

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 92
v.	:	T.C. NO. 08 CR 292
KYLE SIMS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

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OPINION

Rendered on the 6th day of November, 2009.

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FROELICH, J.

Kyle Sims (“Kyle”) was convicted after a jury trial in the Clark County Court of Common Pleas of negligent assault, having weapons while under disability, improper handling of a firearm in a motor vehicle, and tampering with evidence. He was sentenced to an aggregate term of eleven years and six months in prison.

On appeal, Kyle argues that his convictions were based on insufficient evidence, that his convictions were against the manifest weight of the evidence, and that the trial court erred in instructing the jury on complicity. For the following reasons, Kyle's conviction and sentence for tampering with evidence will be vacated. In all other respects, the judgment will be affirmed.

I

The State's evidence at trial established the following facts.

On March 21, 2008, Dominic Sims ("Dominic")¹ was driving with Marcus Fisher in Dominic's blue Chevrolet van when they saw Devin Ramsey talking to another man at the intersection of Lowry Avenue and Oakwood Place in Springfield, Ohio. Dominic and Ramsey had "bad feelings" toward each other, some of which stemmed from Ramsey's prior romantic relationship with Dominic's and Kyle's sister, Tara. After seeing Ramsey, Dominic turned the van around and called Kyle, his older brother.

Dominic and Fisher picked up Kyle, who got in the back seat of the van, and the three found Ramsey in his Ford Explorer near the intersection of Grant and Lowry Avenues.

Ramsey threw a bottle at the van's driver's side window. Ramsey then sped away, with Dominic following.

As they chased Ramsey in their vehicle, Kyle put his arm on the front passenger seat and shot a firearm out of the passenger side window at Ramsey. Kyle fired again as the two vehicles traveled eastbound on West Johnny Lytle Avenue toward Fountain Avenue. The bullet struck 10-year-old Mikeala Humphrey in the leg as she stood on the sidewalk in front

¹For clarity, the Sims brothers will be referred to by their first names.

of her uncle's house. Humphrey's uncle, Craig Davis, looked at her leg and then saw the SUV drive past, followed by the blue van. Davis observed the SUV turn right on Fountain Avenue while the van turned left. Davis got into his wife's vehicle, turned it around, and began to pursue the van, because "that's where the shots came out of."

Between Grand Avenue and Euclid Avenue on Fountain Avenue, Kyle got out of the vehicle. Soon thereafter, Fisher observed Davis's vehicle chasing them. Davis called the police, who stopped Dominic's vehicle on High Street. At that time, the van contained two people: Dominic, the driver, and Fisher, the front seat passenger. Officers searched the van several times and walked along High Street looking for a gun. No weapon was found.

On April 2, 2008, Kyle was interviewed by Detective Katherine Hart at the Springfield Police Department regarding the shooting; Dominic was already being held on charges related to the shooting. Although Kyle denied involvement during much of the interview, he ultimately admitted that he was the shooter, not his brother, and that neither Dominic nor Fisher knew that he (Kyle) was armed when he got into the van.

On April 8, 2008, Kyle was indicted for felonious assault, in violation of R.C. 2903.11, with a firearm specification and a specification for discharging a firearm from a motor vehicle; having weapons while under disability, in violation of R.C. 2923.13; improper handling of a firearm, in violation of R.C. 2923.16; and tampering with evidence, in violation of R.C. 2921.12. After a jury trial, Kyle was convicted of having weapons while under disability, improper handling of a firearm, tampering with evidence, and negligent assault, a lesser included offense of felonious assault. Kyle was sentenced accordingly.

Kyle appeals from his convictions, raising two assignments of error.

II

His first assignment of error states:

“APPELLANT’S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE TO PROVE GUILT BEYOND A REASONABLE DOUBT AND ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

“A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law.” *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, at ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Id.*

In contrast, “a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive.” *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and

determine whether, in resolving conflicts in the evidence, the trier of fact “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder’s decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. *Id.*

The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

Kyle claims that the State failed to present sufficient evidence that he was involved in the shooting. We disagree. Several witnesses – included Davis, Ramsey, and Fisher – testified that shots were fired from the blue van. Fisher, who was present in the vehicle, testified that he and Dominic had picked up Kyle after seeing Ramsey near Lowry Avenue and Oakwood Place. Fisher further testified that, after encountering Ramsey again and after Ramsey threw a bottle at the van, Dominic chased Ramsey’s Ford Explorer, during which Kyle leaned out of the passenger window and fired two or three times at Ramsey’s vehicle. Two weeks later, Kyle admitted during an interview with a police officer that he had been in the van and had shot a firearm out the window at Ramsey’s vehicle. The parties stipulated

that Kyle had a previous conviction for complicity to felonious assault, an offense of violence, in Champaign County. Construing in this evidence in the light most favorable to the State, the State presented sufficient evidence that Kyle committed negligent assault, having weapons while under disability, and improper handling of a firearm in a motor vehicle.

Kyle further asserts that his conviction for tampering with evidence was based on insufficient evidence, because the sole basis for the conviction was his confession, which was not properly admissible. During his interview, Kyle had informed Detective Hart that he had disassembled the gun and disposed of it by throwing it into the spillway of a reservoir off North Limestone Street. Kyle argues that his confession could not form the basis for his conviction for tampering with evidence due to the corpus delicti rule.

The corpus delicti of an offense consists of the act and the criminal agency of the act. *State v. Edwards* (1976), 49 Ohio St.2d 31. Before a confession to a crime may be admitted at trial, the State must introduce evidence independent of the confession to establish the corpus delicti. See *State v. Maranda* (1916), 94 Ohio St. 364, paragraphs one and two of the syllabus; see, also, *State v. Van Hook* (1988), 39 Ohio St.3d 256, 261. The corpus delicti rule is designed to protect “persons who confess to crimes that they not only did not commit themselves, but which were never committed by anyone.” *State v. Nobles* (1995), 106 Ohio App.3d 246, 261-62. Accordingly, “this rule does not require evidence, other than the confession, showing that the accused committed the crime but, rather, requires some evidence that a crime was, in fact, committed.” *State v. Hopfer* (1996), 112 Ohio App.3d 521, 561.

The evidence necessary to satisfy the corpus delicti rule is not the same as is required to defeat a Crim.R. 29 motion. “The evidence presented need not be so strong that it is capable of persuading a factfinder on some element of the crime beyond a reasonable doubt.” *Nobles*, 106 Ohio App.3d at 262. Nor must the evidence be “even enough to make it a prima facie case.” *Maranda*, supra, at paragraph two of the syllabus. Rather, the evidence is sufficient to satisfy the corpus delicti rule “if there is some evidence outside of the confession that tends to prove some material element of the crime charged.” *Id.* The evidence need not relate to all elements of the crime, *Van Hook*, 39 Ohio St.3d at 262, and the State may rely on circumstantial, rather than direct, evidence, *State v. Nicely* (1988), 39 Ohio St.3d 147, 152. Although the corpus delicti rule remains applicable, the Supreme Court of Ohio has indicated that it need not be applied “with a dogmatic vengeance.” *Edwards*, 49 Ohio St.2d at 36.

The offense of tampering with evidence is defined, in pertinent part, as follows: “No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall ** * [a]lter, destroy, conceal, or remove any record, document, or thing, [in this case, a handgun,] with purpose to impair its value or availability as evidence in such proceeding or investigation.” R.C. 2912.12(A)(1). Kyle’s conviction for tampering with evidence is based primarily on his admission that he dismantled the gun and disposed of it in the reservoir.

In response to Kyle’s argument, the State asserts that there is sufficient corroborating evidence for purposes of the corpus delicti rule to permit Kyle’s admission regarding his disposal of the gun. The State argues that Fisher testified that Kyle was in the van, that

Kyle had the gun in the van and was the shooter, and that the gun was not in the van after Kyle jumped out on Fountain Avenue. The State thus asserts that there is “a modicum of evidence” that Kyle tampered with evidence by removing the gun from the van.

We addressed a similar charge of tampering with evidence in *State v. Like*, Montgomery App. No. 21991, 2008-Ohio-1873. In that case, we rejected the State’s argument that the absence of a gun from the scene of the crime (and its probable removal by the defendant) is sufficient to establish the corpus delicti of tampering with evidence. We stated:

“The state contends that the discovery of a dead body with bullet wounds at the apartment and the absence of the gun that inflicted those wounds were sufficient evidence of tampering with evidence by disposal of the gun to permit the use of Like’s statements about disposal of the gun. We disagree. Although it is beyond dispute that the gun was removed from the scene of the crime, no evidence was presented to support an inference that the gun was taken to impair its value or availability as evidence. Thus, the state failed to offer evidence, other than Like’s own statement about throwing the gun into a dumpster, tending to prove the fact that the crime of tampering with evidence (the gun) was committed.”

In short, *Like* stands for the proposition that the mere removal of a weapon from the scene of a crime, in the absence of any evidence that the purpose of the removal was to impair its value or availability, is insufficient to prove the corpus delicti of tampering with evidence.

We see no legally significant differences between the case before us and *Like*. Other than Kyle’s confession to Detective Hart that he dismantled the gun and threw it into the

spillway of a reservoir, there is no evidence that Kyle took the gun from the van with the purpose to impair its value or its availability as evidence. Moreover, although this might not be controlling either, there was no evidence that any law enforcement officers searched for the weapon after Kyle was identified as a suspect. In the absence of Kyle's confession, it is just as likely that Kyle took the weapon back to his home and placed it in a location where it could have easily been found. We, therefore, agree with Kyle that the State failed to produce evidence that the offense of tampering with evidence had occurred so as to allow his statements to Detective Hart regarding the disposal of the weapon to be admissible.

In the absence of those statements, the State failed to offer sufficient evidence to support a conviction for tampering with evidence. "The inability of law enforcement to find the gun used in a shooting, by itself, does not show that the defendant 'altered, destroyed, concealed, or removed' it." *State v. Beard*, Wood App. No. WD-08-037, 2009-Ohio-4412, at ¶18, citing *State v. Wooden* (1993), 86 Ohio App.3d 23, 27. In *State v. Spears*, 178 Ohio App.3d 580, 2008-Ohio-5181, at ¶24, we found that the defendant's conviction for tampering with evidence was plain error when the conviction was based solely on the absence of a weapon at the scene of a shooting and the defendant's own statements that he "threw the gun away." We stated:

"Without additional evidence to support an inference that the gun was thrown away to impair its value or availability as evidence, the state, upon objection, would not have been permitted to present Spears's alleged admission to disposing of the gun. Because there was no properly admissible evidence to support the inference that Spears tampered with evidence by disposing of the gun, Spears's conviction for tampering with evidence is based on

insufficient evidence and is, therefore, necessarily against the manifest weight of the evidence.”

Such is the case here. Because Kyle’s statement to Detective Hart that he had disposed of the gun in the reservoir was not properly admissible, there was no admissible evidence from which the jury could conclude that Kyle had tampered with evidence by disposing of the gun. Kyle’s conviction for tampering with evidence was based on insufficient evidence.

Kyle also claims that his convictions were against the manifest weight of the evidence, because there was testimony suggesting that Dominic, not Kyle, was the shooter. He notes that Fisher was the only witness to testify that Kyle was in the van and fired the gun, and that Fisher’s testimony differed from his initial statement to the police. He further argues that his own confession to the police was made only after the police agreed to release his brother, casting doubt on the veracity of his confession, and that it did not contain any confirmable details that had not already been mentioned to him by Detective Hart. Moreover, he emphasizes that Davis and Ramsey did not see him in the van and that Davis had testified that the shots came from the driver’s side of the van, contrary to Fisher’s testimony.

As noted by Kyle, several witnesses provided testimony that suggested that Dominic, rather than Kyle, might have been the shooter. No one, other than Fisher, testified that Kyle was in the van. Davis testified that he saw a hand come out of the driver’s side of the vehicle, and Ramsey stated that he had given a prior statement to the police where he identified Dominic as both the driver and the shooter. Ramsey had told the police that he

saw “his left arm out the window with the weapon in the palm of his hand and that’s when the shots were fired both time.” (At trial, Ramsey explained that Dominic was the only person that he saw in the van, along with a passenger he couldn’t identify.) Kyle also presented the testimony of Martin Lewis, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation, who indicated, in part, that Dominic tested positive for gun shot residue on his right hand.

Nevertheless, upon review of the evidence, we cannot conclude that Kyle’s conviction was against the manifest weight of the evidence. Although several witnesses noticed that Dominic’s left arm was out of the window, neither Davis nor Rolanda Humphrey, a witness on behalf of Kyle, observed a weapon in the driver’s hand. Fisher testified that Dominic was driving with his right hand on the steering wheel and with his left arm out of the window, and that Kyle had fired shots out of the passenger window. The jury could have reasonably accepted Ramsey’s assertion that he had assumed that Dominic had the gun, because he did not see anyone else that might have been firing a gun. Moreover, the jury was free to credit Fisher’s testimony that Kyle was the shooter rather than Dominic.

The jury could have also reasonably believed Kyle’s confession, even though his statements were made only after the detective agreed to have his brother released. In his confession, Kyle told Detective Hart that, after leaving his house, Dominic “made a right on Lowry and Devon Ramsey was sitting right there on the corner of Grand and Lowry. And it was like he was coming this way and we was going this way sitting across the street at the stop sign. My brother pulls up beside him and asks him what’s going on man. Going on

saying, why you still messing with my sister. Why you still got a beef with my sister. But he's not yelling anything. Just asking. *** Devon Ramsey takes a pop bottle, a bottle, a glass bottle, or whatever and throws it at the window.” Kyle told Detective Hart that Dominic “made a U-turn to go after him” and that Dominic was swerving. These statements were consistent with Ramsey's and Fisher's testimony describing the events just prior to the shootings. Kyle also added certain details, such as the fact that the gun was a .38 caliber pistol. Kyle further told Detective Hart that Ramsey had threatened to kill his grandmother, mother, and sister, and that he (Kyle) had only meant to scare Ramsey. We cannot conclude that the jury lost its way when it chose to credit the evidence indicating that Kyle was the shooter.

Kyle's first assignment of error is sustained in part and overruled in part.

III

Kyle's second assignment of error states:

“THE TRIAL COURT ERRED IN CHARGING THE JURY WITH AN INSTRUCTION ON COMPLICITY IN THE ABSENCE OF EVIDENCE THEREOF.”

In his second assignment of error, Kyle claims that the trial court erred in giving a jury instruction on complicity to felonious assault, because there was no evidence that he aided or assisted any other person to commit the offenses of which he was convicted. Kyle objected to the complicity instruction at trial.

During the trial court's instruction on felonious assault, the trial court told the jury:

“*** Evidence has been presented that the defendant may have acted in concert with another person in committing felonious assault.

“When two or more persons have a common purpose to commit a crime and one does one part and another performs the other part, both are equally guilty of the offense. One who purposely aids, helps, or assists another to commit a crime is regarded by law as an accomplice to that offense and is treated as if he were the principal offender. If your verdict is guilty with respect to the felonious assault charge, you will separately decide beyond a reasonable doubt if the defendant had a firearm on or about his person or under his control while committing felonious assault and if the defendant displayed it, brandished it, indicated that he possessed it, or used it to facilitate the offense.

“***

“If your verdict on the felonious assault offenses is not guilty, or if you’re unable to reach a verdict on that offense, you will continue your deliberations to consider the lesser included offense of negligent assault. ***”

The trial court did not include a complicity instruction with respect to negligent assault.

“A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence.” *State v. Williford* (1990), 49 Ohio St.3d 247, 251. Jury instructions should be tailored to fit the facts of the case. *State v. Mullins*, Montgomery App. No. 22301, 2008-Ohio-2892, at ¶9.

The decision whether to give a particular jury instruction is a matter left to the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *State v. Davis*, Montgomery App. No. 21904, 2007-Ohio-6680, at ¶14. An abuse of discretion means more than just a mere error of law or an error in judgment; it

implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

R.C. 2923.03(A)(2), the complicity statute, provides: “No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: *** (2) Aid or abet another in committing the offense.” A person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense. R.C. 2923.03(F). “To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime.” *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus; *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, at ¶27.

Contrary to Kyle’s assertion, the State presented sufficient evidence that Kyle was complicit in a felonious assault, even if he were not the shooter. Kyle told Detective Hart that Ramsey had threatened to kill his grandmother, mother, and sister. Dominic contacted Kyle after first noticing Ramsey talking to a gentleman on Lowry Avenue. Fisher testified that “Dominic called Kyle and, I guess, I thought they were going to beat the dude up.” (Fisher, who did not know Ramsey, clarified that he was referring to the “guy in the green truck,” meaning Ramsey.) Dominic drove home and picked up Kyle; Kyle admitted to Detective Hart that he brought the gun into the van. Shortly thereafter, Dominic confronted

Ramsey while they were in their respective vehicles, and Kyle was in Dominic's van when shots were fired at Ramsey as Dominic pursued him. After the van turned on Fountain Avenue, Kyle got out of the vehicle; no gun was found in the vehicle when it was stopped shortly thereafter. Although Davis did not see the van for a short period of time when he began to pursue it, he did not see anyone throw a gun from the van while he was following it.

Even if the jury had concluded that Dominic was the shooter, a jury could have reasonably concluded that Kyle entered the van with the intent to support and encourage an assault against Ramsey, that he provided the gun that was used in the assault with the intent that the gun be used to shoot at Ramsey, and that he left the van with the weapon. Accordingly, the trial court did not err in giving a complicity instruction to the jury over defense counsel's objection.

The second assignment of error is overruled.

IV

The judgment of conviction and sentence for tampering with evidence will be vacated. In other respects, the trial court's judgment will be affirmed. The case will be remanded to the trial court for the limited purpose of amending the termination entry in order for the Department of Rehabilitation and Corrections to be made aware of the sentence.

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DONOVAN, P.J. and BROGAN, J., concur.

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