[Cite as *State v. Barry*, 2014-Ohio-4452.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 13CA3569
	:	
vs.	:	
	:	DECISION AND JUDGMENT
CHELSEY BARRY,	:	ENTRY
	:	
Defendant-Appellant.	:	**Released: 09/30/14**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Assistant Public Defender, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Pat Apel, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

McFarland, J.

{¶1} Chelsey Barry appeals from her conviction in the Scioto County Court of Common Pleas after a jury found her guilty of trafficking in drugs/heroin, possession of drugs, tampering with evidence and conspiracy to traffic drugs. On appeal, Appellant contends that 1) the trial court erred by convicting her of tampering with evidence despite the lack of an investigation or likely investigation when she concealed drugs; 2) her conviction for tampering with evidence was against the manifest weight of the evidence; 3) trial counsel was ineffective for failing to make a Crim.R. 29 motion to dismiss the tampering charge; 4) the trial

court committed plain error by instructing the jury that knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime; and 5) trial counsel was ineffective for failing to object to the trial court's "unmistakable crime" jury instruction.

{¶2} Because we conclude that Appellant's conviction for tampering with evidence is supported by sufficient evidence and is not against the manifest weight of the evidence, her first and second assignments of error are overruled. Further, because we find no plain error with respect to the jury instruction provided by the trial court regarding tampering with evidence, Appellant's fourth assignment of error is overruled. Likewise, because Appellant's third and fifth assignments of error raise claims of ineffective assistance of counsel which are premised upon the arguments raised under assignments of error one, two and four, which we have already overruled, we find no merit to Appellant's third and fifth assignments of error and they are, therefore, overruled. Having found no merit to any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

FACTS

{¶3} The appellant was stopped by the Ohio State Highway Patrol while driving a vehicle not owned by her, as she was heading south on State Route 23 in Scioto County, Ohio. In addition to Appellant, three males were in the vehicle,

two of whom it was later revealed were from Detroit, Michigan and one of whom was from Phoenix, Arizona. Upon being stopped for loud exhaust and driving on the fog line, Appellant was removed from the vehicle, placed in the back of the cruiser, and was questioned regarding the smell of marijuana coming from inside the vehicle as well as the names of the passengers and her whereabouts earlier that day. After the trooper spoke with some of the other passengers and confirmed that conflicting information was being provided, he placed Appellant and the others under arrest, called for backup and searched the vehicle.

{¶4} Only a small amount of marijuana residue was located during the search, however, receipts indicating the occupants had been in Detroit, Michigan earlier that day were found in the vehicle. This fact contradicted statements given by the occupants which indicated they had been Middletown, Ohio, not Detroit. Appellant was further questioned and denied having drugs on her person. Appellant, the others and the vehicle were eventually taken to the patrol post for a further search and additional questioning. Although she denied having drugs on her person multiple times, she eventually admitted that she was carrying drugs. She stated that upon leaving Middletown earlier that day she was instructed to put the drugs away, meaning to insert them into her vagina. A female officer from the Portsmouth Police Department was contacted and assisted in removing a baggie full of what was later determined to be heroin from Appellant's vaginal cavity.

{¶5} Subsequently, on May 28, 2013, Appellant was indicted for trafficking in drugs/heroin, a felony of the first degree, in violation of R.C. 2925.03(A) & (C)(6)(f); possession of drugs, a felony of the first degree, in violation of R.C. 2925.11 (A)/(C)(6)(e); tampering with evidence, a felony of the third degree, in violation of R.C 2921.12 (A)(1); and conspiracy to traffic drugs, a felony of the second degree, in violation of R.C. 2923.01 (A)(2)/2925.03(A). After a jury trial, Appellant was convicted on all counts. The trial court merged the trafficking, possession and conspiracy counts for purposes of sentencing and sentenced Appellant to six years in prison. The trial court also imposed a three year term of imprisonment on the tampering with evidence count, and ordered that it be served consecutively to the six years, for a total prison term of nine years. It is from the trial court's July 18, 2013, judgment entry that Appellant now brings her timely appeal, setting forth the following assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED BY CONVICTING CHELSEY BARRY OF TAMPERING WITH EVIDENCE DESPITE THE LACK OF AN INVESTIGATION OR LIKELY INVESTIGATION WHEN SHE CONCEALED DRUGS.

II. CHELSEY BARRY'S CONVICTION FOR TAMPERING WITH EVIDENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A RULE 29 MOTION TO DISMISS THE TAMPERING CHARGE.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR BY INSTRUCTING THE JURY THAT KNOWLEDGE OF AN UNMISTAKABLE CRIME WAS THE SAME AS KNOWLEDGE OF AN INVESTIGATION INTO THAT CRIME.

V. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S 'UNMISTAKABLE CRIME' JURY INSTRUCTION."

ASSIGNMENTS OF ERROR I AND II

{¶6} For ease of analysis, we address Appellant's first two assignments of error together, and the remaining assignments of error out of order. Appellant's first two assignments of error allege that her conviction for tampering with evidence was not supported by sufficient evidence and was against the manifest weight of the evidence. "A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. "In reviewing such a challenge, '[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.' " Id.; quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds.

{¶7} " '[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.' " *Hunter* at ¶ 118; quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Accordingly, "a reviewing court is not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.' " *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 12; quoting *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541(1997) (Cook, J., concurring).

{¶8} When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily also includes a finding that sufficient evidence supports the conviction.[1] *State v. Markins*, 4th Dist. Scioto No. 10CA3387, 2013-Ohio-602, ¶ 28. Therefore, we first consider whether Appellant's conviction is against the manifest weight of the evidence. Appellant was convicted of tampering with evidence, a third degree felony in violation R.C. 2921.12(A)(1). R.C. 2921.12 provides, in pertinent part, as follows:

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

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[1] The inverse proposition is not always true. See *State v. Thompkins*, 78 Ohio St.3d 380, 387-388, 678 N.E.2d 541 (1997).

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

{¶9} Appellant contends under these assignments of error that she should not have been found guilty of tampering with evidence when she concealed evidence of an "unmistakable crime" without actual knowledge of any pending or likely investigations. Appellant argues that although the State presented evidence that she concealed drugs in her vagina, it presented no evidence "that she did so knowing that an official proceeding or investigation [was] in progress, or [was] about to be or likely to be instituted[.]" Appellant further argues that "no evidence creates a reasonable inference that [she] hid the drugs knowing that an investigation to find the drugs was likely."

{¶10} Contrary to Appellant's argument, this Court has previously reasoned that " '[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed.' " *State v. Nguyen*, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, ¶ 89; citing *State v. Schmitz*, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617, ¶ 17. In *Nguyen*, the appellant removed tape, rope and scissors from the crime scene after he committed the unmistakable crimes of rape and kidnapping, but argued that he could not be found guilty of tampering with evidence because no official

proceeding was in progress at the time he removed the items, and he did not know an official proceeding or investigation was about to be or likely to be instituted. *Nguyen* at ¶¶ 88-89. This Court rejected that argument, reasoning that unmistakable crimes were committed and that as such, Nguyen had constructive knowledge of an impending investigation. Id.

{¶11} Appellant acknowledges our holding in *State v. Nguyen*, but requests that we depart from our prior reasoning on the basis that the unmistakable crime committed sub judice differs from other cases where courts have imputed knowledge of an impending investigation. The crimes committed herein are drug possession and trafficking. The crimes at issue in *Nguyen* were rape and kidnapping and the crime at issue in *Schmitz* was gross sexual imposition. Appellant claims that the present case is factually distinguishable from *Nguyen* and *Schmitz* in that those cases involved crimes which involved victims who were likely to make reports, which would have put the defendants on notice of a likely investigation. Appellant argues that this Court should instead adopt the reasoning set forth in *State v. Cavalier*, 2nd Dist. Montgomery No. 24651, 2012-Ohio-1976, ¶ 50, where the court cast doubt on the *Schmitz* holding, reasoning that although the *Schmitz* opinion does state that "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed[,]' " "we doubt that it should be taken so literally." The

Cavalier court went on to discuss the fact that the cases relied upon by the *Schmitz* court both involved fatal shootings, as opposed to solicitation, which was at issue in *Cavalier*. Id. at ¶ 51.

{¶12} Despite Appellant's argument and the reasoning set forth in *Cavalier*, supra, we decline to depart from our prior reasoning in *State v. Nguyen*, supra. Appellant committed unmistakable crimes of drug trafficking, drug possession and conspiracy to traffic in drugs. She admitted as much through her testimony at trial and does not challenge those convictions on appeal. Those crimes, while they may not have victims likely to make reports, are not victimless crimes. Appellant knew at the time she concealed the drugs at issue and climbed into a vehicle to drive from Middletown, Ohio to Huntington, West Virginia that she was committing the unmistakable crimes of drug possession and trafficking. She admitted at trial that her intended purpose in putting the drugs into her vagina was to conceal them. Thus, she had constructive knowledge of an impending investigation.

{¶13} Based upon the foregoing, the evidence reasonably supports the conclusion that Appellant tampered with evidence. Appellant's conviction is not against the manifest weight of the evidence. As set forth above, the determination that the weight of evidence supports a defendant's conviction necessarily includes a finding that sufficient evidence supports the conviction. Having determined that Appellant's conviction for tampering with evidence is not against the manifest

weight of the evidence, we necessarily determined that her conviction was also supported by sufficient evidence and therefore overrule her first and second assignments of error.

ASSIGNMENT OF ERROR IV

{¶14} In her fourth assignment of error, which we address out of order, Appellant contends that the trial court committed plain error by instructing the jury that knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime. Under Crim.R. 30(A) "a party may not assign as error the giving or failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." When a party fails to properly object, then the party waives all but plain error. See *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 51; *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus (1983). In the case at bar, it is undisputed that Appellant failed to object to the trial court's instruction to the jury regarding tampering with evidence. Thus, except for plain error, Appellant has waived this issue.

{¶15} Plain error exists when the error is plain or obvious and when the error "affect[s] substantial rights." Crim.R. 52(B). The error affects substantial rights when " 'but for the error, the outcome of the trial [proceeding] clearly would have been otherwise.' " *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416,

868 N.E.2d 1018, ¶ 11; quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Courts ordinarily should take notice of plain error "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 78; *State v. Patterson*, 4th Dist. No. 05CA16, 2006-Ohio-1902, ¶ 13. A reviewing court should consider noticing plain error only if the error " ' "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." ' " *Barnes* at 27; quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508, (1993); quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, (1936). In the case sub judice, we do not believe that plain error exists.

{¶16} Generally, a trial court has broad discretion to decide how to fashion jury instructions. The trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if such instruction is " 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.' " *State v. Lessin*, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993); quoting *State v. Nelson*, 36 Ohio St.2d 79, 303 N.E.2d 865 (1973), paragraph one of the syllabus.

{¶17} "In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.' " *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995); quoting *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990). Whether the jury instructions correctly state the law is a question of law which we review de novo. *State v. Neptune*, 4th Dist. No. 99CA25, 2000 WL 502830 (Apr. 21, 2000).

{¶18} In the case sub judice, Appellant argues that the trial court erred when it instructed the jury that "knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime." The pattern Ohio Jury Instruction for the offense of tampering with evidence reads as follows:

> "1. The defendant is charged with tampering with evidence. Before 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, knowing that an official (proceeding)(investigation) was (in progress)(about to be instituted)(likely to be instituted)

(A)(1) (altered)(destroyed)(concealed)(removed) a (record)(document)(thing) with purpose to impair its value or availability as evidence in the (proceeding)(investigation)."

The pattern jury instruction goes on to provide or reference definitions for the words "purposely," "knowingly," "official proceeding," and "public official."

{¶19} At issue herein is the definition of "knowingly," which was provided to the jury by the trial court. The pattern jury instruction does not include any statement regarding "unmistakable crimes." A review of the record reveals that the trial court instructed the jury as follows:

"The Defendant is also charged with Count 3 Tampering with Evidence. Before you can find the Defendant guilty, you must find beyond a reasonable doubt that on or about the 28th day of February, 2013, and in Scioto County, Ohio, the Defendant, knowingly – knowing that an official investigation was in progress or about to be instituted or was likely to be instituted, altered, concealed or removed, or was an accomplice in concealing or removing a thing with purpose to impair its value or availability as evidence in the investigation.

A person acts purposely when it is her specific intention to cause a certain result. It must be established in this case that at the

time in question there was present in the mind of the Defendant a specific intention to impair it's availability as evidence.

The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, and all the other facts and circumstances in evidence.

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when he is aware that circumstances probably exist.

When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed.

If you find that the State proved beyond a reasonable doubt all the essential elements of the offense of Tampering with Evidence, your verdict must be guilty.

If you find the State failed to prove beyond a reasonable doubt any one of the essential elements of Count 3 Tampering with Evidence, then your verdict must be not guilty." (Emphasis added).

{¶20} Comparing the two instructions, it is clear that they are not identical. However, "[a]lthough appellant cites the pattern jury instructions to support his

argument, those instructions are not binding upon this court." *State v. Bundy*, 974 N.E.2d 139, 2012-Ohio-3934, ¶ 53; citing *State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025, 869 N.E.2d 674, ¶ 57 (stating that the Ohio jury instruction handbook is "a respected and authoritative source of the law, but it is merely a product of the Ohio Judicial Conference and not binding on the courts").

{¶21} As indicated above, Appellant's complaint with the jury instruction provided by the trial court relates to the definition of "knowingly." In particular, Appellant takes issue with the following statement: "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." Appellant argues that this statement erroneously instructed the jury that "knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime." However, in light of our prior holding in *State v. Nguyen*, supra, which we adhered to in our analysis of Appellant's first and second assignments of error, we conclude that portion of the trial court's instruction which stated that "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed[,]" was not given in error, but rather, was a correct statement of the law.

{¶22} For these reasons, we find no error, let alone plain error, in the instructions provided by the trial court for the offense of tampering with evidence.

As such, we find no merit to Appellant's fourth assignment of error and it is, therefore, overruled.

ASSIGNMENTS OF ERROR III AND V

{¶23} Appellant's third and fifth assignments of error both allege claims of ineffective assistance of trial counsel and, thus, will be addressed together. Criminal defendants have a constitutional right to counsel, and this right includes the right to effective assistance from trial counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, (1970); *In re C.C.*, 4th Dist. No. 10CA44, 2011-Ohio-1879, ¶ 10. To establish ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, (1984); see also *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200.

{¶24} Both prongs of the *Strickland* test need not be analyzed, however, if a claim can be resolved under one prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000); see also *State v. Saultz*, 4th Dist. No. 09CA3133, 2011-Ohio-2018, ¶ 19. In short, if it can be shown that an error, assuming arguendo that such an error did in fact exist, did not prejudice an appellant, an ineffective assistance claim can be resolved on that basis alone. To establish the existence of prejudice, a defendant must demonstrate that a reasonable probability exists that,

but for his counsel's alleged error, the result of the trial would have been different. See *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus (1989).

{¶25} Appellant's fifth assignment of error argues that counsel was ineffective for the reasons raised under her fourth assignment of error, which related to the jury instruction provided for tampering with evidence. However, in light of the fact that we found no merit to that argument and overruled her fourth assignment of error, we do not find any constitutionally ineffective assistance of counsel. As such, Appellant's fifth assignment of error is overruled.

{¶26} Appellant's third assignment of error argues that trial counsel was ineffective for failing to make a Crim.R. 29 motion for acquittal. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. Because we have already determined that Appellant's conviction was supported by sufficient evidence, we conclude that a Crim.R. 29 motion for acquittal, had it been made by trial counsel, would have failed. Thus, any alleged deficient performance in failing to move the trial court for an acquittal pursuant to Crim.R. 29 did not affect the outcome of the trial. Consequently, we reject Appellant's argument that trial

counsel was ineffective in that regard. Thus, Appellant's third assignment of error is overruled.

{¶27} Having found no merit in any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

Harsha, J., concurring in part and dissenting in part:

{¶28} I would sustain the first and second assignments of error and in doing so would distinguish *State v. Nguyen, supra*, and not apply its holding here. See *State v. Cavalier, supra*, which correctly cautions against applying the dicta in *Schmitz, supra,* too literally or to situations where the crime and the act of tampering are in essence one and the same.

{¶29} In all other regards, I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Part and Dissents in Part with Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.