[Cite as *State v. Vicente-Colon*, 2010-Ohio-6242.]

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

STATE OF OHIO	C.A. No. 09CA009705
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRYAN VICENTE-COLON	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 08CR077101

DECISION AND JOURNAL ENTRY

Dated: December 20, 2010

MOORE, Judge.

{¶1} Appellant, Bryan Vincente-Colon[1], appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} We previously summarized the facts in this case in our disposition of a case involving Vincente-Colon's co-defendant. *State v. Pedraza*, 9th Dist. No. 09CA009706, 2010-Ohio-4284.

> "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

[1] The record contains several versions of Vincente-Colon's last name, including "Vicente-Colon" and "Vicento-Colon." His brief on appeal uses "Vincente-Colon." We do so as well.

> 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.
>
> "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."

{¶3} On December 18, 2008, Vincente-Colon was indicted on one count of tampering with evidence in violation of R.C. 2921.21(A)(1), with a firearm specification. On October 6, 2009, the matter proceeded to a bench trial. Vincente-Colon was tried along with Pedraza. At the conclusion of the evidence, the trial court found Vincente-Colon guilty of tampering with evidence and the accompanying firearm specification. The trial court sentenced him to a total of two years of incarceration. He timely appealed this decision and has raised two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "VINCENTE-COLON'S CONVICTION IN THIS CASE WAS BASED ON INSUFFICIENT EVIDENCE AND, THEREFORE, SHOULD BE REVERSED."

{¶4} In his first assignment of error, Vincente-Colon contends that his conviction for tampering with evidence was not supported by sufficient evidence.

{¶5} 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 the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶6} Vincente-Colon 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[.]"

{¶7} Initially, Vincente-Colon 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 & 75AP-211. R.C. 2901.22(B) provides that "[a] person has knowledge of circumstances when he is aware that such circumstances probably exist." With regard to whether he 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.

{¶8} 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.

{¶9} 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 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.

{¶10} Vincente-Colon further contends that the State failed to present evidence that would tend to show Vincente-Colon first knew there was an official proceeding or investigation

in progress *and then* concealed the shotguns. Police arrived on the scene approximately 10 seconds after they heard the gunshots. As we stated above, the State presented evidence that Vincente-Colon knew there was an official proceeding or investigation in progress shortly after the police arrived when Officer Morris saw someone close the blinds in the upstairs window. Detective Perez stated that officers were at the home for at least an hour before Pedraza and Vincente-Colon came out of the home. The testimony revealed that the shotguns were found under blown-in insulation in the attic and that there was fresh insulation on the floor below the attic access panel. Finally, testimony revealed that Pedraza and Vincente-Colon came out of the home with insulation on their clothes. From the testimony of the officers that shortly after they arrived on scene they shone a flashlight in the window and saw someone move the window blinds, the trier of fact could reasonably have drawn an inference that the evidence was hidden after this occurred, particularly since it was an hour later that the co-defendants finally emerged from the residence. If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.'" *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2, quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Accordingly, we conclude that the State presented sufficient evidence on this issue.

{¶11} Next, Vincente-Colon contends that the State failed to present sufficient evidence that he concealed the shotguns. He points out that although gunshot residue tests revealed gunshot residue on Pedraza, the test did not reveal any residue on Vincente-Colon. Martin Lewis, with the Trace Evidence section of Bureau of Criminal Investigation testified that "[t]he absence of gunshot primer residue on a person's hands does not preclude the possibility of any of

the above stated event." In other words, a person could have handled or fired a gun and yet test negative for gunshot residue.

{¶12} Further, the State was not required to show evidence that Vincente-Colon himself concealed the shotguns. R.C. 2923.03(A)(2) provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: * * * (2) Aid or abet another in committing the offense[.]" An individual aids or abets "when he supports, assists, encourages, cooperates with, advises, or incites the other person in the commission of the crime, and shares the other person's criminal intent." *State v. Ward*, 9th Dist. No. 24105, 2008-Ohio-6133, at ¶17, citing *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. Because a charge of complicity can be stated in terms of the principal offense, a trial court in a bench trial may make a finding of guilty in terms of either the principal offense or complicity. *State v. Gorayeb*, 7th Dist. No. 09-BE-15, 2010-Ohio-2535, at ¶28. As we will next explain, the State presented sufficient evidence that Vincente-Colon and Pedraza shared the criminal intent to purposely impair the evidentiary value or availability of the shotguns.

{¶13} Vincente-Colon 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 and Vincente-Colon had insulation on their 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 or handling the weapon. As

explained above, the mere fact that Vincente-Colon did not have residue on his hands does not mean that he did not handle the gun, or that he did not assist Pedraza in hiding the gun. Further, Officer Soto testified that he needed assistance to enter the trap door leading to the attic. He explained that "[s]omebody had to boost me up, which wasn't easy[.]" Thus, it is clear from Officer Soto's testimony that the attic-access door was at such a height that it would have been difficult for one person alone to access it without the assistance of a ladder. The trial court could reasonably have inferred from this fact and the absence of any ladder in the room that Pedraza and Vincente-Colon assisted one another in attempting to dispose of the gun.

{¶14} Lastly, Vincente-Colon contends that the State failed to present evidence that an underlying crime was committed, because they did not prove that the shotguns were involved in the commission of a crime. R.C. 2921.12(A)(1), however, does not require the State to justify an official proceeding or investigation by successful prosecution of an underlying crime. This section simply requires that an underlying investigation or proceeding is or is about to take place and that the offender purposely "[a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]" In this case, officers were investigating gunshots. Pedraza and Vincente-Colon hid shotguns. These shotguns were necessary to an investigation of the gunshots that officers believed to have occurred outside the home.

{¶15} Accordingly, viewing all this evidence in the light most favorable to the State, the trial court could have found that Vincente-Colon tampered with the evidence.

{¶16} Vincente-Colon's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE GUILTY VERDICT IN THIS CASE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND, THEREFORE, MUST BE REVERSED."

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

{¶18} 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).

{¶19} 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.

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

{¶20} Vincente-Colon combined his first and second assignments of error. This is not appropriate, as sufficiency and manifest weight are two separate, legally distinct arguments. Although he consistently states that his conviction was against the manifest weight of the evidence and not based upon sufficient evidence, it does not appear that he asks this Court to

weigh any evidence or to consider the credibility of the witnesses when resolving any conflicts of the evidence. We have addressed each of Vincente-Colon's specific arguments in our resolution of his first assignment of error. Notably, each of these arguments was under titles that specifically referred to the evidence as insufficient.

{¶21} We do note that in one portion of his argument, Vincente-Colon contends that the State's theory was that the shotguns were found in the attic that contained "newspaper-like insulation" and upon exiting the home, Vincente-Colon was observed to have newspaper-like insulation on his clothing. He argues that this theory was rebutted by defense witnesses Pedro Marquez, who testified that the insulation on the carpet below the attic-access panel had been there for three to four months. We will construe this argument as a manifest weight argument.

{¶22} 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 the owner gave permission to search the home, 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 Vincente-Colon had insulation on his clothes.

{¶23} Pedraza presented the testimony of Marquez, the owner of the home, who testified that Pedraza and Vincente-Colon are his cousins. 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, Vincente-Colon presented the testimony of Edgardo Otero, Pedraza's older brother and Vincente-Colon's cousin. Otero testified that he was next door during the incident, that he did not hear a gunshot and that he was close enough to observe Pedraza exit the home and would have seen if he had anything on his clothing.

{¶24} 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 Vincente-Colon does not lead to a conclusion that Vincente-Colon's conviction was against the manifest weight of the evidence. Notably, the only two witnesses to testify on Pedraza and Vincente-Colon'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 Vincente-Colon guilty of tampering with evidence. *Otten*, 33 Ohio App.3d at 340.

III.

{¶25} Vincente-Colon'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.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶26} I concur in the judgment. Although I might have analyzed paragraph 7 of the majority's opinion differently, I agree that there was sufficient evidence to establish that Mr. Vincente-Colon knew that an official proceeding or investigation was in progress.

APPEARANCES:

BRIAN J. DARLING, Attorney at Law, for Appellant.

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