that the person aided was charged with a crime:

{¶17} "Obviously, one cannot hinder the prosecution or conviction of another for crime unless a crime has actually occurred. The statute does not require, however, that the specific person being legally [sic] assisted be actually convicted of such crime. To hold otherwise would emasculate the purpose and intent of the legislature expressed in unambiguous terms. It is sufficient to show that the defendant's husband was charged with a crime, and that the defendant hindered his prosecution or conviction." *Mootispaw*, 23 Ohio App.3d at 144. This court then upheld the denial of Mootispaw's Crim.R. 29 motion for acquittal.

{¶18} Subsequently, in *State v. Penwell* (Jan. 21, 1986), Fayette App. No. CA85-02-004, we addressed a trial court's refusal to instruct a jury that the state was required to prove, beyond a reasonable doubt, that the person aided committed a crime. In *Penwell*, the person aided had been indicted for the corruption of a minor. Relying on *Mootispaw*,

we rejected the defendant's argument as follows:

{¶19} "The jury instruction given by the trial court, regarding the elements of obstruction of justice, included *inter alia*, 'the defendant did so [harbor or conceal, etc.] with purpose to hinder the discovery and/or apprehension of *[the person aided] for a crime*.' Such an instruction was correct and in accord with our holding in *Mootispaw* and we adhere to our position in *Mootispaw*." Id. at 9-10. (Emphasis sic.)

{¶20} *Mootispaw* and *Penwell*, therefore, stand for the proposition that while obstruction of justice cannot be committed unless an underlying crime has been committed, to sustain a conviction for obstruction of justice under R.C. 2921.32, the state need not prove the person aided committed the underlying crime; rather, the state need only prove the person aided was charged with the underlying crime at the time of the defendant's conduct.

{¶21} In contrast with this court's position in *Mootispaw* and *Penwell*, the First Appellate District held that "[t]he crime of obstructing justice cannot be committed without the commission of an underlying crime by another[.] Therefore, it was incumbent upon the state to establish that the underlying crime had been committed." *State v. Bronaugh* (1980), 69 Ohio App.2d 24, 25. Finding there was no proof that the underlying crime occurred, the appellate court reversed the trial court's denial of the defendant's Crim.R. 29 motion for acquittal and discharged the defendant.[2]

{¶22} At the time of the foregoing decisions, the degree of a defendant's guilt for

2. *Bronaugh* was decided a few years before *Mootispaw* and *Penwell*. In *Mootispaw*, declining to express an opinion as to the merits of *Bronaugh* as substantive law, this court found it was clearly distinguishable as there was no proof in *Bronaugh* that any underlying crime had been committed, and no one was charged by such. By contrast, in *Mootispaw*, it was undisputed a theft had occurred and that Mootispaw's husband was charged with the offense. *Mootispaw*, 23 Ohio App.3d at 144. In *Penwell*, this court rejected the argument *Mootispaw* was in conflict with *Bronaugh*: "*Bronaugh* does not hold that a jury should be instructed as suggested by appellant nor does it hold that it has to be shown that the person being illegally assisted has committed a crime. *Bronaugh* only holds that the state has to show that an underlying crime has been committed; not that the person being illegally assisted committed the underlying crime beyond a reasonable doubt." *Penwell*, Fayette App. No. CA85-02-004, at 10.

obstruction of justice was governed by former R.C. 2921.32(B): "Whoever violates this section is guilty of obstructing justice, a misdemeanor of the first degree. If the crime *committed* by the person aided is a felony, obstructing justice is a felony of the fourth degree." (Emphasis added.) Other appellate districts followed suit and likewise held that obstruction of justice cannot be committed without the commission of an underlying crime by another. Thus, the state was required to show that an underlying crime was in fact committed to convict a defendant of obstruction of justice. See *State v. Crispin* (Mar. 23, 2001), Erie App. No. E-99-030; *State v. Hearns* (Aug. 24, 1983), Summit App. Nos. 11012 and 11094. Other appellate districts further required the state to prove beyond a reasonable doubt that the underlying crime was committed by the person aided. See *State v. Herron* (Oct. 21, 1994), Trumbull App. No. 93-T-4913; *State v. Logan* (1991), 77 Ohio App.3d 333. Mere suspicion was insufficient; likewise, a mere statement or allegation that the underlying crime was committed by the person aided was insufficient. Id.

{¶23} Subsequently, the provision setting forth a defendant's guilt for obstruction of justice under R.C. 2921.32 was extensively rewritten, was renumbered R.C. 2921.32(C), and increased the number and level of degrees of obstruction of justice. Whereas former R.C. 2921.32(B) made the crime of obstruction of justice either a first-degree misdemeanor or a fourth-degree felony based on the crime committed by the person aided, the degree of guilt for obstruction of justice under current R.C. 2921.32(C) now ranges from a misdemeanor to a felony of the first, second, third, or fifth degree. As under former R.C. 2921.32(B), the degree of guilt depends on the crime committed by the person aided.

{¶24} Following the revision of R.C. 2921.32, the Fifth and Ninth Appellate Districts held that in Ohio, the crime of obstructing justice cannot be committed without the

commission of an underlying crime by another. While R.C. 2921.32 does not specify the degree or method of proof required to show that an underlying crime was committed, mere suspicion is insufficient; there must be some proof of the underlying crime. A mere statement or allegation that a crime was committed by the person aided is insufficient. The state is required to present evidence proving beyond a reasonable doubt that the person aided committed a crime. See *State v. Hall*, Fairfield App. No. 05 CA 35, 2006-Ohio-2160; *State v. Kolvek*, Summit App. No. 21752, 2004-Ohio-3706.

{¶25} We decline to follow the Fifth and Ninth Appellate Districts in requiring the state to prove beyond a reasonable doubt that the person aided committed the underlying crime. To so hold would place a considerable burden on the state and would result in a trial within a trial. Notwithstanding the revision of R.C. 2921.32 and its emphasis on "the crime committed by the person aided" (a phrase which existed in former R.C. 2921.32), we do not believe R.C. 2921.32, as rewritten, was meant to burden the state with proving the person aided committed the underlying crime.

{¶26} Under the obstruction of justice statute, a violation of R.C. 2921.32(A) constitutes the offense of "obstructing justice." 2002 Legislative Service Commission Comment to R.C. 2921.32. As stated earlier, the penalty for obstructing justice is now determined under R.C. 2921.32(C) which increased the number and level of degrees of obstruction of justice from two to five different degrees. Further, when rewritten, the following provision was added to R.C. 2921.32:

{¶27} "A person may be prosecuted for, and may be convicted of a violation of [R.C. 2921.32(A)] regardless of whether the person aided ultimately is apprehended for, is charged with, is convicted of, [or] pleads guilty to for committing the crime the person aided committed. The crime the person aided committed shall be used under [R.C. 2921.32(C)] in determining the penalty for the violation of [R.C. 2921.32(A)], regardless of

whether the person aided ultimately is apprehended for, is charged with, is convicted of, [or] pleads guilty to for committing the crime the person aided committed." R.C. 2921.32(B) (internal references to children as either the offender or the individual aided, and to underlying acts committed by the child aided removed.)

{¶28} As R.C. 2921.32(B) clearly states, in a prosecution or conviction for obstruction of justice, it matters not whether the person aided was ultimately apprehended for, charged with, convicted of, or pled guilty to committing the underlying crime. In other words, "apprehension, prosecution, or conviction of the person aided is not a prerequisite to a prosecution or conviction for obstructing justice." 2002 Legislative Service Commission Comment to R.C. 2921.32.

{¶29} According to the Fifth and Ninth Appellate Districts, the commission of the underlying crime by the person aided must be proved to support a conviction for obstructing justice. The state would be required to prove the person aided was guilty of an offense beyond a reasonable doubt as well as proving the guilt of the defendant on trial. In other words, the actual guilt of the person aided (notwithstanding the language of newly amended R.C. 2921.32[B]) becomes an essential element of obstructing justice.

{¶30} If we were to follow the Fifth and Ninth Appellate Districts' reasoning, how would the state prove a person aided committed an underlying crime, especially if such crime was a serious offense such as murder, an offense committed in another state, and/or an offense committed years ago? Further, in light of newly amended R.C. 2921.32(B), how would the state be able to prove that the person aided committed the underlying crime if that person was never apprehended for, charged with, convicted of, or pled guilty to the underlying crime? Last, but not least, because the degree of a defendant's guilt for obstructing justice is dependent upon the degree of the underlying crime, the dissent's reasoning would require the state, in some cases, to instruct the jury

on all possible lesser included offenses of the underlying crime in order to sentence the defendant for obstructing justice. To require the state to prove that the person aided committed the underlying crime would result in an impossible trial within a trial and place a heavy and disproportionate burden on the state. We do not believe this was what the legislature intended when it amended R.C. 2921.32.

{¶31} We therefore continue to adhere to our position in *Mootispaw* and *Penwell*. At this juncture, we note that contrary to the dissent's assertion, this court in *Penwell* did not agree with the First Appellate District in *Bronough* that the state is required to prove that a crime was committed by the aided party. (See fn. 2 of this opinion.) In *Mootispaw*, the person aided was charged with an underlying crime; in *Penwell*, the person aided was indicted for an underlying crime. In both cases, such evidence was sufficient.

{¶32} We therefore hold that to prove the crime of obstructing justice under R.C. 2921.32, it is sufficient to show that the person aided was charged with a crime. The state is not required to prove the actual guilt of the person aided, that is, that the person aided committed the underlying crime. We recognize our holding is in conflict with the Fifth Appellate District in *Hall*, 2006-Ohio-2160, and its progeny, and with the Ninth Appellate District in *Kolvek*, 2004-Ohio-3706.

{¶33} In light of the foregoing, we find that the trial court's jury instructions for obstruction of justice were proper. The trial court did not abuse its discretion when it declined to instruct the jury under Section 521.32 of the Ohio Jury Instructions, and when it did not require the jury to find that Charles, the person aided, committed a felony. The trial court properly instructed the jury it was sufficient to show that Charles had been charged with a crime at the time of appellant's conduct. See *State v. Davis* (Sept. 28, 2000), Franklin App. No. 99AP-1428 (trial court did not err in instructing the jury that issuance of an indictment against the person aided was sufficient to prove the underlying

crime was committed).

{¶34} Appellant's third assignment of error is overruled.

{¶35} Assignment of Error No. 1:

{¶36} "THE APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT AND/OR THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

{¶37} As noted earlier, the original charge against appellant stemmed from allegations that when police were attempting to ascertain the identity of one of his employees, appellant told police that his employee's name was Charles Williams when it was Charles Martin and that Charles had left the building shortly before he was found by police hiding inside the building. Appellant argues his conviction was supported by insufficient evidence and was against the manifest weight of the evidence because the state failed to prove (1) appellant lied to the police when he told them Charles had left the building; (2) appellant had any purpose to hinder the discovery of Charles when he made the statement to the police; and (3) Charles had committed or been charged with a felony at the time of the incident.

{¶38} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶70, certiorari denied (2006), 548 U.S. 912, 126 S.Ct. 2940, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury's. See *State v. Holdbrook*, Butler

App. No. CA2005-11-482, 2006-Ohio-5841.

{¶39} When reviewing whether a conviction is against the manifest weight of the evidence, "[t]he 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When reviewing the evidence, an appellate court must be mindful the original trier of fact was in the best position to judge the credibility of witnesses and weight to be given the evidence. *State v. DeHass* (1967), 10 Ohio App.2d 230, paragraph one of the syllabus.

{¶40} Appellant was convicted of obstruction of justice in violation of R.C. 2921.32(A)(5) and (C)(3). R.C. 2921.32(A)(5) provides in relevant part that "[n]o person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime *** shall *** [c]ommunicate false information to any person." Pursuant to R.C. 2921.32(C), "[w]hoever violates this section is guilty of obstruction of justice. [I]f the crime committed by the person aided is a felony ***, obstructing justice is a felony of the fifth degree." R.C. 2921.32(C)(1), (3).

{¶41} At appellant's second trial, the state presented the testimony of two Middletown police officers, Dennis Jordan and Jonathan Rawlings, and successfully moved to admit a certified copy of the Dayton Municipal Court's records relating to a felony robbery warrant against a Charles Martin. This time, the state's theory focused solely on appellant's statement to police that Charles was not in the building (and not his

statement that Charles' last name was Williams). Appellant did not testify or present evidence on his behalf. However, over his objection, his testimony on direct examination from his first trial was read into the record. Testimony at trial revealed the following:

{¶42} In the early hours of May 24, 2006, Officers Dennis Jordan and Jonathan Rawlings were dispatched to a used car lot in Middletown to investigate a possible break-in. When the officers arrived at the lot, they encountered two men out in the lot, appellant and a man who identified himself as Charles Williams. Appellant told the officers that the car lot belonged to his mother and that they were rearranging cars. Appellant and Charles provided information as to their identity and the officers left. Officer Jordan entered the information into his police car computer. While the identification provided by appellant was correct, the social security number provided by Charles did not exist. Officer Jordan further discovered an outstanding traffic violation warrant for a Charles Williams. The officers drove back to the car lot.

{¶43} Upon arriving at the car lot, they observed Charles smoking a cigarette on the front porch of the office trailer. Officer Jordan observed Charles walk back towards the front door of the trailer. As the officers drove by to park, they lost sight of Charles. Neither officer saw Charles enter the trailer. By the time the officers parked and walked back to the trailer (two to three minutes after seeing Charles smoke), Charles was gone; a cigarette was laying on the railing. Officer Rawlings walked to the back of the trailer and stayed there; Officer Jordan walked to the front door of the trailer.

{¶44} Looking through the front door, "a full length pane of glass," Officer Jordan saw appellant on the phone in an office, knocked, and made eye contact with appellant who ignored the officer. The officer knocked again and motioned appellant to come to the door. Appellant swiveled in his chair and turned his back to the officer. After a third knock, appellant finally came to the door and asked Officer Jordan what he needed. The

officer asked where Charles was; appellant replied "Charles left when we left or Charles wasn't there." When the officer explained he had just seen Charles on the front porch walking toward the front door, appellant once again replied Charles was not there. Likewise, when the officer told appellant he had a warrant for Charles, appellant replied Charles was not there. At the officer's request, appellant opened the door but only partly. As the officer started stepping in, appellant started asking questions, told the officer he was going to call his attorney, and demanded a supervisor, "leading [the officer] to believe he was not wanting [him] to come in."

{¶45} The back of the trailer had a door. When Officer Rawlings was positioned at the back of the trailer, no one came out through the back door. However, the officer heard noise coming from inside the trailer. After Officer Jordan entered the trailer, Officer Rawlings walked back to the front door of the trailer, entered the trailer, and walked to the back of the trailer where he found Charles hiding in a back office with the door closed and the light off. Charles was found in the vicinity of where Officer Rawlings heard the noise.

{¶46} Following the discovery of Charles, Officer Rawlings tried to ascertain his true identity by talking to appellant. According to appellant, Charles had been employed at the car lot for a few months. While appellant was looking for Charles' job application, Officer Rawlings noticed a monitor displaying a security camera with a live feed to the front of the trailer. Unable to find Charles' job application, appellant called someone whom he referred to as his mother. Officer Rawlings felt that by referring to Charles as Charles Williams, appellant was trying to prompt his mother with regard to Charles' identity.

{¶47} Although there was a traffic citation under the name of Charles Williams, it was later discovered that the traffic violation warrant which in part prompted the officers to return to the car lot was not for Charles. Despite a lengthy interview, the officers were

unable to ascertain the true identity of Charles while at the car lot. It was not until the next day when his fingerprints were sent to AFIS (Automatic Fingerprint Identification System) that Charles was identified as Charles Martin, with a felony robbery warrant pending against him out of Dayton.

{¶48} Upon thoroughly reviewing the record, we find that appellant's conviction for obstruction of justice under R.C. 2921.32(A)(5) and (C)(3) was supported by sufficient evidence and was not against the manifest weight of the evidence. At the outset, we find that in light of our holding under appellant's second, third, and sixth assignments of error (under R.C. 2921.32(C)(3) it is sufficient to show that the person aided was charged with, rather than committed a felony; the trial court properly admitted State's Exhibit 2, the certified copy of the Dayton Municipal Court's records relating to a felony robbery warrant against Charles Martin; and the Charles Martin referred to in Exhibit 2 was the same Charles Martin present at the car lot on the day of the incident), the state did prove that Charles was charged with a felony at the time of the incident.

{¶49} "The making of unsworn false statements to a law enforcement officer with the purpose to hinder the officer's investigation of a crime is punishable conduct within the meaning of R.C. 2921.32(A)(5)." *State v. Bailey* (1994), 71 Ohio St.3d 443, syllabus. "The purpose with which a person does an act is determined from the manner in which it is done, the means used, and all the other facts and circumstances in evidence." *State v. Puterbaugh*, 142 Ohio App.3d 185, 189, 2001-Ohio-2498.

{¶50} The record shows that when the officers came back to the car lot, they saw Charles smoking a cigarette on the front porch of the trailer; Officer Jordan observed Charles walk toward the front door of the trailer before losing sight of him. Officer Jordan was at the front door within two to three minutes of seeing Charles smoke. The record also shows that in the office where appellant was on the phone, there was a monitor

displaying a security camera with a live feed to the front of the trailer. Appellant ignored Officer Jordan's first two knocks but finally came to the front door after the third knock, and asked the officer what he needed. In response to the officer's inquiry about Charles' whereabouts, appellant each time stated Charles was not in the trailer. Likewise, upon being told there was a warrant against Charles, appellant replied Charles was not there. It was not until the officer made the request that appellant opened the front door of the trailer, but only partly. Appellant's behavior led the officer to believe appellant did not want him to come in. Subsequently, Charles was found hiding in the trailer.

{¶51} Although much of the evidence against appellant is circumstantial, circumstantial evidence and direct evidence have the same probative value, and in some instances, certain facts can only be established by circumstantial evidence. *Jenks*, 61 Ohio St.3d at 272; *State v. Mobus*, Butler App. No. CA2005-01-004, 2005-Ohio-6164, ¶51. A conviction based on purely circumstantial evidence is no less sound than one based on direct evidence. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 27; *Mobus* at ¶51.

{¶52} Given the foregoing evidence, we cannot say that the jury lost its way in finding that appellant made false statements to the officer with the purpose to hinder the discovery or apprehension of Charles in the trailer. See *Bailey*, 71 Ohio St.3d at 448 (finding that words uttered by a defendant to officers as she blocked the entrance to her home constituted communication of false information under R.C. 2921.32(A)(5), and that a trier of fact could reasonably conclude from the evidence that defendant's purpose in making false statements to the officers was to hinder the discovery or apprehension of the illegally aided person).[3] Appellant's conviction is therefore not against the manifest weight

3. We find that the cases cited by appellant in support of this assignment of error are factually distinguishable and are therefore inapplicable here. *Puterbaugh* involved a conviction for obstructing official

of the evidence. It follows that his conviction for obstruction of justice is supported by sufficient evidence. *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73 (a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency).

{¶53} Appellant's first assignment of error is overruled.

{¶54} Assignment of Error No. 2:

{¶55} "THE TRIAL COURT ERRED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 10 & 16 OF THE OHIO CONSTITUTION WHEN IT FAILED TO DISMISS THE NOVEMBER 26, 2008 AMENDED INDICTMENT."

{¶56} Appellant argues that the trial court erred when it failed to dismiss the amended indictment. Appellant asserts that when the trial court granted his motion to dismiss the original indictment in its first decision, it could not later amend an indictment that had already been dismissed. Appellant further asserts that the amended indictment is defective because it lacks the essential element under R.C. 2921.32(C)(3) that "the person aided *committed* a felony."

{¶57} In the case at bar, the trial court issued two decisions before its journal entry. Based upon the reasons discussed earlier, the first decision stated that "Defendant's motion to dismiss is hereby **GRANTED**." The second decision simply reiterated the reasoning set forth in the first decision. Then, in its journal entry, the trial court "**ORDERED** that the Defendant's motion to dismiss is granted insofar as the State of Ohio is barred from further prosecution on the offense of Obstructing Justice, a third degree felony in violation of R.C. 2921.32(A)(5) as charged in the Indictment (a third

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business in violation of R.C. 2921.31 which requires that a defendant's action actually impede a public official. *Cincinnati v. Smith* (1986), 31 Ohio App.3d 158, involved a conviction for obstructing justice in violation of R.C. 2921.32(A)(1) (harboring or concealing the aided person) and the evidence in that case clearly supported the reversal of the defendant's conviction.

degree felony under R.C. 2921.32(C)(4) by virtue of allegation that the crime committed by the person aided was aggravated murder, murder, or a felony of the first or second degree, other than an act of terrorism), inasmuch as the previous jury's verdict acquitted the Defendant on this enhancement element under R.C. 2921.32(C)(4)[.]"

{¶58} The journal entry "**FURTHER ORDERED** that the State of Ohio may proceed upon retrial on the lesser included offense of Obstructing Justice, a fifth degree felony in violation of R.C. 2921.32(A)(5) (a fifth degree felony under R.C. 2921.32(C)(3) by virtue of allegation that the crime committed by the person aided was a felony), inasmuch as the previous jury's verdict had convicted the Defendant of that lesser included offense, whereas the Court of Appeals ordered that this conviction be set aside and remanded the case to this Court for further proceedings." The journal entry then amended the original indictment to charge appellant with fifth-degree felony obstruction of justice.

{¶59} It is well-established that a court speaks only through its journal entries and not by oral pronouncement or through decisions. See *Schenley v. Kauth* (1953), 160 Ohio St. 109; *Hayden v. Hayden*, Warren App. No. CA2003-08-081, 2004-Ohio-6483. Without a journal entry, a decision or finding of a court has no force or effect. *State v. Ronan*, Franklin App. No. 06AP-63, 2007-Ohio-168, ¶9. It follows that notwithstanding the language used in the trial court's first decision, the trial court did *not* dismiss the original indictment in its decision. The trial court, therefore, did not amend an indictment that had been dismissed.

{¶60} In its journal entry, the trial court granted appellant the right not to be retried on third-degree felony obstruction of justice, allowed the state to retry appellant on fifth-degree felony obstruction of justice, and amended the original indictment to charge appellant with fifth-degree felony obstruction of justice ostensibly to conform to the evidence presented at the first trial. See *State v. Breedlove* (July 11, 1994), Butler App.

No. CA93-12-230. We find no error.

{¶61} Appellant also asserts that the amended indictment is defective because it lacks the essential element under R.C. 2921.32(C)(3) that "the person aided *committed* a felony."

{¶62} The purpose of an indictment issued by a grand jury has always been to give notice to the accused. An indictment is sufficient if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶9; *Hamling v. United States* (1974), 418 U.S. 87, 117, 94 S.Ct. 2887. Where one of the vital elements identifying a crime is omitted from the indictment, it is defective and cannot be cured by the court as such a procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury. *State v. Wozniak* (1961), 172 Ohio St. 517, 520; *Harris v. State* (1932), 125 Ohio St.257.

{¶63} We find that the specific language in R.C. 2921.32(C)(3) "the crime committed by the person aided" need not be included in an indictment for obstructing justice. We have not found, and appellant has not cited any cases holding that the phrase "the crime committed by the person aided", or the allegation "the person aided committed a felony" is an essential element of obstructing justice under R.C. 2921.32(C), or that its omission from an indictment renders the indictment defective. We decline to require the state to include such language or allegation in an indictment for obstructing justice.

{¶64} In the case at bar, the amended indictment stated:

{¶65} "On or about May 24, 2006, at Butler County, Ohio, Robert B. Smith Jr., with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime (to wit: a

felony), did communicate false information to another person, which constitutes the offense of Obstructing Justice, a Fifth Degree Felony, in violation of R.C. §2921.32(A)(5), and against the peace and dignity of the State of Ohio."

{¶66} As drafted, the amended indictment fully and fairly informed appellant of the nature and cause of the accusations against him, identified the underlying offense as a felony, and stated the degree of the offense allegedly committed by appellant, to wit fifth-degree felony obstruction of justice. We find the amended indictment was not defective.

{¶67} In light of all of the foregoing, we find that the trial court did not err when it failed to dismiss the amended indictment. Appellant's second assignment of error is overruled.

{¶68} Assignment of Error No. 4:

{¶69} "THE TRIAL COURT ERRED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT FAILED TO SUPPRESS EVIDENCE THAT WAS SEIZED DURING A WARRANTLESS SEARCH."

{¶70} Two days before trial, appellant moved to suppress the seizure of Charles' person on the ground the search of the office trailer was unconstitutional. The state's attempt to dismiss the motion on the ground it was untimely filed was unsuccessful. Following a suppression hearing on the first day of trial, the trial court overruled the motion on the ground appellant lacked standing to challenge the search. Alternatively, the trial court found that Officer Jordan properly entered the trailer because he was let in voluntarily by appellant. It is conceded that the search of the trailer was conducted without a warrant.

{¶71} Appellant argues that the trial court erred in denying his motion to suppress. Appellant asserts that based on Officer Jordan's testimony at the second trial, the officers' testimony at the first trial, and appellant's first trial testimony (as read into the record

during the second trial), appellant clearly had standing to challenge the warrantless search. Appellant also asserts that because he was never asked and never consented to the search of the trailer, the warrantless search was unconstitutional.

{¶72} Appellate review of a trial court's decision on a motion to suppress involves mixed questions of law and fact. *State v. Renner*, Clinton App. No. CA2002-08-033, 2003-Ohio-6550, ¶8. When ruling on a motion to suppress evidence, the trial court assumes the role of the trier of fact and is in the best position to resolve questions of fact and to evaluate the credibility of witnesses. Id. Accordingly, an appellate court must defer to the trial court's findings of fact if competent, credible evidence supports them. Id. The appellate court must then independently determine, without deference to the trial court, whether the trial court properly applied the substantive law to the facts of the case. Id.

{¶73} Appellant alleges that the warrantless search of the trailer was conducted in violation of his constitutional rights. It is well-settled that the protections of the Fourth Amendment to the United States Constitution relating to searches and seizures extend to commercial premises as well as homes. *State v. Denune* (1992), 82 Ohio App.3d 497, 504. However, because Fourth Amendments rights are personal rights which may not be vicariously asserted, see *Rakas v. Illinois* (1978), 439 U.S. 128, 99 S.Ct. 421, only those whose personal rights have been violated can raise Fourth Amendment claims. *Renner*, 2003-Ohio-6550 at ¶9. Though once expressed as a question of "standing," the issue has been framed in terms of whether a defendant has a legitimate expectation of privacy in the searched property. *Denune* at 504. Thus, in order to challenge a search or seizure on Fourth Amendments grounds, a defendant has the burden of proving he had a legitimate expectation of privacy in the area searched. *Renner* at ¶9.

{¶74} In the case at bar, appellant failed to demonstrate he had an expectation of

privacy in the searched area. There was no testimony during the suppression hearing that he owned the car lot, that he was employed there, or that he had control over the operation of the business. The only testimony regarding appellant's presence on the car lot came from Officer Jordan's statement that appellant's mother owned the car lot and that appellant was rearranging cars. The mere presence of appellant on a car lot owned by his mother at the time of the search is not enough to establish a personal privacy interest in the car lot or trailer. Having failed to establish an expectation of privacy in the trailer, appellant lacks standing to challenge the warrantless search.

{¶75} Appellant nonetheless asserts there was sufficient evidence of standing because (1) his testimony from his first trial, which was read into the record, clearly established his relationship with the car lot; and (2) the trial court, which had presided over the first trial, could have taken judicial notice of the officers' testimony from the first trial.

{¶76} With regard to appellant's first trial testimony, we note it was read into the record *after* the trial court declined to reconsider its ruling on the motion to suppress. The alleged evidence of appellant's relationship with the car lot was therefore not before the trial court when it ruled on appellant's motion to suppress. With regard to appellant's motion to reconsider, the record shows that following the two officers' testimony during the second trial, appellant moved the trial court to reconsider its denial of the motion to suppress based upon additional evidence resulting from the officers' testimony. The trial court summarily denied the motion.

{¶77} A motion to suppress is clearly a pre-trial motion which must be timely determined prior to trial. Crim.R. 12. "Otherwise, the state loses its right to appeal from the motion prior to trial." *State v. Rodgers* (Apr. 19, 1984), Cuyahoga App. Nos. 47146, 47147, and 47151, 1984 WL 5516, at *3 (finding the trial court did not err in failing to

reconsider appellant's suppression motion during trial). Further, reconsideration at trial of a motion previously denied defeats the benefits of pretrial motion practice and unfairly imposes upon the prosecution the obligation of proving legality twice. See *State v. Kempton* (May 1, 1985), Ross App. No. 1099.

{¶78} As for appellant's suggestion the trial court could have taken judicial notice of the officers' testimony from the first trial, we disagree. "A trial court may not take judicial notice of prior proceedings in the court, but may only take judicial notice of the proceedings in the immediate case." *State v. Baiduc*, Geauga App. No. 2006-G-2711, 2007-Ohio-4963, ¶20. "The rationale for this holding is that, if a trial court takes notice of a prior proceeding, the appellate court cannot review whether the trial court accurately interpreted the prior case because the record of the prior case is not before the appellate court." Id. at ¶21. See, also, *State v. Taylor* (1999), 135 Ohio App.3d 634 (a court cannot take notice of proceedings in separate actions even when the separate actions involve the same parties and were before the same court.)

{¶79} We therefore find appellant lacked standing to challenge the warrantless search. In light of our holding, we need not address appellant's failure to consent to the search. Appellant's fourth assignment of error is overruled.

{¶80} Assignment of Error No. 5:

{¶81} "THE TRIAL COURT ERRED IN ACCEPTING THE STATE'S PROFFERED RACE NEUTRAL REASON FOR STRIKING JUROR NO. 17 AND BY FAILING TO CONDUCT A COMPARATIVE JUROR ANALYSIS CONSISTENT WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶82} Appellant argues the trial court erred by permitting the state to use its peremptory challenges to remove the only African-American juror (Juror No. 17) from the

venire in violation of *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, and *Miller-El v. Dretke* (2005), 545 U.S. 231, 125 S.Ct. 2317. Appellant, who is African-American, asserts that his constitutional right to equal protection was violated because "the trial court accepted the state's proffered race neutral reasons at face value and failed to conduct a comparative juror analysis between similarly situated nonminority jurors who were not excluded."

{¶83} Voir dire started with the state questioning prospective jurors. Then, during his questioning, defense counsel generally asked prospective jurors whether some of them were scared or nervous to stand up and speak in front of people. The record indicates several prospective jurors raised their hands; however, counsel only questioned two persons: a female non-African-American juror who stated she was nervous (the record does not indicate her juror number); and Juror No. 17 who stated she was shy and nervous. Defense counsel did not further question the two jurors about their nervousness; the state never questioned the two jurors about their nervousness. The other prospective jurors who had raised their hands were never identified. Thereafter, in exercising their peremptory challenges, both parties each removed a prospective juror. The state then removed Juror No. 17 and defense counsel objected on the basis of *Batson*.

{¶84} The state gave several nondiscriminatory reasons to the trial court for using a peremptory challenge against Juror No. 17: the state was not aware Juror No. 17 was African-American and instead assumed she was Asian; Juror No. 17 was 21 and a student; and the juror's nervousness and shyness. The trial court noted its belief the juror was Asian rather than African-American; heard arguments on appellant's objection; and then overruled it, finding that the state had offered sufficient race-neutral justifications for

its removal of Juror No. 17.[4]

{¶85} The Equal Protection Clause forbids the state's use of peremptory challenges to exclude potential jurors based solely on their race. *Batson*, 476 U.S. at 89. *Batson* set forth a three-prong test for determining whether a prosecutor's use of a peremptory challenge is racially motivated. First, the opponent of the peremptory challenge must make a prima facie case of racial discrimination by showing that the state used peremptory challenges to exclude potential jurors on the basis of race.[5] Id. at 96. The burden then shifts to the state to offer a race-neutral explanation for the peremptory challenge. Id. at 97. The state's explanation need only be based on a juror characteristic other than race and not be pretextual. *State v. McCuller*, Butler App. No. CA2005-07-192, 2007-Ohio-348, ¶10. The ultimate burden of persuasion regarding racial motivation rests at all times with the opponent of the strike. Id.

{¶86} Finally, the trial court must determine whether the prosecutor's race-neutral explanation is credible or is instead a pretext for unconstitutional discrimination. Id. at ¶11. Because this stage of the analysis rests largely on the trial court's evaluation of the prosecutor's credibility, the findings of the trial court are given great deference. Id. "Deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations." *Miller-El v. Cockrell* (2003), 537 U.S. 322, 339, 123 S.Ct. 1029; *State v. Carver*, Montgomery App. No. 21328, 2008-Ohio-4631. A trial court's determination that a

4. Immediately thereafter, using a peremptory challenge, defense counsel removed the other prospective juror who had stated she was nervous, the female non-African-American juror.

5. The trial court made no ruling on whether appellant made a prima facie showing of discrimination. Rather, the prosecutor went on to offer race-neutral reasons to remove Juror No. 17 and the trial court overruled the *Batson* challenge based on those reasons. However, "once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot." *Hernandez v. New York* (1991), 500 U.S. 352, 359, 111 S.Ct. 1859; *State v. Hunter*, Montgomery App. No. 22201, 2008-Ohio-2887, ¶14.

defendant has failed to establish purposeful discrimination will not be reversed on appeal unless that determination can be said to be "clearly erroneous." *McCuller* at ¶11.

{¶87} In making this determination, the United States Supreme Court has set forth several factors to consider: (1) the bare statistics; (2) the similarity of answers to voir dire questions by African-American jurors who were peremptorily challenged and answers by non-African-American prospective jurors who were allowed to serve; (3) broader patterns of practice, including jury shuffling; (4) disparate questioning of African-American and non-African-American jurors; and (5) evidence that the prosecutor's office has historically discriminated against African-Americans in jury selection. *Miller-El v. Dretke*, 545 U.S. 231, 240-264; *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶67.

{¶88} We find that the *Dretke* factors are not present in the case at bar. There is no evidence of broader patterns of practice and the state did not engage in jury shuffling.[6] There is no evidence the Butler County Prosecutor's office has historically discriminated against African-Americans in the jury-selection process. There is no evidence of disparate questioning of African-American and non-African-American jurors.

{¶89} Further, there is no evidence that the "bare statistics" support a *Batson* challenge. While no African-American jurors served on the jury, the record indicates there was only one prospective juror who was possibly African-American, Juror No. 17. Indeed, as indicated earlier, while defense attorney raised a *Batson* challenge on the ground Juror No. 17 was African-American, the prosecutor and the trial court were both under the impression that Juror No. 17 was Asian. The lack of African-American jurors could very well be the result of so few African-American jurors being randomly selected for the original jury pool. See *Frazier*, 2007-Ohio-5048 at ¶69; *Hunter*, Montgomery App. No.

6. In *Frazier*, the Ohio Supreme Court explained jury shuffling as follows: "Under Texas practice, during voir dire in a criminal case, either side may literally reshuffle the cards bearing panel members' names, thus rearranging the order in which members of a venire are seated for questioning." *Frazier*, 2007-Ohio-5048 at fn. 1.

22201, 2008-Ohio-2887 at ¶19.

{¶90} As for the last factor, appellant argues that the state's reason for excluding Juror No. 17 (nervousness) was improper because other jurors also expressed nervousness but were not peremptorily challenged. We disagree. While the record indicates several prospective jurors raised their hands when asked by defense counsel about nervousness, only two jurors were questioned: Juror No. 17 and the female non-African-American juror. Both provided similar short answers. Defense counsel did not further question the two jurors about their nervousness; the state never questioned the two jurors about their nervousness. Neither were allowed to serve on the jury: the state used a peremptory challenge to remove Juror No. 17; the defense used a peremptory challenge to remove the other juror. No other jurors were identified or questioned by either party regarding nervousness.

{¶91} In overruling appellant's *Batson* objection, the trial court stated: "the Court has watched all the jurors in their response to all the questions. And the Court would agree with the observation with the prosecuting attorney that [Juror No. 17] did appear to be nervous. She is 21, not married[.] I believe that the reason given by the prosecuting attorney is a race neutral reason. It was not motivated by any bias or prejudice on behalf of the State of Ohio. *** I certainly believe the reasons given are valid based on my observations of the juror."

{¶92} Giving great deference to the trial court's findings and given that none of the *Dretke* factors apply, we find that the trial court did not err in determining that appellant failed to establish purposeful discrimination. Accordingly, the state's use of its peremptory challenge to remove Juror No. 17 did not violate equal protection or deny appellant a fair trial and an impartial jury. Appellant's fifth assignment of error is overruled.

{¶93} Assignment of Error No. 6:

{¶94} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED A POLICE REPORT [STATE'S EXHIBIT 3] AND A COPY OF A WARRANT [STATE'S EXHIBIT 2] TO BE ENTERED INTO EVIDENCE AND WHEN IT PERMITTED APPELLANT'S PREVIOUS TRIAL TESTIMONY TO BE ADMITTED INTO EVIDENCE IN VIOLATION OF THE HEARSAY RULE AND FEDERAL AND STATE CONFRONTATION CLAUSES."

{¶95} Appellant argues the trial court erred in admitting into evidence State Exhibit 2 (a certified copy from the Dayton Municipal Court Clerk of Courts and an attached computer printout showing a felony robbery warrant against Charles Martin); a police report prepared by Officer Jordan on May 24, 2006, the day of the incident; and appellant's first trial testimony (which was read into the record during the second trial). The record shows that following the officers' testimony, the state told the trial court it had no further testimony to present. The state then successfully moved to admit Exhibit 2.[7] The next day, after trial resumed, the state successfully moved to admit the police report and appellant's prior testimony.

{¶96} A trial court's decision to admit or exclude evidence will not be reversed by a reviewing court absent an abuse of discretion. *State v. Williams*, Butler App. No. CA2007-04-087, 2008-Ohio-3729, ¶8. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶130.

{¶97} Appellant first argues the trial court erred in admitting Exhibit 2. Appellant asserts the documents in the exhibit were not properly authenticated; further, the certified copy from the Dayton Municipal Court shows a felony robbery "offense" but does not list a

7. Following the admission of the exhibit, appellant asked the trial court to reconsider his motion to suppress, and then moved for acquittal under Crim.R. 29. Both motions were overruled by the trial court and the court adjourned for the day.

"charge." By contrast, the attached computer printout lists a felony robbery "charge" against Charles. The certified copy of the Dayton Municipal Court's records relating to a felony robbery warrant against Charles Martin includes a certification by the Dayton Municipal Court Clerk of Courts that it is "a true and correct copy of the original on file in this court," and is "a complete transcript of the Proceedings, Record, Docket and Journal Entries in said Court in the above entitled case."

{¶98} The trial court admitted the exhibit as a "self-authenticating document." The court also overruled appellant's objection there was no evidence the Charles Martin referred to in the exhibit was the same Charles Martin present at the car lot on May 24, 2006. The trial court found the issue was addressed during Officer Jordan's testimony.

{¶99} Upon reviewing the record, we find that Exhibit 2 was properly admitted as a self-authenticating document pursuant to Evid.R. 902(4). Further, the information provided in the certified copy of the Dayton Municipal Court's records relating to the felony robbery warrant against Charles is identical to the information listed in the attached computer printout. The certified copy clearly shows a warrant charging Charles with a felony robbery offense. Upon reviewing Officer Jordan's testimony, we also find it provided evidence that the Charles Martin referred to in Exhibit 2 was the same Charles Martin present at the car lot on May 24, 2006. The trial court therefore did not err in admitting Exhibit 2.

{¶100} Appellant next argues the trial court erred in admitting Officer Jordan's police report in violation of the hearsay rule. Appellant used the report while cross-examining the two police officers. Following Officer Jordan's authentication of the report, the trial court admitted it on the basis of Evid.R. 801(D)(1)(b) and after finding "sufficient implication *** in the cross-examination that the police officers were fabricating some of their story."

{¶101} Police reports are generally considered to be inadmissible hearsay and should not be submitted to the jury. See *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, certiorari denied (2008), __ U.S. __, 129 S.Ct. 734. However, certain rules of evidence and exceptions may apply and result in a statement's admissibility. See *State v. Jeffers*, Gallia App. No. 08CA7, 2009-Ohio-1672.

{¶102} Evid.R. 801(D) defines certain out-of-court declarations as non-hearsay. Under Evid.R. 801(D)(1)(b), an out-of-court statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. The rule "permits the rehabilitation of a witness whose credibility has been attacked by an express or implied charge that he recently fabricated his story or falsified his testimony in response to improper motivation or undue influence." *State v. Grays*, Madison App. No. CA2001-02-007, 2001-Ohio-8679, at 11.

{¶103} For the rule to apply, the declarant must be subject to cross-examination and the statement must be offered to rebut a charge that the declarant lied or was improperly influenced in his testimony. *Williams*, 2008-Ohio-3729, ¶12. To be admissible, prior consistent statements must have been made before the existence of any motive or influence to falsify testimony. Id. In determining whether to admit a prior consistent statement for rebuttal purposes, a trial court should take a generous view of the entire trial setting to determine if there was sufficient impeachment of the witness to amount to a charge of fabrication or improper influence or motivation. *Grays* at 12.

{¶104} After reviewing the record, we find that the trial court properly admitted the police report pursuant to Evid.R. 801(D)(1)(b). Defense counsel's cross-examination of the two officers amounted to an implication that part of their testimony at the second trial

was fabricated, and the trial court was within its discretion to allow rehabilitation through the introduction of a prior consistent statement pursuant to Evid.R. 801(D)(1)(b).[8]

{¶105} Finally, appellant argues the trial court erred in admitting his prior testimony from the first trial. The testimony was admitted on the basis of *Harrison v. United States* (1968), 392 U.S. 219, 88 S.Ct. 2008, and *State v. Slone* (1975), 45 Ohio App.2d 24. In *Harrison*, the United States Supreme Court noted "the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings." *Harrison*, 392 U.S. at 222. Both *Harrison* and *Slone* held that a defendant who voluntarily takes the stand on his own behalf at a prior trial waives his right to assert his constitutional privilege against self-incrimination in a subsequent trial where the prior testimony can be used against him. *Harrison* at 222; *Slone*, 45 Ohio App.2d at 27-28 (listing rationales used by state courts to justify the practice).[9] In light of the foregoing, we find that the trial court did not err in admitting appellant's testimony from his first trial.

{¶106} Appellant's sixth assignment of error is overruled.

{¶107} Judgment affirmed.

HENDRICKSON, J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

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8. Appellant also summarily asserts that the admission of the report violated his right of confrontation. However, appellant did not raise this issue below. Further, when a declarant testifies at trial and is subject to cross-examination, the Sixth Amendment right to confrontation is not implicated. See *Williams*, 2008-Ohio-3729. Finally, the record indicates the trial court reviewed the report before admitting it to determine whether to redact potential hearsay statements, and gave appellant the opportunity to do the same.

9. Appellant argues that *Slone* does not apply because he was not retried for the same offense. We disagree. In both trials, appellant was tried for obstruction of justice in violation of R.C. 2921.32(A)(5). The only difference between both trials was that they involved inferior degrees of the indicted offense (a third-degree felony for the first trial, a fifth-degree felony for the second trial). An inferior degree of the indicted offense is an offense where its elements are identical to the indicted offense, but which, upon proof of a mitigating or aggravating element, is assigned a different degree of punishment. *State v. Deem* (1988), 40 Ohio St.3d 205, 209.

{¶108} I respectfully dissent because I agree with the position of the First, Fifth and Ninth Appellate Districts. I further realize, as does the majority, that today's decision, coupled with our previous decisions in *Mootispaw* and *Penwell*, conflict with the views expressed by those other appellate courts. It is also readily apparent that a resolution of those conflicting positions is in order. R.C. 2921.32 requires the state to prove commission of an underlying crime by the aided individual. It is insufficient to simply show that an aided individual was charged with a crime. I recognize the considerable burden placed upon the state to prove commission of an underlying crime to support a conviction for obstructing justice which may reasonably result with a trial within a trial.

{¶109} However, "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04(A); *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, ¶18.

{¶110} In *Mootispaw*, this court found that, to convict an individual for obstruction of justice, it was not necessary to show that the aided individual had been convicted of the underlying crime. 23 Ohio App.3d. at 144. This court found that it was sufficient to show the aided individual was charged with a crime. Id. While I agree with *Mootispaw* that it is not necessary to show that the specific person illegally assisted was actually convicted of a crime, it is not sufficient to show that the illegally assisted individual was merely charged with a crime.

{¶111} Subsequently, in *Penwell*, this court revisited *Mootispaw* to examine this court's decision in light of the First Appellate District's decision in *Bronaugh*. In *Bronaugh*, the First District held, "[t]he crime of obstructing justice cannot be committed without the commission of an underlying crime by another * * *. Therefore, it was incumbent upon the state to establish that the underlying crime had been committed." 69 Ohio App.2d at 25.

In *Penwell*, this court concluded that *Mootispaw* was not in conflict with *Bronaugh*. 1986 WL 906 at *4. Further, the *Penwell* court attempted to explain the First District's decision in *Bronough* and the absence of a conflict. "*Bronaugh* does not hold * * * that it has to be shown that the person being illegally assisted has committed a crime. *Bronaugh* only holds that the state has to show that an underlying crime has been committed; not that the person being illegally assisted committed the underlying crime beyond a reasonable doubt." Id.

{¶112} To the contrary, though, in a subsequent decision, which preceded both *Mootispaw* and *Penwell*, the First District had already clarified what was required by *Bronaugh*. In *State v. Hopkins*, Hamilton App. No. C-810539, 1982 WL 8511, the First District, citing *Bronaugh,* found that to support a conviction for obstruction of justice the underlying crime must be established beyond a reasonable doubt. Id. at *1. Despite any claims to the contrary by the *Penwell* court, a conflict clearly existed between *Mootispaw* and the decisions of the First District.

{¶113} *Penwell* obscured this district's position on the instant issue by proclaiming that no conflict existed with the First District and agreeing with *Bronaugh*'s pronouncement that "the state has to show that an underlying crime has been committed," while also reaffirming the holding of *Mootispaw*. Due to *Penwell*, it is unclear what evidence this court requires to support a conviction for obstruction of justice. Must the state prove that a crime was committed by the aided party, as required by the First District in *Bronaugh* and agreed with by this court in *Penwell*, or is it sufficient to merely show a pending criminal charge against the aided party? A crime being charged is not the same as a crime being committed. The majority in this case wishes to adhere to *Mootispaw* despite extensive revision to R.C. 2921.32.

{¶114} The former version of R.C. 2921.32(B), which was in effect at the time of

Mootispaw and *Penwell*, provided, "[w]hoever violates this section is guilty of obstructing justice, a misdemeanor of the first degree. If the crime committed by the person aided is a felony, obstructing justice is a felony of the fourth degree."[10]

{¶115} R.C. 2921.32, as revised, requires proof that an underlying crime has been committed to support a conviction for obstructing justice. Unlike the former version of R.C. 2921.32, all sections defining the degree of the offense are based specifically upon the "crime committed" by the aided party. This manifests a clear intent that commission of an underlying offense must be proved. R.C. 2921.32(C) lists the degrees of culpability as follows:

{¶116} "(2) If the crime committed by the person aided is a misdemeanor or if the act committed by the child aided would be a misdemeanor if committed by an adult, obstructing justice is a misdemeanor of the same degree as the crime committed by the person aided or a misdemeanor of the same degree that the act committed by the child aided would be if committed by an adult.

{¶117} "(3) Except as otherwise provided in divisions (C)(4) and (5) of this section, if the crime committed by the person aided is a felony or if the act committed by the child aided would be a felony if committed by an adult, obstructing justice is a felony of the fifth degree.

{¶118} "(4) If the crime committed by the person aided is aggravated murder, murder, or a felony of the first or second degree or if the act committed by the child aided would be one of those offenses if committed by an adult and if the offender knows or has reason to believe that the crime committed by the person aided is one of those offenses or that the act committed by the child aided would be one of those offenses if committed

10. As a further note, neither *Mootispaw* nor *Penwell* specifically identify the degree of the offense for which each respective defendant was convicted.

by an adult, obstructing justice is a felony of the third degree.

{¶119} "(5) If the crime or act committed by the person or child aided is an act of terrorism, obstructing justice is one of the following:

{¶120} "(a) Except as provided in division (C)(5)(b) of this section, a felony of the second degree;

{¶121} "(b) If the act of terrorism resulted in the death of a person who was not a participant in the act of terrorism, a felony of the first degree."

{¶122} The majority acknowledges the strong emphasis placed upon the crime committed by the person aided in the revised version. Further, the majority explicitly recognizes that "the degree of guilt depends on the crime *committed* by the person aided." (Emphasis added.) Yet, the majority then concludes it is sufficient to show that the person aided was merely charged with a crime. Without commission of an underlying crime, how can the degree of the offense be determined?

{¶123} The majority suggests that the legislature did not intend to "burden the state with proving the person aided committed the underlying crime," advancing hypothetical situations where proving commission of an underlying offense could be difficult.

{¶124} The majority may, or may not, be correct. Nevertheless, it is not the court's role to speculate upon or inject a legislative intent because "courts do not have the authority to ignore the plain and unambiguous language of a statute under the guise of either statutory interpretation or liberal construction; in such situation, the courts must give effect to the words utilized." *Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St. 3d 344, 346, 1994-Ohio-380. See, also, *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752, ¶14. Even if the majority is correct, it is up to the legislature, not the courts, to amend the law.

{¶125} Additionally, R.C. 2921.32(B) provides, "[t]he crime or act the person * * * aided *committed* shall be used * * * in determining the penalty for the violation * * *

regardless of whether the person * * * *is charged with* * * * the crime." (Emphasis added.) With this provision, the legislature explicitly indicated that the evidence which *Mootispaw* claimed is sufficient to support a conviction is no longer enough.

{¶126} The current version of R.C. 2921.32 is clear and unambiguous. Simply put, the statute "says what it says;" an underlying crime must be *committed* by the aided individual. This element, determining the degree of culpability for the offense, must be found by a jury. See *State v. Pelfry*, 112 Ohio St.3d 422, 2007-Ohio-256, syllabus (jury verdict form must include either the degree of the offense for which the defendant is convicted or a statement that an aggravating element has been found). Unless or until the legislature changes the language of the statute, R.C. 2921.32 must be strictly construed as written. Courts do not have the luxury to speculate upon the legislature's intentions and amend a statute if the language is plain and unambiguous. I cannot ignore the plain language of R.C. 2921.32.

{¶127} As it currently stands, proof of the commission of an underlying crime is necessary to support a conviction for obstructing justice. In this case, it was not sufficient to merely show that Charles Martin was charged with a crime. Rather, the court should have instructed that the jury was required to find that Charles Martin committed an underlying offense. The trial court's jury instructions were incorrect. Additionally, the state failed to present any evidence demonstrating that Charles Martin committed an underlying crime. Instead, the state merely introduced evidence that Martin had a felony charge pending in another county. As a result, appellant's conviction is not supported by sufficient evidence and against the manifest weight of the evidence. I would sustain appellant's first and third assignments of error. I concur with the majority's resolution of the remaining assignments of error.