[Cite as *State v. Garrett*, 2009-Ohio-5363.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92349

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTWONE GARRETT

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS MODIFIED;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-512786

BEFORE: Rocco, P.J., Sweeney, J., and Jones, J.

RELEASED: October 8, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Chief Public Defender

BY: John T. Martin
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Marc Bullard
Gregory J. Mussman
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Antwone Garrett appeals from his convictions after a jury found him guilty of possession of criminal tools ("PCT") and attempted tampering with records.

{¶ 2} Garrett presents five assignments of error. As to his conviction for PCT, he argues that conviction should be reversed because the jury specifically found he did not intend to use the tools criminally. He further asserts that, even if his PCT conviction is not reversible, rather than a fifth-degree felony as set forth in the journal entry, it constituted only a first-degree misdemeanor; therefore, the trial court imposed an improper sentence for that conviction.

{¶ 3} As to his conviction for tampering with records, Garrett argues his conviction should be reversed because he was charged with a general crime when a more specific crime applied and because it is unsupported by sufficient evidence. He further asserts that, even if his conviction is not reversible, the verdict form signed by the jury supports a conviction only for a second-degree misdemeanor, rather than for a fifth-degree felony.

{¶ 4} This court has reviewed the record with Garrett's arguments in mind. Since the verdict forms provided to the jury so require, his conviction for PCT must be modified to reflect he was convicted of a first-degree misdemeanor, and his

conviction for attempted tampering with records must be modified to reflect he was convicted of a second-degree misdemeanor. Consequently, this case is remanded for correction of the record and for resentencing.

{¶ 5} Garrett originally was indicted in this case on thirteen counts. He was charged with one count of aggravated burglary, four counts of aggravated robbery, four counts of kidnapping, one count of felonious assault, one count of attempted murder, one count of PCT, and one count of tampering with records. Counts one through eleven each additionally contained both a one-year and a three-year firearm specification.

{¶ 6} All the crimes were alleged to have taken place on November 13, 2006. According to the state's witnesses, on that night, a man carrying a gun entered a delicatessen located at the intersection of East 104th Street and Union Avenue in Cleveland.

{¶ 7} Once inside, the intruder "snatched"[1] some money, then pulled the owner by his hair out to the street, where an accomplice who wore a mask waited. The intruder tried to force the owner into a black Aztek SUV; another accomplice was in the driver's seat of the vehicle. The owner resisted and escaped; shots were fired at him as he fled.

[1]Quotes indicate testimony given by a witness at trial.

{¶ 8} A homeowner on East 105th Street had spotted the Aztek parked on his street that night; his attention had been attracted to it by "some guys arguing" inside. About a half-hour later, police officers arrived at the delicatessen, and he provided the vehicle's license plate number to them. The license plate indicated the vehicle belonged to Ebony Johnson, Garrett's girlfriend.

{¶ 9} At Garrett's trial, Johnson testified she permitted Garrett to drive her vehicle on November 13, 2006, but he returned that night without it. When she asked him where it was, he told her "the police had it." Johnson stated Garrett informed her his "stupid friend" had done something "stupid," and he needed her to "report [her] car stolen."

{¶ 10} Johnson testified Garrett provided her with a story to tell the police, i.e., that she was kidnapped while driving the Aztek, a bag was placed over her head, then the kidnappers put her out on the freeway before driving away in her vehicle. She stated she got into Garrett's car, and he took her to the freeway then dropped her off. She "started running, crying," and "flagged a car down."

{¶ 11} After arriving at the police station, Johnson began making "a false police report" of her fictional ordeal. While an officer was taking her report, "three detectives showed up."

{¶ 12} One of the detectives was John Kraynik. According to his testimony, Johnson's vehicle already had been located near the scene of the incident, and he suspected Garrett had been involved. Kraynik arrived at the police station just as

"Officer Morales was in the process of taking a report" from Johnson. Kraynik testified the report's title was "grand theft, kidnapping."

{¶ 13} Kraynik indicated he advised Johnson that if what she described "actually happened," she should complete it. Otherwise, she needed to reconsider what she was doing.

{¶ 14} Johnson testified that, at that point, she told the police she had been "lying about what really happened." She proceeded to "tell them the truth." Johnson further provided a written statement in which she declared Garrett had told her to report her Aztek stolen by her "kidnappers."

{¶ 15} Kraynik testified that after the Aztek was located on "East 104th Street" on the night of the incident, it had been towed to the police impound lot. He searched it on November 15, 2006. It contained, among other things, rolls of duct tape and a neoprene ski mask.

{¶ 16} Garrett subsequently was indicted; his case proceeded to a jury trial. Prior to the commencement of the proceeding, the state dismissed two counts. This led to the renumbering of the remaining counts, thus, count 10 charged Garrett with PCT and count 11 charged him with tampering with records.

{¶ 17} After receiving the trial court's instructions, the jury found Garrett not guilty on counts 1 through 9. The jury found Garrett guilty of count 10, PCT, but specifically found that he "did not" intend to use the articles to commit "aggravated burglary, and/or aggravated robbery." The jury also found Garrett guilty of

attempted tampering with records, a lesser included offense of the charge in count 11.

{¶ 18} The trial court sentenced Garrett for the foregoing "felony" convictions to concurrent prison terms of, respectively, six months and fourteen months.

{¶ 19} Garrett presents the following assignments of error:

{¶ 20} "I. The verdict form in Count Ten only supports a conviction for possession of criminal tools as a first-degree misdemeanor.

{¶ 21} "II. The verdict form in Count Eleven only supports a conviction for tampering with records [sic] as a second-degree misdemeanor.

{¶ 22} "III. The defendant cannot be convicted of possession of criminal tools because the jury specifically found that the state did not prove one of the elements of the offense that the jury was instructed had to be proven.

{¶ 23} "IV. Mr. Garrett could not be charged with tampering with records because the offense of making a false statement to the police is governed by R.C. 2921.13(A)(3), which is a more specific offense.

{¶ 24} "V. The evidence is insufficient to support the defendant's conviction for tampering with records [sic] as alleged in Count Eleven."

{¶ 25} This court will address Garrett's arguments in logical order. In his first assignment of error, he argues with respect to the charge of PCT that since

the verdict form provided to the jury references only "R.C. 2923.24(A)," without more, the jury found him guilty of only a first-degree misdemeanor, rather than an "F5," as stated in the trial court's journal entry of verdict and sentence.

{¶ 26} The state concedes Garrett's argument on this point. The verdict form fails to state the jury made a finding that the items were possessed with the intent to use them in the commission of a felony; therefore, pursuant to R.C. 2945.75, Garrett's conviction on that count was for the least degree of the offense. *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256.

{¶ 27} Garrett's first assignment of error, accordingly, is sustained. That does not end the matter, however, since Garrett further argues in his third assignment of error that his conviction for PCT remained unsupported by sufficient evidence and thus the trial court should have dismissed that charge.

{¶ 28} Garrett points out that, according to the verdict form, the jury specifically found that he "did not" possess the criminal tools with the intent to use them "to commit the offense of Aggravated Burglary and/or Aggravated Robbery." In instructing the jury, the trial court stated in pertinent part:

{¶ 29} "Before you can find the defendant guilty of [PCT] you must find beyond a reasonable doubt that on or about the 13th day of November, 2006 and in Cuyahoga County, Ohio, the defendant possessed or had under his control a * * * instrument or article with the purpose to use it criminally, to wit: a firearm and/or

duct tape, and/or mask, and such * * * instrument or article was intended for use in the commission of a felony in violation of 2923.24 of the Ohio Revised Code. * * *

{¶ 30} "The felony in this case is aggravated burglary, and/or aggravated robbery. All elements of these offenses have been previously defined and the same definitions apply herein. * * *

{¶ 31} "If you find that the State failed to prove beyond a reasonable doubt any one of the essential elements of the offense of [PCT] as charged in count ten of the indictment your verdict must be not guilty according to your findings.

{¶ 32} "If you find that the defendant is guilty of [PCT] you will separately decide whether the State has proven beyond a reasonable doubt that the defendant did or did not intend to use the * * * instrument or article * * * to commit the offense of aggravated burglary, and/or aggravated robbery, and indicate your finding on the further finding of the verdict form.

{¶ 33} "If your verdict [is] not guilty of [PCT], it will not be necessary to make any further determination." (Emphasis added.)

{¶ 34} Garrett contends the jury's verdict on Count 10 is internally inconsistent. He claims the jury could not have decided the state proved the elements of the offense of PCT, while at the same time have decided the state did not prove he intended to use the items to commit either of the only two underlying felonies, which the jury was instructed also were elements of the crime.

{¶ 35} The state asserts Garrett waived this argument when his trial counsel raised no objection to the verdict forms provided to the jury. Although at least one other Ohio appellate court has agreed with the state's position, this court does not find it necessary to resolve the issue on that basis. See *State v. Twyman* (Nov. 21, 1984), Hamilton App. No. C-840092.

{¶ 36} An inconsistent verdict arises from inconsistent responses to the same count. *State v. Kennedy*, Cuyahoga App. No. 90231, 2008-Ohio-4237, fn. 1. This court has previously noted that a jury's "finding on a specification that is inconsistent with a guilty finding on the principal charge will not undermine the guilty finding on the principal charge where the guilty finding on the principal charge is supported by the evidence." *State v. Kimbrough* (Aug. 17, 2000), Cuyahoga App. No. 76517. See, also, *State v. Burton* (Mar. 8, 1996), Sandusky App. No. S-95-008.

{¶ 37} Clearly, both the instructions and additional verdict form provided to the jury in this case on Count 10 treated the underlying "felony" as a "specification" for the jury's "further" determination. The evidence supported a finding that Garrett intended to use the items for a criminal purpose. *State v. Parks*, Cuyahoga App. No. 90368, 2008-Ohio-4245.

{¶ 38} However, the jury previously determined the state failed to prove Garrett himself intended to commit either aggravated burglary or aggravated robbery. In view of the instruction the jury received that, "It is also alleged that the

defendant acted in complicity by aiding and abetting another in commission of the offenses charged," the jury could have found that Garrett's intent went only that far, and no farther.

{¶ 39} Under the circumstances presented in this case, therefore, the verdict forms cannot be deemed internally inconsistent. Consequently, Garrett's third assignment of error is overruled.

{¶ 40} Garrett's second, fourth and fifth assignments of error all challenge his conviction for attempted tampering with records.[2]

{¶ 41} Initially, he argues, as he does in his first assignment of error, that because the verdict form neglected to set forth either the degree of the offense or the nature of the record he was accused to have falsified, he could be convicted of only the least degree of the offense. A review of the record demonstrates Garrett is correct.

{¶ 42} The verdict forms signed by the jury indicate the jury found Garrett not guilty of "Tampering with Records, in violation of §2913.42(A)(1) of the Ohio Revised Code," however, Garrett was found guilty of "Attempted Tampering with Records, in violation of §2923.02/2913.42(A)(1) of the Ohio Revised Code, a lesser included offense as charged in Count Eleven of the Indictment."

---

[2]Garrett incorrectly refers to this conviction in his assignments of error as "tampering with records" rather than attempted tampering with records.

{¶ 43} Since the jury's verdict forms for the charge specified neither the particular type of record nor a particular monetary value for the subject of the falsification, pursuant to R.C. 2945.75, he was convicted of only a second-degree misdemeanor offense, rather than for a fifth-degree felony. R.C. 2913.42 (B)(2)(a); R.C. 2923.02; *State v. Pelfrey*, supra. Garrett's second assignment of error, therefore, is sustained.

{¶ 44} Garrett next argues that the trial court should have ordered his acquittal on Count 11 because he was charged with tampering with records under R.C. 2913.42(A), a "general statutory provision," when he should have been charged with falsification under R.C. 2921.13(A), a more "specific" offense. Garrett cites *State v. Riggs* (Apr. 13, 1993), Franklin App. Nos. 92AP-1755, 93AP-258, as authority for his position.

{¶ 45} More recently, however, the Ohio Sixth District Court of Appeals rejected a nearly identical argument by observing as follows:

{¶ 46} "Well-established principles of statutory construction require that specific statutory provisions prevail over conflicting general statutes. R.C. 1.51 states that:

{¶ 47} "'If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as

an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.'

{¶ 48} "In *State v. Volpe*, the Ohio Supreme Court found that R.C. 2915.02(A)(5) and 2923.24 were irreconcilable. R.C. 2923.24 generally made possession and control of criminal tools a felony of the fourth degree, whereas R.C. 2915.02(A)(5) specifically made possession and control of gambling devices a misdemeanor of the first degree. As such, the Ohio Supreme Court held that the specific statute concerning gambling devices, in particular, prevailed over the general statute which encompassed any criminal tool. The court held that the general statute could not be used to charge and convict a person of possessing and controlling a gambling device.

{¶ 49} "In this case * * * we find that R.C. 2921.13(A)(5) and R.C. 2913.42(B)(4) are not irreconcilable. R.C. 2913.42 prohibits any person from knowingly uttering any falsified 'writing or record' which 'is kept by or belongs to a local, state, or federal governmental entity * * *.' Whereas, all that is necessary to violate R.C. 2921.13(A)(5) is that a person 'knowingly make a false statement' for the purpose of securing 'the issuance by a governmental agency of a license, permit, authorization, certificate, registration, release, or provider agreement.' R.C. 2921.13(A)(5) clearly does not require that the statement be made in writing or that the falsified writing or record be kept by a governmental entity. As such, we

find that the statutes to not prohibit the identical conduct and that a violation of R.C. 2921.13(A)(5) would not necessarily result in a violation of R.C. 2913.42.

{¶ 50} "Clearly, the General Assembly considered that the uttering of a falsified written document or record, that was to be maintained by a governmental agency, was more egregious conduct, necessitating a greater degree of offense, than making a statement, whether oral or written, for the purpose of securing the issuance of a license or permit. Moreover, we note that absent a discriminatory purpose, it is not unconstitutional for the prosecution to determine, within its discretion, which offense will be charged when two statutes proscribe similar conduct. *State v. McDonald* (1987), 31 Ohio St.3d 47, 50, 509 N.E.2d 57, citing, *State v. Wilson* (1979), 58 Ohio St.2d 52, 55, at fn. 2, 388 N.E.2d 745. As such, we find that it was properly within the state's discretion to proceed under R.C. 2913.42 with respect to appellant's conduct." *State v. Hall*, Lucas App. No. L-01-1374, 2004-Ohio-1654, ¶32-36, appeal not allowed, *State v. Hall*, 103 Ohio St.3d 1426, 2004-Ohio-4524.

{¶ 51} Garrett finally claims his conviction for attempted tampering with records is not supported by sufficient evidence. In reviewing his claim, this court is required to view the evidence adduced at trial, both direct and circumstantial, in a light most favorable to the prosecution to determine if a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Jenks* (1991), 61

Ohio St.3d 259. Viewing the evidence adduced at Garrett's trial in a light most favorable to the state leads to the conclusion that Count 11 was supported by sufficient evidence.

{¶ 52} According to Johnson's testimony, Garrett encouraged her to falsely report to the police that her vehicle was stolen. Garrett did so in order to distance himself from the incident in which the vehicle was used. An officer was taking Johnson's report in writing for official purposes when she changed her mind and recanted her story.

{¶ 53} Based upon the record, this court cannot determine Garrett's conviction for attempted tampering with records was supported by insufficient evidence.

{¶ 54} Accordingly, Garrett's fourth and fifth assignments of error are overruled.

{¶ 55} Based upon the disposition of Garrett's first and second assignments of error, his convictions are modified. Garrett's conviction for PCT is reduced to a first-degree misdemeanor, and his conviction for attempted tampering with records is reduced to a second-degree misdemeanor.

{¶ 56} This case is remanded for resentencing consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been modified, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

_____

KENNETH A. ROCCO, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
LARRY A. JONES, J., CONCUR