[Cite as *State v. Beard*, 2009-Ohio-4412.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-08-037

Appellee — Trial Court No. 07 CR 453

v.

Andrew Beard — **DECISION AND JUDGMENT**

Appellant — Decided: August 28, 2009

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, and
Gwen Howe-Gebers, Assistant Prosecuting Attorney, for appellee.

Dan M. Weiss, for appellant.

* * * * *

SHERCK, J.

{¶ 1} This is a criminal appeal from the Wood County Court of Common Pleas. Following a jury trial, appellant, Andrew Beard, was convicted of felonious assault with a firearm specification, a felony of the second degree, and tampering with evidence, a felony of the third degree. He was acquitted on a second felonious assault charge. The trial court

imposed a sentence of five years incarceration for the felonious assault with a firearm specification conviction, and one year incarceration for the tampering with evidence conviction, to be served concurrently. For the following reasons, the felonious assault conviction is affirmed, but the conviction for tampering with evidence is not supported by sufficient evidence and is, therefore, reversed.

{¶ 2} The relevant facts of this case are as follows. On October 17, 2007, Taren Coleman was with Walter Marshall at his Maurer's trailer park residence. According to their testimony, Coleman's friend, Tyler Heckman, and Marshall's neighbor, Jason Meyers, were also present. Marshall and Coleman testified that the two of them were near Marshall's shed, exchanging motorcycles. According to the testimony of Meyers and Heckman, Beard arrived and parked his car in the street, remaining inside his vehicle. Coleman recognized the car and approached the vehicle to say hello to Beard. Coleman testified that he had not seen Beard in approximately two years. They had been friends during high school but Beard stopped consorting with Coleman for seemingly no explanation; Coleman and Heckman believed that Beard had stolen money from them.

{¶ 3} Coleman testified that as he approached the driver's side of the car from the rear, Beard stepped out of the car, swung around with a gun in his hand, and shot him. Coleman testified that the gun was a "blue snub nose" with an approximately one inch barrel. Marshall testified that after Coleman was shot, Beard shot at Marshall but missed. Multiple witnesses from the trailer park testified that they heard more than one shot. Marshall and

several neighbors then observed Beard fleeing the scene, with Marshall giving chase in an attempt to view his license plate number.

{¶ 4} After the incident, Coleman waited a few hours before seeking medical attention. Coleman delayed going to the hospital because he did not have health insurance and would not be able to pay for treatment. When he finally went to the hospital the emergency room physician who examined him testified that he appeared to have a gunshot wound. Multiple x-rays were taken. Both the emergency room physician, Dr. Helfman, and a vascular surgeon on call, Dr. Ubunama, testified that the x-rays showed a metallic object, similar to a bullet in size and shape, inside his arm. The x-rays were admitted into evidence. Dr. Ubunama ultimately chose not to remove the object, testifying that no bones were fractured, and there was a risk that surgery would have damaged the arteries in Coleman's arm.

{¶ 5} Meyers, who did not know Beard prior to the incident, corroborated Coleman's story. He testified that he saw Coleman recognize Beard and heard Coleman say that he was going to say hello to Beard. Meyers first testified that Coleman walked up to the bumper of Beard's car when "shots were fired." Upon further questioning, Meyers said he heard but did not see the first shot, then looked around to see what was going on, and saw Beard fire a second shot.

{¶ 6} Heckman's testimony also corroborated Coleman's story. Heckman, who said he was standing near Marshall at the time, testified that he saw Beard step out of the car, turn

around with a gun held at his side, and shoot Coleman. According to Heckman, Beard fired a second shot in the direction of Marshall's trailer, then got in his car and left.

{¶ 7} Zach Binion and Jessica Stuber, neighbors of Marshall, testified that they had called Beard to come to the trailer park that day to sell them marijuana. Stuber testified that when she saw Beard pull up in front of her house, she went out to ask him how much the marijuana was going to cost. After going back inside to retrieve her money, she heard two gunshots. Binion heard the same noise from inside their residence.

{¶ 8} Within 15 minutes of the police being called, a sheriff's deputy, Brian Ruckstuhl, arrived at Beard's home. Ruckstuhl testified that Beard was not home, but Beard's mother gave Ruckstuhl Beard's cell phone number. Ruckstuhl called Beard from Beard's home and Beard informed him that he was on his way to a friend's house, but would come to the sheriff's department as requested. Approximately 40 minutes after the initial 911 call, Beard arrived at the sheriff's department. According to the testimony of both law enforcement officers who spoke with him there, Beard was very cooperative. He consented to a search of his vehicle which produced no sign of a gun or ammunition. He also gave a written statement in which he admitted being at the trailer park to see his friend Zach. In his written statement, Beard claims that while he was in the trailer park he heard people yelling, so he got out of his car to see what was going on. At that point, he heard gunshots and then saw Taren Coleman running around a driveway, holding his side. Not knowing what was going on, he then left the scene to go to a friend's house.

{¶ 9} At trial, the state asserted during its closing argument that since Beard was seen by multiple witnesses with a gun in his hand, and a gun was never found after searching Beard's car, Beard must have disposed of it.

{¶ 10} Appellant raises one assignment of error:

{¶ 11} "The trial court's decision was against the manifest weight of the evidence."

{¶ 12} When reviewing the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way and created such a miscarriage of justice that a new trial is required. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. To reverse a conviction from a jury trial based on the weight of the evidence, the appellate panel must be unanimous. Section 3(B)(3), Article IV, Ohio Constitution.

{¶ 13} "With respect to sufficiency of the evidence, '"sufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' Black's Law Dictionary (6 Ed.1990) 1433. * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S.

31, 45, citing *Jackson v. Virginia* (1979), 443 U.S. 307." *State v. Thompkins*, 78 Ohio St.3d at 386-387. If a verdict is unsupported by sufficient evidence, it is necessarily against the manifest weight of the evidence.

{¶ 14} Upon review of the entire record, we find that the conviction for felonious assault with a firearm specification is not against the manifest weight of the evidence. But, as a matter of law, the conviction for tampering with evidence is unsupported by sufficient evidence and must be reversed. Even though Beard has not raised the sufficiency of evidence issue as it relates to the conviction for tampering with evidence, we may recognize plain error sua sponte to prevent a miscarriage of justice as such a conviction violates due process. *State v. Malone*, 3d Dist. No. 9-06-43, 2007-Ohio-5484, ¶ 33, citing *State v. Conklin*, 2d Dist. No. 1556, 2002-Ohio-2156; Crim.R. 52(B); *State v. Thompkins*, supra.

{¶ 15} To be convicted of felonious assault, a person must knowingly "cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(2). A "deadly weapon" is "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A). In order for a defendant to receive an enhanced penalty for a firearm specification, the state must prove beyond a reasonable doubt that a firearm was operable at the time of the offense. *State v. Murphy* (1990), 49 Ohio St.3d 206, at syllabus. "[S]uch proof can be established beyond a reasonable doubt by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." Id.

{¶ 16} Here, with respect to the felonious assault charge, the state presented the testimony of six witnesses who were at or near the scene (including the victim) and the law enforcement officers who conducted the investigation. These witnesses testified that they recognized Beard and his car from having previously been friends with him, heard gunshots, saw Beard with a gun in his hand, and saw Beard flee the scene. The victim of the shooting, Taren Coleman, testified that it was Andrew Beard who shot him. Contrary to Beard's assertions, Coleman's version of events is consistent with, and corroborated by, the testimony of Marshall, Heckman, Meyers, Binion, and Stuber. The jury obviously found these witnesses to be credible. We see no sign that the members of the jury clearly lost their way in doing so, and therefore we must affirm the conviction for felonious assault with a firearm specification.

{¶ 17} The tampering with evidence statute provides that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * 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." R.C. 2921.12(A)(1). The statute applies even before formal proceedings have commenced. *State v. Copley*, 10th Dist. No. 04AP-511, 2005-Ohio-896, ¶ 59, citing *State v. Moore* (Jan. 20, 1992), 4th Dist. No. 91CA1966.

{¶ 18} 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. Wooden* (1993), 86 Ohio App.3d 23, 27. For instance, in *State v. Spears*, 178 Ohio App.3d

580, 2008-Ohio-5181, the defendant's conviction for tampering with evidence was recognized as plain error because it was unsupported by sufficient evidence and was, therefore, against the manifest weight of the evidence. In *Spears*, the only evidence to support the charge was the lack of the weapon used and the defendant's alleged statement to a third party that the defendant had thrown it away. Id. at ¶ 23. Similarly, in *State v Like*, 2d Dist. No. 21991, 2008-Ohio-1873, the fact that the gun was missing was insufficient evidence of tampering to allow statements about the disposal of the gun. Id. at ¶ 24. In the same case, the fact that no fingerprints were found in the victim's apartment was also insufficient to support a tampering with evidence conviction because it did not prove the defendant wiped the apartment down to remove them. Id. at ¶ 25. These cases all stand for the proposition that more than a missing weapon is required to prove "tampering."

{¶ 19} In *Copley*, supra, the evidence was sufficient to support a tampering with evidence conviction where law enforcement could not find the gun used in the shooting. However, the conviction was supported by the additional evidence of the defendant's testimony that he had dropped the gun on the ground after shooting the victim. *Copley*, 2005-Ohio-896, ¶ 12.

{¶ 20} In the case at hand, the state provided no evidence that Beard actually altered, destroyed, concealed, or removed the gun. The gun used in the shooting was not found, but that fact alone cannot lead to an inference that Beard tampered with it. See *Wooden*, supra. The state relied on a faulty syllogism: Witnesses saw Beard fire a gun. The gun was never found. Therefore, Beard must have tampered with the gun in order to make it unavailable as

evidence against him. This was the extent of the evidence used to prove tampering. It is clearly insufficient to meet the standard applied by *Wooden*, *Spears*, and *Like*. Since the evidence was insufficient to support a tampering conviction, the conviction must be vacated. *Like*, 2008-Ohio-5181, ¶ 24.

{¶ 21} Beard's assignment of error is not well-taken with respect to his conviction for felonious assault with a firearm specification. The assignment of error is well-taken with respect to the conviction for tampering with evidence. Accordingly, Beard's conviction for felonious assault with a firearm specification is affirmed, and the conviction for tampering with evidence is vacated as unsupported by sufficient evidence. The judgment of the Wood County Court of Common Pleas is affirmed in part and reversed in part. This matter is remanded to that court to modify the judgment according to this decision. Appellant and appellee are ordered to each pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

James R. Sherck, J,
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.