

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 14CA3465
	:	
v.	:	<u>DECISION AND</u>
	:	<u>JUDGMENT ENTRY</u>
THOMAS E. LEWIS,	:	
	:	
Defendant-Appellant.	:	RELEASED: 04/12/2016

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APPEARANCES:

Aaron M. McHenry, Chillicothe, Ohio for appellant.

Matthew S. Schmidt, Ross County Prosecuting Attorney and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio for appellee.

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Hoover, J.

{¶ 1} Defendant-appellant Thomas E. Lewis (“Lewis”) appeals his convictions and sentences for one count of burglary and one count of impersonating a peace officer from the Ross County Common Pleas Court following a jury trial. On appeal, Lewis contends that the trial court erred when it instructed the jury on the issue of flight. At trial, the trial court gave the jury a consciousness of guilt instruction because testimony indicated that Lewis concealed his whereabouts from police. Because we find that the evidence demonstrated a sufficient basis for instructing the jury on consciousness of guilt, the trial court did not err in giving the instruction. Therefore, we overrule Lewis’s one assignment of error; and we affirm his convictions.

**I. Facts and Procedural Posture**

{¶ 2} On September 27, 2013, the Ross County Grand Jury indicted Lewis on one count of burglary, a second degree felony, in violation of R.C. 2911.12 and one count of impersonating a peace officer, a third degree felony, in violation of R.C. 2921.51. The indicted count of burglary included a repeat offender specification pursuant to R.C. 2929.01.

{¶ 3} The case proceeded to a jury trial on the indicted offenses.<sup>1</sup> During its case-in-chief, the State of Ohio (“State”) called 11 witnesses including Wyatt Corey, his wife Angela Corey, his son Kyle Corey, and his daughter Breanna Corey, the alleged victims in this case. The testimony at trial revealed the following facts. On September 4, 2013, at 9:00 p.m., an individual knocked on the door of Wyatt Corey’s residence. Wyatt’s wife, Angela, told the individual to come inside their residence. During their direct examinations, Wyatt, Angela, and Breanna identified Lewis as the individual who entered their residence. Lewis entered the residence dressed in dark clothing. Wyatt described Lewis’s clothing as “army fatigue” similar to what police officers wear during raids.

{¶ 4} Lewis asked Wyatt’s wife if she was Angela Corey and if Wyatt Corey was in the house. Lewis then stated, “This is a raid.” Both Wyatt and Angela testified that they believed that Lewis was a police officer. Wyatt testified that Lewis kept asking him “Where’s it at?” According to Breanna, Lewis was asking about money and drugs. Wyatt then walked Lewis back to his bedroom. Lewis asked Wyatt to dump everything out of his pockets. Wyatt testified that he handed Lewis his identification and his wallet. Lewis gave the identification back to Wyatt, but placed Wyatt’s wallet on the bed. At some point, Wyatt and Lewis exited the bedroom. Wyatt testified that before Lewis left the residence, Lewis went back to the bedroom. Also, before Lewis left, he told the Corey family that a K-9 unit was on the way. When Wyatt went back to

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<sup>1</sup> Lewis waived his right to jury trial on the repeat offender specification attached to the one count of burglary.

his bedroom after Lewis had left, he could not find his wallet. Police officers responded to the scene, but Lewis was already gone by the time they arrived. Wyatt testified that he had \$600 and some prepaid spending cards in his wallet. A city employee found Wyatt's wallet on the street. The State marked and introduced the wallet into evidence as an exhibit.

{¶ 5} During this incident, Lewis stayed on the first floor of the home. Angela and Breanna were in the living room on the first floor. Kyle was upstairs during the incident, except for a brief period when he came downstairs to see what was going on. When Wyatt and Lewis left the bedroom and went to another part of the house, Breanna exited the residence. Once outside, Breanna observed a black SUV and a man in the driver's seat. Breanna then walked up the street to a neighbor's house. Angela, Breanna, and Kyle all provided similar testimony regarding what happened inside the house during this incident.

{¶ 6} On September 10, 2013, Detective Jason Gannon, of the Chillicothe Police Department, went to the Corey residence to conduct a photo array with Wyatt and Breanna. Both Wyatt and Breanna identified Lewis as the individual who entered their home on September 4. On September 12, 2013, Angela and Kyle went to the police station to conduct their photo arrays. Angela identified Lewis in the photo array, but Kyle was unable to make any identification.

{¶ 7} The State also called Detective John Winfield, Detective Jason Gannon, and Sergeant Roger Wayne Hyden as witnesses. The three police officers testified regarding the apprehension of Lewis. Their testimony is important because it provided the basis for the trial court's instruction on consciousness of guilt, the issue that Lewis assigns as error in this appeal.

{¶ 8} As the State began its direct examination of Detective Winfield, the prosecutor asked him about the investigation into locating Lewis. Defense counsel objected to the

admissibility of Detective Winfield's potential testimony. Specifically, defense counsel argued that the State would use Detective Winfield's testimony to raise inferences as to Lewis's consciousness of guilt. The trial court overruled defense counsel's objection.

{¶ 9} Detective Winfield testified that he attempted to locate Lewis on September 10, 2013 at Lewis's residence. Lewis was not there. Detective Winfield questioned other suspects that had information on Lewis's whereabouts. On September 11, 2013, Detective Winfield investigated a house located on Pleasant Valley Road in hopes of locating Lewis. Detective Winfield observed Lewis walk into that house. Detective Winfield and other police officers knocked on the door of the house, but they did not get a response.

{¶ 10} At that time, Detective Winfield left to obtain a warrant to search the house. Detective Winfield testified that when he arrived back at the house, he observed another detective "trying to communicate with Mr. Lewis through the front door with no success." After two hours had passed, police officers executed a search warrant on the house. Detective Winfield testified that police officers found Lewis in the basement of the house.

{¶ 11} Next, the State called Detective Gannon to testify. Detective Gannon was present when officers searched the house where Lewis was apprehended. Detective Gannon testified that after Detective Winfield left, officers tried to make contact with the residents of the home. After a while, two individuals, who Detective Gannon identified as Ms. Trainer and Mr. Beavers, exited the house. Ms. Trainer and Mr. Beavers confirmed to the police that Lewis was in the house. According to Detective Gannon, police officers attempted to speak to Lewis for another two hours. Detective Gannon testified that upon Detective Winfield's return with a search warrant, a tactical team entered the home. Detective Gannon testified that Lewis was found in a crawl space in the basement of the house.

{¶ 12} The State’s last witness was Sergeant Roger Hyden of the Ross County Sheriff’s Department. Sergeant Hyden was one of the tactical officers that executed the search warrant. Sergeant Hyden testified that Lewis was found behind an approximately five-foot high cinder block wall in the basement. Sergeant Hyden testified that when the officers retrieved Lewis from the area where he was hiding, Lewis was covered “head to toe” in dirt.

{¶ 13} After the State completed their case-in-chief, Lewis’s defense counsel recalled Detective Winfield. Lewis asked Detective Winfield if he gained an understanding as to what Lewis was doing in the house for the two-hour period before the officers executed the search warrant. Detective Winfield answered, “comment was made that he was inside the basement, the crawl space, smoking crack.”

{¶ 14} Before the trial court gave the jury their instructions, defense counsel objected to the portion of the instructions regarding Lewis’s concealment from law enforcement. The trial court overruled the objection.

{¶ 15} The jury found Lewis guilty of the one count of burglary and the one count of impersonating a peace officer as charged in the indictment. The trial court sentenced Lewis to 5 years in prison for the count of burglary and 36 months in prison for the count of impersonating a police officer. The trial court ordered those sentences to be served concurrently with one another, but consecutively to the sentence in another case, numbered 13CR471.

{¶ 16} Lewis then filed this timely appeal.

## **II. Assignment of Error**

{¶ 17} Lewis presents one assignment of error for our review:

THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY ON  
FLIGHT.

### III. Standard of Review - Improper Jury Instruction

{¶ 18} A trial court generally has broad discretion in deciding how to fashion jury instructions. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011–Ohio–2783, ¶ 69. However, “a trial court must 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. “The jury instructions must be based upon the actual issues in the case as presented by the evidence.” (Internal quotations omitted.) *State v. Dyer*, 4th Dist. Scioto No. 07CA3163, 2008-Ohio-2711, ¶ 11, quoting *State v. Monroe*, 4th Dist. Scioto No. 05CA3042, 2007-Ohio-1492, ¶ 50. “Where it is possible that ‘reasonable minds might reach the conclusion sought by the specific instruction’ the court must provide guidance to the jury.” *Monroe* at ¶ 50, citing *Murphy v. Carrollton Mfg. Co.* 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). “It is within the sound discretion of the trial court to determine whether the evidence presented at trial is sufficient to require a particular jury instruction.” *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, 861 N.E.2d 823, ¶ 20 (4th Dist.).

### IV. Law and Analysis- Consciousness of Guilt Jury Instruction

{¶ 19} In his one assignment of error, Lewis argues that the trial court erred when it gave the jury an instruction on flight. Lewis claims that there is no evidence in the record that he concealed his presence from law enforcement because of the charges at issue in this case. Lewis asserts that he was a suspect in other criminal activity and that he was facing a parole violation. Lewis contends that because he was in other trouble with law enforcement, it would be impossible for a trier of fact to determine that he was concealing himself because of the specific charges in this case.

{¶ 20} In rebuttal, the State claims that sufficient evidence existed in the record to warrant a flight instruction. Furthermore, the State argues that even if the trial court abused its discretion by instructing the jury on flight, such error was not prejudicial because of the other overwhelming evidence establishing Lewis's guilt.

{¶ 21} Here, the trial court gave the following jury instruction:

TESTIMONY HAS BEEN ADMITTED INDICATING THAT THE  
DEFENDANT CONCEALED HIS WHEREABOUTS FROM LAW  
ENFORCEMENT. YOU ARE INSTRUCTED THAT CONCEALING HIS  
WHEREABOUTS FROM LAW ENFORCEMENT ALONE DOES NOT RAISE  
A PRESUMPTION OF GUILT, BUT IT MAY TEND TO INDICATE THE  
DEFENDANT'S CONSCIOUSNESS OR AWARENESS OF GUILT.

IF YOU FIND THAT THE FACTS DO NOT SUPPORT THAT THE  
DEFENDANT CONCEALED HIS WHEREABOUTS FROM LAW  
ENFORCEMENT, OR IF YOU FIND THAT SOME OTHER MOTIVE  
PROMPTED THE DEFENDANT'S MOTIVATION WAS, THEN YOU  
SHOULD NOT CONSIDER THIS EVIDENCE FRO [sic] ANY PURPOSE.  
HOWEVER, IF YOU FIND THAT THE FACTS SUPPORT THAT THE  
DEFENDANT ENGAGED IN SUCH CONDUCTED [sic] AND IF YOU  
DECIDE THAT THE DEFENDANT WAS MOTIVATED BY A  
CONSCIOUSNESS OR AN AWARENESS OF GUILT, YOU MAY, BUT ARE  
NOT REQUIRED TO, CONSIDER THAT EVIDENCE IN DECIDING  
WHETHER DEFENDANT IS GUILTY OF THE CRIME CHARGED. YOU

ALONE WILL DETERMINE WHAT WEIGHT, IF ANY, TO GIVE TO THIS EVIDENCE.

{¶ 22} “[A]n accused’s flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.” (Internal quotations omitted.) *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 167. “An instruction on flight is proper if the record contains sufficient evidence to support the charge.” *Monroe, supra*, at ¶ 51, citing *United States v. Dillion*, 870 F.2d 1125, 1126 (6th Cir. 1989). “Flight from justice means some escape or affirmative attempt to avoid apprehension.” (Internal quotation omitted.) *State v. Williams*, 8th Dist. Cuyahoga No. 101121, 2015-Ohio-172, ¶ 36.

{¶ 23} The evidence regarding Lewis’s concealment came from three witnesses, Detective Winfield, Detective Gannon, and Sergeant Hyden. Their testimony revealed that on September 11, 2013, a week after the incident at the Corey family residence, police officers located Lewis, pursuant to a search warrant, in a crawl space in the basement of a house.

{¶ 24} In *Monroe*, this court held that when police searched for a defendant for seven months; and the defendant was found hiding in a wall in a trailer, those facts created a sufficient basis for instructing the jury on the implications of flight. *Id.* at ¶ 52. In *State v. Babu*, 4th Dist. Athens No. 07CA36, 2008-Ohio-5298, this court found that when a defendant tried to leave a crime scene but was unable to do so because of an injury, the jury could reasonably conclude that he attempted to leave. *Id.* at ¶ 23. Therefore, the trial court had not erred in instructing the jury that if it found that the defendant fled from police it could consider the defendant’s flight as evidence of the defendant’s consciousness of guilt. *Id.*



{¶ 25} In *State v. McCullough*, 3d Dist. Putnam No. 12-07-09, 2008-Ohio-3055, the Third District Court of Appeals concluded that a trial court’s instruction on consciousness of guilt was well supported by the evidence when the defendant “refused to answer the door to his residence even after the police announced their presence, boarded up the back door, concealed himself in a crawl space accessible through a trap door in a closet, and refused to come out until the police told him that they would bring in a canine unit.” *Id.* at ¶ 41.

{¶ 26} In *State v. Moore*, 2013-Ohio-1435, 990 N.E.2d 625 (7th Dist.), the Seventh District Court of Appeals addressed the same argument as Lewis sets forth in this appeal. In *Moore*, the defendant-appellant argued that “\* \* \*evidence and the instructions on flight were improper because there was no evidence that he knew the police were looking for him due to the [specific offenses at issue].” *Id.* at ¶ 131. The defendant-appellant further asserted that he had multiple cases pending against him that were unrelated to the crimes for which he was being put on trial. *Id.* The Seventh District Court of Appeals concluded:

The motive for the various acts of flight was a jury question, not a legal question merely because there happened to exist undisclosed prior offenses. That is, when a particular defendant is so involved in crime that, when he flees from the police, he could be fleeing for any number of past offenses, this does not mean that a flight instruction cannot be provided in the trial for the most extreme offense.

In fact, if appellant wished to argue that his flight was not due to consciousness of guilt for the murder but was due to other offenses, *he* could have taken the chance and introduced his other criminal acts into evidence. As this strategy had its own risks, he rationally chose not to do so.

Finally, the trial court informed the jury that they should not consider the flight evidence if they found that another motive prompted the flight or if they were unable to decide what the defendant's motivation was. (Tr. 562). This instruction tempered the instruction that flight and resisting arrest can provide evidence of guilt. (Emphasis sic.)

*Id.* at ¶¶ 134-136.

Similarly, the Third District Court of Appeals, in *State v. Wilson*, 3d Dist. Allen No. 1-09-64, 2010-Ohio-2294, stated that defendant-appellant's arguments regarding other motives for his flight "\* \* \* only serve to demonstrate reasons the jury could find that his flight was not evidence of consciousness of guilt, not that a consciousness of guilt instruction was unwarranted." *Id.* at ¶ 10.

{¶ 27} Here, the testimony at trial revealed that police attempted to make contact with Lewis after Detective Winfield observed him enter into a house that was not his own. Police attempted to speak to him through the front door of the house. During this time, two individuals exited the house; and they confirmed to police that Lewis was inside the house. After approximately two hours, police executed a search warrant and located Lewis in the basement behind a five-foot high cinder block wall, otherwise described as a crawl space. Lewis was covered from "head to toe" in dirt. These facts indicate that Lewis attempted to conceal his whereabouts from law enforcement. Therefore, the trial court had a sufficient basis for instructing the jury on consciousness of guilt.

{¶ 28} We are not persuaded by Lewis's argument that the trial court erred in giving the instruction because a trier of fact could not distinguish what led him to hide in that basement. Upon questioning from Lewis's defense attorney, Detective Winfield gave testimony indicating

that Lewis was inside the crawl space smoking crack while police were attempting to communicate with him. Thus, the jury was given another motive as to why Lewis was in the crawl space. We find the Seventh District's ruling in *Moore, supra* and the Third District's ruling in *Wilson, supra* persuasive. That is, we too find that although a defendant may be concealing his whereabouts from law enforcement because of other, undisclosed legal matters not at issue in the present case, the trial court can still give a consciousness of guilt instruction when the evidence is sufficient to do so. Lewis has not cited any authority implying that the evidence at trial must demonstrate only one possible motivation for a defendant's flight before a trial court may instruct the jury on consciousness of guilt.

{¶ 29} Furthermore, the instruction here was similar in substance to the flight instruction in *Monroe, supra*. In *Monroe*, we noted that the Ohio Supreme Court had upheld the use of a similar instruction because it was neither arbitrary nor unreasonable, and did not create an improper mandatory presumption. *Id.* at ¶ 52, quoting *State v Taylor*, 78 Ohio St.3d 15, 27, 676 N.E.2d 82 (1997). The instruction here provided that a defendant concealing his whereabouts does not create a presumption of guilt; but it may tend to indicate the defendant's consciousness or awareness of guilt. The instruction also stated that if the jury found that some other motive prompted the defendant to conceal his whereabouts from law enforcement, then the jury should not consider the evidence for any purpose. Finally, the instruction was neutral in its effect, providing that the jury may, but was not required to consider the concealment evidence in deciding whether Lewis was guilty of the crime charged.

{¶ 30} In sum, the State provided sufficient evidence to support the consciousness of guilt instruction; and the trial court provided a neutral instruction that the jury may consider whether defendant's conduct was motivated by a consciousness of guilt. Under the facts of this

case, we find that the trial court did not abuse its discretion in providing a consciousness of guilt jury instruction. Lewis's one assignment of error is overruled.

### **V. Conclusion**

{¶ 31} Having overruled Lewis's assignment of error, the judgment of the Ross County Common Pleas Court is affirmed.

JUDGMENT AFFIRMED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross 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, J.: Concurrency in Judgment and Opinion.  
McFarland, J.: Concurrency in Judgment Only.

For the Court

BY: \_\_\_\_\_  
Marie Hoover, 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.**