[Cite as *State v. Doll*, 2017-Ohio-2894.]

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

STATE OF OHIO,	:	Case No. 16CA3731
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
BRANCH J. DOLL,	:	
Defendant-Appellant.	:	**RELEASED: 05/01/2017**

APPEARANCES:

John A. Gambill, Portsmouth, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, for appellee.

Harsha, J.

{¶1} A jury convicted Branch J. Doll of multiple crimes including felonious assault with a firearm, and the Scioto County Court of Common Pleas sentenced him to prison. On appeal Doll initially asserts that the trial court erred in instructing the jury that his voluntary intoxication could not be considered when determining whether he knowingly committed the crimes charged in the indictment. Because Doll did not object at trial to this instruction, he forfeited all but plain error. We reject Doll's assertion because the trial court did not commit error, much less plain error, by instructing the jury that his voluntary intoxication was not an available defense. The cases Doll cites preceded the General Assembly's 2000 amendment to R.C. 2901.21, which provided that voluntary intoxication could no longer be considered in determining the existence of a mental state that is an element of a criminal offense. To the extent we previously held otherwise in *State v. Goad*, 4th Dist. Washington No. 08CA25, 2009-Ohio-580, we overrule it on this point. Next we reject Doll's contention that his trial counsel was

ineffective for conceding that voluntary intoxication was not a defense to the charged offenses and for failing to object to the trial court's instruction to that effect. A failure to raise a meritless objection cannot constitute deficient performance.

{¶2} Finally Doll claims that his conviction for tampering with evidence was not supported by sufficient evidence and was against the manifest weight of the evidence. Doll argues that the state failed to present any evidence that he knew of an ongoing or likely investigation when he picked up a shell casing from a bullet he had fired at one of his neighbors, and placed it in his pocket. But there was evidence that Doll was in the close proximity of the victim/neighbor who implored a passerby several times to call 911. And the victim and his girlfriend retreated to her residence, giving Doll reason to believe that she would contact the police. This constituted sufficient, credible evidence that Doll knew that an investigation was likely at the time he pocketed the shell casing. His conviction for tampering with evidence was thus supported by sufficient evidence and not against the manifest weight of the evidence.

{¶3} Therefore, we overrule Doll's assignments of error and affirm his convictions.

I. FACTS

{¶4} The Scioto County Grand Jury returned an indictment charging Branch J. Doll with attempted murder, with an accompanying firearm specification, felonious assault, with an accompanying firearm specification, improperly discharging a firearm at or into a habitation, with an accompanying firearm specification, tampering with evidence, assault on a peace officer, and improper handling of a firearm in a motor

vehicle. After the trial court appointed counsel for Doll, the case proceeded to a jury trial, which provided the following evidence.

{¶5} Kelly Howell and his girlfriend Stacie Tripp heard their neighbor Doll sitting in his driveway revving the engine of his vehicle until he blew it up. Tripp tried to help Doll's grandmother get Doll back inside his residence after Doll hit the grandmother with the vehicle's door, but Doll was intoxicated, and said he was mad at and going to beat up another neighbor.

{¶6} Eventually, Doll returned to his residence, entered his garage, and became mad at his dogs. Neighbors heard rattling of cages and dogs yelping. Jane Nichols, a passerby who was visiting her son, stopped her car to see what was happening, and Howell told her to call 911. After several of his dogs escaped, Doll picked one up off the ground and slammed it into the ground. Howell again told Nichols to call 911. According to Howell, he repeated his request three times.

{¶7} After being told not to hurt the dogs, Doll went to his vehicle and retrieved a semi-automatic handgun, which caused Tripp to yell that Doll had a gun. Doll then yelled at Tripp to stay out of his business and pointed the gun at Tripp. Howell yelled at Doll not to point the gun at Tripp, which made Doll turn and fire one shot at Howell, who stood in the doorway of his residence. The bullet hit the shutter next to the doorway where Howell was standing, then ricocheted off the door trim, and went through the screen. Nichols was near the area where Doll fired his gun, and she heard Tripp yell "he's got a gun" and then heard the gunshot as she called 911. Tripp ran back into the house and called 911 to report the shooting.

{¶8} Scioto County Deputy Sheriff Nicholas Shepherd responded to the 911 calls of a man firing shots at a neighbor and when he arrived, he observed Doll bend over, pick something up, and put it in his pocket. Deputy Sheriff Shepherd testified that he did not believe that Doll saw him before Doll picked up the object. Deputy Sheriff Shepherd approached Doll, but when he tried to detain him, Doll started swinging wildly at Shepherd, hitting him several times in his leg. Deputy Sheriff Shepherd used his taser on Doll and handcuffed him. Shepherd retrieved the gun from the driver's seat of Doll's vehicle. After Doll was transported to the sheriff's office, an empty .40 caliber shell casing was discovered in his pocket. During his police interview, Doll said that he did not know what happened and claimed that his grandmother may have put the shell casing in his pocket because she was crazy.

{¶9} The trial court instructed the jury that Doll's voluntary intoxication was not an excuse for the offenses and was not to be considered by the jury in its deliberations in determining the existence of Doll's mental state. Doll's trial counsel did not object to the instruction.

{¶10} The jury found Doll not guilty of attempted murder but guilty of the remaining offenses, and the trial court sentenced him to prison.

II. ASSIGNMENTS OF ERROR

{¶11} Doll appeals and assigns the following errors for our review:

1. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT APPELLANT'S VOLUNTARY INTOXICATION COULD NOT BE CONSIDERED WHEN DETERMINING WHETHER APPELLANT "KNOWINGLY" COMMITTED THE CRIMES CHARGED IN THE INDICTMENT.

2. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR MISREPRESENTING LAW RELATED TO VOLUNTARY

INTOXICATION AND FAILING TO OBJECT TO JURY INSTRUCTION INDICATING THAT VOLUNTARY INTOXICATION IS NOT AN AFFIRMATIVE DEFENSE TO THE CRIMES CHARGED IN THE INDICTMENT.

3. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO CONVICT APPELLANT OF TAMPERING WITH EVIDENCE; OR, IN THE ALTERNATIVE, THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. LAW AND ANALYSIS

A. Instruction on Voluntary Intoxication

{¶12} In his first assignment of error Doll asserts that the trial court erred by instructing the jury that his voluntary intoxication could not be considered in determining whether he knowingly committed the crimes charged in the indictment. Because Doll did not object to the trial court's jury instruction for the crimes, he forfeited all but plain error. *See State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002) (defendant's failure to object to jury instruction at trial forfeited all but plain error).

{¶13} "The test for plain error is stringent." *State v. Ellison*, 4th Dist. Highland No. 16CA16, 2017-Ohio-284, ¶ 27. "To prevail under this standard, the defendant must establish that an error occurred, it was obvious, and it affected his or her substantial rights." *State v. Spaulding*, __ Ohio St.3d __, 2016-Ohio-8126, __ N.E.3d __, ¶ 64. An error affects substantial rights only if it changes the outcome of the trial. *Id.* citing *Barnes* at 27. "We will notice plain error 'only to prevent a manifest miscarriage of justice.' " *State v. Fouts*, 4th Dist. Washington No. 15CA25, 2016-Ohio-1104, ¶ 59, quoting *State v. Long*, 53 Ohio St.3d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶14} In arguing that the trial court committed plain error in its jury instruction, Doll relies on *State v. Fox*, 68 Ohio St.2d 53, 428 N.E.2d 410 (1981), *Long v. State*, 109 Ohio St. 77, 141 N.E. 691 (1923), and *State v. Norman*, 7 Ohio App.3d 17, 453 N.E.2d 1257 (5th Dist.1982). These older cases stand for the traditional view that the intoxication of an accused is a defense under limited circumstances. *See generally* Katz, Martin, and Giannelli, *Baldwin's Ohio Practice Criminal Law*, Section 91:5 (3d Ed.2017); *Fox*, 68 Ohio St.2d at 55 (voluntary intoxication may be considered in determining whether the defendant was precluded from forming the necessary intent to commit the crime); *Norman*, 7 Ohio App.3d at 19-20 ("The rule in Ohio is that intoxication is not a defense to the commission of a crime unless a defendant is able to show that the degree of intoxication was so great as to negate the ability to form an intent to commit the crime").

{¶15} However, in 2000, the General Assembly amended R.C. 2901.21 by adding subsection (C), now subsection (E), which provides: "Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense."

{¶16} Since that amendment courts have been nearly unanimous in their view that the defense of voluntary intoxication no longer exists in Ohio. *See, e.g., State v. Koballa*, 8th Dist. Cuyahoga No. 100664, 2014-Ohio-3592, ¶ 24, and cases cited there ("Pursuant to the amended statute, a lack of capacity to form an intent to commit a crime due to self-induced intoxication is no longer a defense to a crime where a mental state is an element of the crime"); *State v. Hiler*, 2d Dist. Montgomery No. 25609, 2014-

Ohio-137, ¶ 41 ("voluntary intoxication is not a defense to any crime in Ohio"); *State v. Hill*, 10th Dist. Franklin No. 09AP-398, 2010-Ohio-1687, ¶ 27, quoting *State v. Melhado*, 10th Dist. Franklin No. 02AP-458, 2003-Ohio-4763, ¶ 48 ("This court has held that, since the General Assembly amended R.C. 2901.21 in 2000, 'voluntary intoxication may no longer be taken into account in determining the existence of a mental state that is an element of a criminal offense' "); Katz, Martin, and Giannelli, *Baldwin's Ohio Practice Criminal Law*, at Section 91:5 (prior law on voluntary intoxication as a limited defense "is now superseded by the new statute").

{¶17} The state notes in its appellate brief that following the amendment to R.C. 2901.21 our court issued a decision that continued to apply the prior precedent notwithstanding the amendment. *See State v. Goad*, 4th Dist. Washington No. 08CA25, 2009-Ohio-580. In *Goad*, although we cited the amended statute, we held that "despite the language contained in [former] R.C. 2901.21(C) [now R.C. 2901.21(E)]* * *, this Court has held that intoxication may, in fact, preclude the existence of the mental state of 'knowingly,' as required for the commission of felonious assault." *Id.* at ¶ 13-14. We proceeded to rely on cases decided before the amendment, but we affirmed the defendant's convictions because there was no evidence to support a defense that the defendant was intoxicated to the extent that he was incapable of forming the requisite intent for the crimes. *Id.* at ¶ 14.

{¶18} Upon reflection and after applying the test set forth in *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, for overruling precedent, we are persuaded that a special justification authorizes us to overrule *Goad* on this point. First, based on the manifest language in the 2000 amendment to R.C. 2901.21, *Goad*

was bad law. As now-Justice French noted in her opinion for the Tenth District Court of Appeals in *Hill*, 2010-Ohio-1687, our decision in *Goad* was unpersuasive because "the cases upon which [we] relied predate the 2000 amendments to R.C. 2901.21, which added the controlling statutory language." Our decision is an outlier in post-2000 jurisprudence on this issue.[1]

{¶19} Second, our decision defies practical workability. "Defendants in our district should not be afforded greater, judicially created rights than those afforded to defendants in every other district that has addressed this issue." *See State v. Mozingo*, 2016-Ohio-8292, __ N.E.3d __, ¶ 27 (4th Dist.).

{¶20} Finally, abandoning our precedent would not create an undue hardship for those who have relied on it. Those who may in the past have benefited from our decision in *Goad* cannot retroactively be "disenfranchised" from its application now. New defendants cannot reasonably rely upon asserting the intoxication defense in light of the legislature's enactment that expressly precludes it. And as noted, *Goad* was an outlier. We also seriously doubt that Doll relied upon it before engaging in his drunken rage. Finally, overruling *Goad* will restore order to our system of separation of powers and restore this district's jurisprudence to the proper rule of the judiciary in that system. *See Galatis* at ¶ 58-60.

{¶21} In light of the plain and unambiguous language of R.C. 2901.21(E), the trial court did not commit error, much less plain error, by instructing the jury that Doll's voluntary intoxication did not excuse his offenses and could not be considered in

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[1] We are nevertheless aware that the Supreme Court of Ohio, in an opinion after the 2000 amendment, suggested in dicta that "a voluntary-intoxication defense" is something "that Ohio law sometimes permits." *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, fn. 1, citing *Fox*, 68 Ohio St.2d 53, 428 N.E.2d 410, at syllabus.

determining the existence of his mental state at the time of the offenses. We overrule Doll's first assignment of error.

B. Ineffective Assistance of Counsel

{¶22} The second assignment of error contends that Doll received ineffective assistance of counsel because his attorney failed to object to the trial court's jury instruction on voluntary intoxication and conceded this point to the jury in his closing argument.

{¶23} To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to establish either part of the test is fatal to an ineffective-assistance claim. *Strickland* at 697, 104 S.Ct. 2052; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

{¶24} Based upon our disposition of the first assignment of error, an objection would have been meritless. Because Doll's trial counsel cannot be deficient for failing to raise a meritless objection, and for conceding that voluntary intoxication did not excuse him from the charged crimes, we overrule the second assignment of error. *See, e.g., State v. Tolbert*, 4th Dist. Washington No. 15CA5, 2015-Ohio-4733, 27 ("counsel's failure to raise what at the time was a meritless objection was not deficient").

C. Sufficiency of the Evidence and Manifest Weight of the Evidence

{¶25} The third assignment of error claims that Doll's conviction for tampering with evidence was based upon insufficient evidence and was against the manifest weight of the evidence.

{¶26} "When a court reviews the record for sufficiency, '[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. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶27} "A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness." *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, ___U.S. ___, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶28} By contrast in determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, 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 it demands reversal. *State*

v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6254, 960 N.E.2d 955, ¶ 119.

{¶29} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541. However, we are reminded that generally, the weight and credibility of evidence are to be determined by the trier of fact. *See Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. Thus, we defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, at ¶ 18.

{¶30} Doll was convicted of tampering with evidence, in violation of R.C. 2921.12(A)(1), which provides:

> (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:
>
> (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;

{¶31} "There are three elements of this offense: (1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration,

destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation." *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 11. Doll argues that the state failed to satisfy the first of these elements here. To support his argument Doll points out that Deputy Sheriff Shepherd testified on cross-examination that Doll did not realize the deputy was there when Doll bent over and pocketed the shell casing. "A conviction for tampering with evidence pursuant to R.C. 2921.12(A)(1) requires proof that the defendant intended to impair the value or availability of evidence that related to an existing or likely official investigation or proceeding." *Straley* at syllabus. "Likelihood is measured at the time of the act of alleged tampering." *Id.* at ¶ 19. Applying *Straley* here, in order to convict Doll of tampering with evidence, the state's burden was to prove beyond a reasonable doubt that at the time Doll concealed the shell casing, he knew that an investigation into his shooting was likely to be instituted. *See, e.g., State v. Barry*, 145 Ohio St.3d 354, 2015-Ohio-5449, 49 N.E.3d 1248, ¶ 22.

{¶32} There was evidence that before Doll concealed the shell casing, he was in the close proximity of Howell who yelled at Nichols to call 911. Moreover, a reasonable person would or should know that after Doll pointed the gun at Tripp and fired the shot at Howell, one or both of them would also contact the police. This provided sufficient credible evidence that Doll knew when he concealed the shell casing that an investigation into the shooting was likely to be instituted.

{¶33} Moreover, the jury could have reasonably relied on this same evidence to convict him of tampering with evidence. By doing so, the jury did not clearly lose its way

and create such a manifest miscarriage of justice that we must reverse its verdict. We overrule Doll's second assignment of error.

IV. CONCLUSION

{¶34} Doll has not established any reversible error. Having overruled his assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

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

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 Court of Common Pleas 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.

Hoover, J: Concurs in Judgment and Opinion.
McFarland, J.: Concurs in Judgment and Opinion as to Assignments of Error II and III; Concurs in Judgment Only as to Assignment of Error I.

For the Court

BY: _____
William H. Harsha, 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.