[Cite as *State v. Pedraza*, 2010-Ohio-4284.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C.A. No. 09CA009706
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DAVID PEDRAZA	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 08CR077152

DECISION AND JOURNAL ENTRY

Dated: September 13, 2010

MOORE, Judge.

{¶1} Appellant, David Pedraza, appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} In the late evening hours of November 4, 2008, Lorain Police Officers Jacob Morris and Orlando Perez were on patrol. They heard what sounded like a gunshot and proceeded to investigate. Less than ten seconds later they observed a man, Steven Vincente-Colon, outside a residence. According to the officers, the smell of gun powder was prevalent. The officers asked Steven Vincente-Colon if he heard the gunshot and he stated that he did not. He further offered, without prompting, that no one else was present in the home. This aroused the officers' suspicion. Officer Morris shined his flashlight on the second floor windows and noticed the outline of a person and observed the window blinds closing. Steven Vincente-Colon then informed him that two men were in the home, his brother, Bryan Vincente-Colon and his

cousin, Pedro Marquez. Steven Vincente-Colon informed the officers that Pedro Marquez owned the home. The officers obtained Pedro Marquez's phone number and contacted him. They determined that he was not in the home as Steven had said. The officers asked him to meet them at the home. While waiting for Marquez, the officers set up a perimeter around the home to ensure that no one left the premises. Other officers arrived to complete this task.

{¶3} Upon Marquez's arrival, officers asked him to unlock the door to the home and he consented. Prior to the police entering the home, Edgardo Otero, who was in the attached duplex, informed the officers that his brother was in the home and asked if he could attempt to get him to come out. Otero then shouted into the residence, both in English and in Spanish. David Pedraza and Bryan Vincente-Colon exited the home. The two men were arrested.

{¶4} On December 18, 2008, Pedraza was indicted on one count of tampering with evidence in violation of R.C. 2921.21(A)(1), with a firearm specification, one count of having a weapon while under a disability in violation of R.C. 2923.13(A)(2), with a firearm specification, one count of using weapons while intoxicated in violation of R.C. 2923.15(A), and one count of obstructing official business in violation of R.C. 2923.31(A).

{¶5} On October 6, 2009, the matter proceeded to a bench trial. Pedraza was tried along with Bryan Vincente-Colon. At the conclusion of the State's case, the trial court dismissed the count involving using weapons while intoxicated. The trial court found Pedraza not guilty of having a weapon while under disability, but found him guilty of tampering with evidence and obstructing official business. Pedraza was sentenced to a total of two years of incarceration. He has timely appealed his conviction, and has raised three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"PEDRAZA'S CONVICTION FOR TAMPERING WITH EVIDENCE IS NOT SUPPORTED BY SUFFICIENT EVIDENCE[.]"

{¶6} In his first assignment of error, Pedraza contends that his conviction for tampering with evidence was not supported by sufficient evidence.

{¶7} When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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 crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶8} Pedraza was convicted of tampering with evidence, in violation of R.C. 2921.12(A)(1). This section states: "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: [] 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[.]"

{¶9} Initially, Pedraza contends that the State failed to establish that he knew that an official proceeding or investigation was in process. "[A]n official investigation generally means an 'inquiry into the legality or illegality of facts which is in process of being made by officials of

one or more levels of government, law enforcement.'" *State v. Murray*, 12th Dist. No. CA2009-03-015, 2009-Ohio-6174, at ¶34, quoting *State v. Diana* (Dec. 23, 1975), 10th Dist. Nos. 75AP-210 and 75AP-211. R.C. 2901.22(B) explains that "a person has knowledge of circumstances when he is aware that such circumstances probably exist." With regard to whether Pedraza knew that a criminal investigation was underway or imminent,

> "we will employ a reasonable-person standard and focus on the defendant's intent, rather than the purpose of the criminal investigation. The law has long recognized that intent, lying as it does within the privacy of a person's own thoughts, is not susceptible of objective proof. The law recognizes that intent can be determined from the surrounding facts and circumstances, and persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." (Internal citations and quotations omitted.) *Murray*, supra, at ¶28.

{¶10} Officer Jake Morris testified that while on patrol on November 4, 2008, he heard what sounded like gunshots. He went to the area from which he believed the sound originated, and discovered a man outside a residence. Officer Morris testified that he could smell the gunpowder in the air. He asked the man if he heard the gunshots, and the man, who appeared nervous, said no. The man then informed Officer Morris that he was the only one at the home and that no one else was inside. Officer Morris immediately shined his flashlight on the house and saw the outline of a person in a second-story window. He testified that the blinds to that window, which were open, were quickly closed.

{¶11} Officer Morris' testimony was supported by Detective Orlando Perez's testimony. Detective Perez stated that he was with Officer Morris on the night of the incident. He verified that they heard a gunshot, approached a duplex that smelled distinctly of gunpowder, and began to investigate. He stated that Officer Morris informed him that he saw someone upstairs who closed the blinds. Thus, the testimony suggests that the individuals inside the home observed the police outside. Detective Perez further explained that the officers were outside the home for

about an hour before Marquez arrived. It was at this time that Otero shouted into the home and Pedraza and Bryan Vincente-Colon came out of the home. Given the facts that the area smelled of gun powder and a gunshot was heard in the area, a reasonable person would know that the police were at the residence to investigate. See *Murray*, supra. Accordingly, viewing the testimony in the light most favorable to the State, we conclude that the State presented sufficient evidence on this element.

{¶12} Next, Pedraza contends that the State failed to present sufficient evidence that he acted with purpose to impair the value or availability of the evidence. R.C. 2901.22(A) states that "a person acts purposely when it is his specific intention to cause a certain result[.]" The testimony at trial revealed that two sawed-off shotguns with the serial numbers scratched off were recovered from underneath insulation in a far corner of the attic. Further, the testimony at trial was that, upon exiting the home, Pedraza had insulation on his clothing, and that there was fresh insulation on the floor below the attic access panel. The trial court also heard testimony that police testing established that Pedraza had gunshot residue on his hands. The presence of this residue could be a result of firing the weapon or by handling the weapon. Finally, the trial court heard that, among other felony convictions, Pedraza had previously been convicted of tampering with the evidence with a gun specification. Accordingly, viewing all this evidence in the light most favorable to the State, the trial court could have found that Pedraza placed the gun in the attic with the specific intention of concealing it from the police.

{¶13} Pedraza's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"PEDRAZA'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

{¶14} In his second assignment of error, Pedraza contends that his conviction for tampering with evidence was against the manifest weight of the evidence. We do not agree.

{¶15} It is well established that a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring).

{¶16} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "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 the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶17} This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶18} Pedraza contends that the State's theory of the case was that Pedraza took the firearms into the residence, thus amounting to tampering. Because, according to Pedraza, this occurred prior to police arriving at the scene, it was not tampering. This argument, that the State

failed to show that Pedraza took the guns inside because he knew of a police investigation, is a sufficiency argument, and is therefore not appropriately argued here. Further, this argument is not supported by the record. The State's "theory" was not necessarily that Pedraza took the guns inside, but rather that he hid them in the attic. Pedraza contends that the evidence did not support the conclusion that he was attempting to hide the guns because he did not also attempt to hide the shell casings, which officers found on the top of the trash in the garbage can. This argument is without merit.

{¶19} The uncontradicted testimony revealed that officers located in the attic underneath blown-in insulation two sawed-off shotguns with the serial numbers filed off. Officer Peter Soto testified that once given permission to search the home by its owner, he noticed insulation on the floor underneath the attic access panel. He explained that in his experience, people hide things in the attic, so he decided to investigate the attic. He stated that "[y]ou could tell that someone had been in there; [the insulation] was matted down in some areas. I just started searching and probing and I came across the two firearms buried under the insulation." He further stated that the guns were located stuffed in the corner of the attic, not close to the attic access panel. On cross examination, Officer Soto stated that he believed that the insulation under the attic access panel would have come down when someone entered the attic. He explained that although he did not know when the guns were put in the attic, the insulation on the floor below the attic access panel looked fresh and was not trampled on or matted down. The testimony revealed that Pedraza had insulation on his clothes and gun shot residue on his hands.

{¶20} Pedraza presented the testimony of Pedro Marquez, the owner of the home. Marquez testified that Pedraza is his cousin. Marquez testified that he had lived in the home about three to four months prior to the incident. He explained that he had never been in the attic

area and that the insulation had been below the attic access panel for at least a month. He explained that because he did not have a vacuum cleaner, he could not fully remove the insulation. Finally, Pedraza's co-defendant presented the testimony of Edgardo Otero, Pedraza's older brother. Otero testified that he was next door during the incident, that he did not hear a gun shot and that he was close enough to observe Pedraza exit the home and would have seen if he had anything on his clothing.

{¶21} The fact that the trial court chose to believe the police officers' testimony with regard to hearing a gunshot, observing fresh insulation under the attic access panel, and observing insulation on both Pedraza and Bryan Vincente-Colon does not lead to a conclusion that Pedraza's conviction was against the manifest weight of the evidence. Notably, the only two witnesses to testify on Pedraza's behalf were his relatives, thus the trial court could have found this testimony to be biased. After reviewing the entire record, weighing the inferences and considering the credibility of the witnesses, we cannot say that the trier of fact created a manifest miscarriage of justice in finding Pedraza guilty of tampering with evidence. *Otten*, 33 Ohio App.3d at 340.

ASSIGNMENT OF ERROR III

> "THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR OBSTRUCTING OFFICIAL BUSINESS IN VIOLATION OF §2921.31[.]"

{¶22} In his third assignment of error, Pedraza contends that there was insufficient evidence to sustain a conviction for obstructing official business. We conclude that this argument is moot.

{¶23} The Ohio Supreme Court has held that:

> "where a criminal defendant convicted of a *misdemeanor*, voluntarily satisfied the judgment imposed upon him or her for that offense, an appeal from the conviction is moot unless the defendant has offered evidence from which an inference can be

> drawn that he or she will suffer some collateral disability or loss of civil rights stemming from that conviction." (Emphasis sic.) *State v. Golston* (1994), 71 Ohio St.3d 224, 226, citing *State v. Wilson* (1975), 41 Ohio St.2d 236, and *State v. Berndt* (1987), 29 Ohio St.3d 3.

{¶24} On October 23, 2009, Pedraza was sentenced to thirty days of incarceration on obstructing official business, a second-degree misdemeanor. He was further sentenced to one year of incarceration for tampering with evidence, a third-degree felony, and one year on the accompanying gun specification.

{¶25} A review of the record reveals that Pedraza did not request the trial court to stay his sentence pending appeal. In *State v. Payne*, 9th Dist. No. 21178, 2003-Ohio-1140, this Court found that the appellant would not suffer any collateral disability or loss of civil rights where the sentence ran concurrently with a longer felony sentence and the six month misdemeanor assault sentence had been fully served. Id. Pedraza does not present this Court with an argument that his sentence for obstructing official business was not moot for some other collateral disability or loss of civil rights. Accordingly, he has failed to satisfy his burden on appeal, and we conclude that his appeal on this particular issue is moot. *In re B.G.*, 9th Dist. No. 24428, 2009-Ohio-1493, at ¶13, citing, *State v. Amell*, 9th Dist. No. 23943, 2008-Ohio-3770, at ¶12; *State v. Solomon*, 9th Dist. No. 23545, 2008-Ohio-553, at ¶39. Pedraza's third assignment of error is overruled.

III.

{¶26} Pedraza's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

MICHAEL STEPANIK, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and AMY IOANNIDIS BARNES, Assistant Prosecuting Attorney, for Appellee.