[Cite as *State v. Bard*, 2015-Ohio-1609.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 14-CA-43
TARYNE MOLLY BARD	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2013-CR-0707-D
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	April 24, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BAMBI S. COUCH-PAGE BY: JOHN NIEFT Assistant Prosecuting Attorney 38 South Park Street Mansfield, OH 44902	R. JOSHUA BROWN 32 Lutz Avenue Lexington, OH 44904

Gwin, P.J.

{¶1} Appellant Taryne Molly Bard ["Bard"] appeals from her convictions and sentences after a jury trial in the Richland County Court of Common Pleas on Falsification in violation of R.C. 2921.13(A)(3), a misdemeanor of the first degree; and Obstructing Justice in violation of RC. 2921.32(A)(5), a felony of the fifth degree.

Facts and Procedural History

{¶2} On October 18, 2013, Bard and Sharon Rory, the girlfriend of Mark Basford, picked up Mark Basford from the Volunteers of America (VoA) in Richland County, a lockdown facility. Mr. Basford had been sentenced to the VoA as part of his sentence for an Unauthorized Use of a Motor Vehicle, a felony of the fourth degree.

{¶3} Basford contacted Sharon Rory around 6:00 a.m. to pick him up from the VoA because Basford had tested positive for methamphetamines that morning and he knew he would get in trouble. Mr. Basford planned to escape; however, he told Ms. Rory that he had a pass to leave the VoA. Bard drove Ms. Rory in a Mint Green Buick vehicle with a white quarter-panel. She drove around the front of the VoA and parked in the back parking lot near the back fence. Basford then exited the VoA into the fenced-in smoking area carrying his possessions in a large plastic bag. Mr. Basford threw his possessions over the fence, jumped the fence, and entered the vehicle. Bard then drove off at a high rate of speed with the vehicle's headlights off.

{¶4} VoA employees observed this escape and video recorded it on the VoA cameras. This security system has twenty-two (22) different cameras throughout the facility that are monitored 24/7 by the security staff On October 18, 2013 security video revealed Mark Basford throwing a laundry type bag over the fenced in area, quickly

jump over the fence, and then enter a vehicle. The security system also recorded a vehicle pulling into the driveway of the VoA at approximately 6:30 a.m. and proceeding to the back parking lot. When employees of the VoA went to investigate Mr. Basford jumping the fence they saw Bard's vehicle speeding off. An emergency count of the residents was then instituted and it was found that Mr. Basford had escaped. Guraldina Marie Hudgens, a resident supervisor at the VoA, went to the back door of the facility to see why a car had gone back there. Ms. Hudgens observed two females in the vehicle seated in the front seat. She was unable to identify either one of them. Ms. Hudgens provided a description of the vehicle to the Mansfield Police Department. The surveillance video of the escape was played for the jury.

{¶5} Bard's vehicle was found around 9:30 p.m. on Helen Avenue; it was followed as it turned onto Park Avenue West. Officer Clapp called for backup and stopped the vehicle in the parking lot of a Walgreens Pharmacy. Bard was driving, Ms. Rory was in the front passenger seat, Mr. Basford was in the seat behind Bard, and Bard's infant son was in a car seat behind Ms. Rory. The women provided identification, but Mr. Basford could not. Mr. Basford initially lied about his social security number, but when further questioned, he admitted that he had been at the VoA and he was arrested.

{¶6} Sergeant Seman spoke with Bard at the time of the stop. Bard initially stated that she had picked up Mr. Basford and Ms. Rory on Helen Avenue. Bard denied being at the VoA that morning. Bard eventually admitted to Officer Clapp later during the stop that she was at the VoA because Ms. Rory had requested her help. Bard was arrested.

{¶7} Bard, was indicted for Aiding or Abetting Escape in violation of R.C. 2921.34(A)(1), a felony of the third degree; Endangering Children in violation of R.C. 2919.22(A), a misdemeanor of the first degree; Falsification in violation of R.C. 2921.13(A)(3), a misdemeanor of the first degree; and Obstructing Justice in violation of RC. 2921.32(A)(5), a felony of the fifth degree.

{¶8} Mr. Basford testified at trial and stated that he told Ms. Rory, his girlfriend, that he needed to be picked up because he had a pass to leave the VoA, even though he did not. He also stated that he told Ms. Rory to drive around to the back parking lot and that no one questioned him when he entered the vehicle after having just jumped the back fence. Mr. Basford did not believe that Bard knew he was attempting to escape the VoA.

{¶9} A jury found Bard not guilty of Aiding or Abetting Escape and Endangering Children, but guilty of Falsification and Obstructing Justice. She was sentenced on March 17, 2014, to six months of incarceration on each guilty count, to run concurrently.

Assignment of Error

{¶10} Bard raises the following assignment of error,

"I. THE VERDICT FORM REGARDING COUNT IV FAILED TO INDICATE WHETHER THE CRIME AIDED WAS (1) A MISDEMEANOR AND THE DEGREE THEREOF, OR (2) A FELONY OF THE SECOND, THIRD, OR FIFTH DEGREE."

Analysis

{¶11} Bard argues the jury verdict forms failed to contain language that indicated the name of the offense that she allegedly hindered, i.e. escape, and the degree of the

escape offense. Specifically, Bard contends the jury found her not guilty on the aiding and abetting escape. However, Bard contends the jury needed to determine the degree of the escape that she aided to determine if Bard was guilty of a misdemeanor or felony with respect to the Obstructing Justice charge.

{¶12} The elements of obstructing justice are: (1) no person, with purpose to hinder the discovery, apprehension, prosecution, conviction or punishment; (2) of another for crime, or to assist another to benefit from the commission of a crime; (3) harbor or conceal the other person or child; *or* (4) provide the other person with money, transportation, a weapon, a disguise, or other means of avoiding discovery or apprehension; *or* (5) warn the other person or child of impending discovery or apprehension *or* (6) destroy or conceal physical evidence of the crime or act, or induce any person to withhold testimony or information or to elude legal process summoning the person to testify or supply evidence; *or* (7) communicate false information to any person; *or* (8) prevent or obstruct any person, by means of force, intimidation, or deception, from performing any act to aid in the discovery, apprehension, or prosecution of the other person or child. R.C. 2921.32(A).

{¶13} As it pertains to Bard's assignment of error, R.C. 2921.32, Obstructing Justice provides,

> (C)(1) Whoever violates this section is guilty of obstructing justice.
>
> (2) If the crime committed by the person aided is a misdemeanor or if the act committed by the child aided would be a misdemeanor if committed by an adult, obstructing justice is a misdemeanor of the same degree as the crime committed by the person aided or a misdemeanor of

the same degree that the act committed by the child aided would be if committed by an adult.

(3) Except as otherwise provided in divisions (C)(4), (5), and (6) of this section, if the crime committed by the person aided is a felony or if the act committed by the child aided would be a felony if committed by an adult, obstructing justice is a felony of the fifth degree.

* * *

{¶14} In addition, 2921.32 further specifically states,

(B) A person may be prosecuted for, and may be convicted of or adjudicated a delinquent child for committing, a violation of division (A) of this section regardless of whether the person or child aided ultimately is apprehended for, is charged with, is convicted of, pleads guilty to, or is adjudicated a delinquent child for committing the crime or act the person or child aided committed. *The crime or act the person or child aided committed shall be used under division (C) of this section in determining the penalty for the violation of division (A) of this section*, regardless of whether the person or child aided ultimately is apprehended for, is charged with, is convicted of, pleads guilty to, or is adjudicated a delinquent child for committing the crime or act the person or child aided committed.

(Emphasis added).

{¶15} As can be observed from the above, R.C. 2921.32 defines the offense of obstructing justice without reference to the degree of the crime or act committed by the

other person and sets forth all that the state must prove to secure a conviction. As the Ohio Supreme Court has observed in an analogous situation,

> R.C. 2913.02(A) defines theft without reference to value and sets forth all that the state must prove to secure a conviction. Subsection (B)(2) of the statute classifies theft as a misdemeanor of the first degree but also states, "If the value of the property or services stolen is five hundred dollars or more and is less than five thousand dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree."
>
> While the special findings identified in R.C. 2913.02(B)(2) affect the punishment available upon conviction for the offense, they are not part of the definition of the crime of theft set forth in R.C. 2913.02(A).
>
> We recently considered a jury's special enhancement finding in *State v. Fairbanks*, 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, which concerned an enhancement to the offense of failing to comply with an order or signal of a police officer in violation of R.C. 2921.331(B). This statute's structure parallels that of the theft statute in that R.C. 2921.331(B) defines the offense as follows, "No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop," while R.C. 2921.331(C)(3) classifies the offense as "a misdemeanor of the first degree." Moreover, R.C. 2921.331(C)(4) and (5)

identify special findings that enhance the degree of the offense. For example, R.C. 2921.331(C)(5)(a) provides:

"A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

" * * *

"(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property."

We stated, "If the trier of fact finds beyond a reasonable doubt that a substantial risk of serious physical harm to persons or property actually resulted from defendant's conduct, then the enhancement is established. This is purely a question of fact concerning the consequences flowing from the defendant's failure to comply. * * * It is analogous to determining whether the offense occurred in daylight or in darkness or whether the place where it occurred was dusty or wet. It is simply a finding of the presence or absence of a condition." 117 Ohio St.3d 543, 2008-Ohio-1470, 885 N.E.2d 888, ¶ 11.

Similarly, we hold that the value of stolen property is not an essential element of the offense of theft but, rather, is a finding that enhances the penalty of the offense. As such, it is submitted to a fact-finder for a special finding in order to determine the degree of the offense.

State v. Smith, 121 Ohio St.3d 409, 2009–Ohio–787, 905 N.E.2d 151, ¶¶ 6-13. (Emphasis added.).

{¶16} R.C. 2921.32(B) and R.C. 2921.32(C) set forth that the crime or act of the person aided shall be used to determine whether obstructing justice is a misdemeanor [2921.32(C)(2)], a felony of the fifth degree [R.C. 2921.32(C)(3)] a felony of the third degree [R.C. 2921.32(C)(4)], or a felony of the second degree [2921.32(C)(5) and 2921.32(C)(6)]. Accordingly, the crime or act of the person aided constitutes a special finding that serves to enhance the penalty of the offense. As the Ohio Supreme Court has observed *Smith,* it is to be submitted to the fact-finder for a special finding in order to determine the degree of the offense.

{¶17} In the case at bar, the jury did not make a special finding that Bard aided Basford in the commission of a felony escape. R.C. 2945.75 provides:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> (1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.
>
> "(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

{¶18} The Supreme Court of Ohio has interpreted this statute to provide the requirements for what must be included in a jury verdict form. *State v. Pelfrey*, 112 Ohio

St.3d 422, 860 N.E.2d 735, 2007-Ohio-256, ¶14. The *Pelfrey* Court held that "pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." Id. *See also, State v. Nethers*, 5th Dist. Licking No. 07 CA 78, 2008-Ohio-2679, ¶ 51.

{¶19} In *Pelfrey*, the jury found him guilty, and he was sentenced on the third-degree felony conviction to serve four years in prison. The Second District Court of Appeals affirmed Pelfrey's conviction, rejecting a manifest-weight-of-the-evidence argument. *State v. Pelfrey*, 2nd Dist. Montgomery. No. 19955, 2004-Ohio-3401. The court of appeals subsequently granted Pelfrey's application to reopen the appeal under App.R. 26(B). Pelfrey argued that the trial court had erred in entering a conviction of a third-degree felony because the verdict form and the trial court's subsequent verdict entry were inadequate to support a conviction of tampering with government records. Instead, Pelfrey argued that he could have been convicted only of the misdemeanor offense of tampering with records. See R.C. 2913.42(B) (2).

{¶20} The Second District Court of Appeals agreed with Pelfrey's argument and stated, "'Pelfrey's failure to raise this defect at trial did not waive it, and the fact that the indictment and jury instructions addressed the government-records issue did not cure the non-compliance with R.C. 2945.75(A) (2).' " *State v. Pelfrey*, 2nd Dist. Montgomery No. 19955, 2005-Ohio-5006, ¶23, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, ¶23. The court of appeals held that "the trial court was

required to enter a conviction for first-degree misdemeanor tampering with records, which is the least degree of the offense under R.C. § 2913.42." Id.

{¶21} The Ohio Supreme Court in *Pelfrey*, agreed that he did not waive the error by failing to raise it in the trial court, "[b]ecause the language of R.C. 2945.75(A) (2) is clear, this court will not excuse the failure to comply with the statute or uphold Pelfrey's conviction based on additional circumstances such as those present in this case. The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form. 112 Ohio St.3d 425-426, 860 N.E.2d at 735, 2007-Ohio-256, ¶14.

{¶22} In the case at bar, pursuant to *Pelfrey*, Bard's failure to bring the issue to the trial court's attention cannot be considered as an excuse for the trial court's failure to comply with the statute.

{¶23} Bard's sole assignment of error is sustained, and the matter remanded to the trial court for resentencing.

{¶24} The judgment of the Richland County Court of Common Pleas is reversed and the matter is remanded for resentencing consistent with the law and this opinion.

By Gwin, P.J.,

Wise, J., and

Baldwin, J., concur