ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	Case No. 2013-0544
Plaintiff-Appellant	:	On Appeal from the Clark County Court of Appeals, Second Appellate District
-vs-	:	
AMANDA STRALEY	:	
Defendant-Appellant	:	Court of Appeals Case No. 12-CA-0034

MERIT BRIEF OF PLAINTIFF-APPELLANT STATE OF OHIO

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FILED
JUL 22 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

This case presents the issue of whether, to prove tampering with evidence, the State must prove that the defendant impaired evidence that was related to law enforcement's initial purpose in investigating the offender. There is a conflict between the Second District and Ninth District on the issue.

The Second District found that Amanda Straley's conviction by a jury for tampering with evidence was both based on legally insufficient evidence and against the manifest weight of the evidence. *State v. Straley*, 2nd Dist. Clark No. 2012-CA-34, 2013-Ohio-510, at ¶¶14-17. Before officers could release Straley from a traffic stop, she insisted on urinating in public a short distance away from officers and dropped a baggie of cocaine while doing so, attempting to conceal the baggie from officers. The Second District reasoned that when Straley removed or concealed the baggie of cocaine from her person she was only being investigated for offenses unrelated to drugs. As a result, the court found Straley could not be said to be acting to impair the availability of the drugs as evidence in such investigation.

In contrast, the Ninth District upheld the conviction of John Skorvanek for tampering with evidence in similar circumstances. *State v. Skorvanek*, 182 Ohio App. 3d 615, 2009-Ohio-1709, 914 N.E.2d 418 (9th Dist.). Officers pulled Skorvanek over for traffic violations. Before pulling to the curb, Skorvanek tossed a pill bottle out the window of his vehicle. Officers collected the pill bottle and found heroin and oxycodone inside. The Ninth District upheld the conviction stating, "[t]his court has never held that a defendant commits the offense of tampering with evidence only if he tampers with an item directly related to a police officer's purpose for investigation the defendant." *Id.* at ¶23.

For the reasons set forth below, the State respectfully asks this Court to reverse the Second District's decision and hold that a tampering with evidence conviction does not require proof that the defendant impaired evidence in an investigation by tampering with evidence related to that investigation.

STATEMENT OF THE CASE

On January 17th, 2012, Amanda Straley was indicted on one count of trafficking in drugs with a specification of forfeiture, one count of possession of cocaine and one count of tampering with evidence. Straley plead no contest to counts one and two of the indictment, proceeded to trial on count three, and was found guilty by a jury of tampering with evidence.

Straley was sentenced on May 15th, 2012. The court merged counts one and two for purposes of sentencing and the state elected to proceed on the trafficking charge. The court imposed sentences of nine months in the Ohio Reformatory for Women on the trafficking and tampering charges and ordered that the sentences be run concurrently.

Straley filed an appeal arguing that her conviction was not supported by sufficient evidence and against the manifest weight of the evidence. The Second District reversed and remanded for vacation of the tampering conviction. The State moved the Second District to certify a conflict with the Ninth District's decision in *State v. Skorvanek*, 182 Ohio App. 3d 615, 2009-Ohio-1709, 914 N.E.2d 418 (9th Dist.), and that motion was granted. On May 22, 2013, this Court determined that a conflict existed and ordered briefing on the above stated issue.

STATEMENT OF THE FACTS

On April 18, 2011 two plain-clothes narcotics detectives observed Straley driving left of center and initiated a traffic stop. The detectives pulled her over and approached her vehicle. They found Straley to be the driver and sole occupant. When they discovered she did not have a

license, the detectives ordered her out of the car. The detectives suspected she was intoxicated based on her driving, slurred speech, and the smell of alcohol. The detectives received consent to search Straley's vehicle, but found no contraband.

The detectives were not on traffic patrol when they made the stop and they elected not to pursue charges for driving without a license or driving under the influence of alcohol. The detectives attempted, unsuccessfully, to get Straley a ride home with family members. While the detectives were contacting a supervisor for permission to drive Straley home, Straley announced that she needed to use the restroom. The detectives advised her to wait due to there being no restroom in the area. Straley insisted that she needed to go the restroom there (in public). Straley then, over the objection of the detectives, moved twenty or thirty feet away to the corner of a building and proceeding to drop her pants and urinate. As she did, she told detectives "I don't care if you have to arrest me; I gotta pee." Detective Speakman testified that he watched Straley out of his peripheral vision, but avoided looking directly at her. After she had finished, Speakman inspected the area where Straley urinated and located a cellophane baggie covered in urine. The baggie contained crack cocaine. When Straley saw Speakman with the baggie, she stated, "I forgot I had that. I wasn't trying to hide it from you." Detective Speakman arrested Straley based on his discovery of the crack cocaine.

ARGUMENT

Certified Conflict Issue:

Whether a tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related to the investigation.

In determining that Straley's conviction for tampering was based on insufficient evidence and against the manifest weight of the evidence, the Second District interpreted the statute to

require that that the record, document or thing at issue must be directly related to the investigation. *Straley*, at ¶15. The Second District then limited the definition of "investigation" to only those charges that law enforcement was then aware of or likely to be aware of. *Id.* In doing so, the Second District chose to use a definition of "investigation" inconsistent with its common usage.

Ohio Revised Code Section 2921.12 states: "(A) 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: (1) 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;..." "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature." R.C. 2901.22(A).

To determine if the purposeful elements exist, "[a] defendant's state of mind may be inferred from the totality of the surrounding circumstances" *State v. Harper*, 9th Dist. Summit No. 19632, 2000 Ohio App. Lexis 1266 (Mar. 29, 2000), at *2. The totality of the surrounding circumstances in this case was that Straley was stopped for suspected traffic violation and then, contrary to an order from detectives, decided to move to the corner of a building an urinate in public. *Straley*, at ¶3. She stated to detectives, "I don't care if you have to arrest me, I gotta pee." *Id.* It was during this time that she removed the baggie of cocaine from her person and urinated upon it. *Id.* Based on the foregoing, it is clear that Straley's urination was a ruse to distance her from the detectives with the purpose of removing and concealing the baggie of cocaine so she would not be caught with it.

The Second District found that when Straley concealed the drugs and urinated upon them, a jury could reasonably have found Straley knew some "investigation" into her public urination was likely. *Straley*, at ¶13. The Second District insisted, however, that the investigation was only into the public urination, and the baggie of drugs could not possibly be evidence in that investigation. *Id.* at ¶14. In doing so, the Second District citied its prior holding where it found that an offender throwing a container of drugs out the window of his car during a traffic stop could not be tampering with evidence because the evidence at issue was not related to the subject of the traffic investigation. *State v. Moulder*, 2nd Dist. Green No. 08-CA-108, 2009-Ohio-5871. The Second District's stance is that the drugs in each case did not relate to the investigations, because in each case the officers were investigating other matters unrelated to the drugs.

"An 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. Pedraza*, 9th Dist. Lorain No. 09CA009706, 2010-Ohio-4284, at ¶9, quoting *State v. Murray*, 186 Ohio App. 3d 185, 193-194, 2009-Ohio-6174, ¶34, 927 N.E.2d 24, 30 (12th Dist.). When detectives observed Straley urinating in public, they inspected the area afterward and observed the baggie of drugs. *Straley*, at ¶3. The Second District would characterize this as an investigation of her public urination only; when in fact, like most investigations, it is a process of inquiry into what happened and what, if any, laws have been broken. Investigations by their very nature involve law enforcement gathering facts and information and then making a determination as to whom to charge, what to charge, and what further steps are necessary. As the Ninth district pointed out "[a]n investigation may quickly proceed beyond its initial purpose." *State v. Skorvanek*, 182 Ohio App. 3d 615, 624, 2009-Ohio-1709, ¶23, 914 N.E.2d 418, 426 (9th Dist.), quoting *State v. Sullivan*, 9th Dist. Medina No.

07CA0076-M, 2008 Ohio App. Lexis 2048 (May 19, 2008). Just as the investigation into a traffic infraction in *Skorvanek* expanded in scope to include drug charges, so too did the investigation of Straley expand from suspicion of driving under the influence, to public indecency and then to drug trafficking and possession.

The Second District justified its decision by mistakenly applied the rule of lenity. The rule of lenity, codified in R.C. 2901.04, states that criminal offenses and penalties are strictly construed against the state and liberally construed in favor of the accused. However, the rule of lenity only applies where the statute is ambiguous. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173, 661 N.E.2d 1049, 1051 (2002). Ambiguity exists if the language is susceptible of more than one reasonable interpretation. *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498, 504 (1996). The tampering statute is not susceptible to more than one reasonable interpretation. If law enforcement is conducting an investigation of a suspect for possible criminal conduct, that investigation necessarily encompasses whatever criminal conduct that law enforcement should come across. If law enforcement is investigating a possible traffic infraction, as in *Skorvanek*, that investigation may branch out into additional charges as the facts develop. Here, the baggie of cocaine concealed by Straley certainly relates to the detectives investigation into possible criminal conduct, even though that conduct first appeared to be limited to traffic infractions and public urination

CONCLUSION

The Second District Court of Appeals was mistaken in applying the rule of lenity in interpreting the tampering with evidence statute. The statute is unambiguous, and the words used in the statute should be given their usual meaning. When Straley removed and concealed the baggie of cocaine, there was an investigation ongoing or likely to be instituted into her

criminal conduct. She removed and concealed that baggie with the purpose impair its value in that investigation. Based on the forgoing, State respectfully asks this Court to reverse the Second District Court of Appeals' decision in this matter.

Respectfully submitted,

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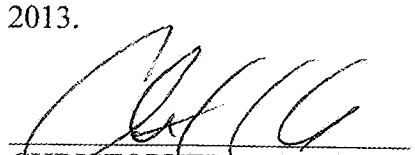
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Plaintiff-Appellant State of Ohio was served by regular mail upon Valerie Kunze, Assistant Public Defender, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Appellee on the 22ND day of July, 2013.



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IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	S.C. Case No. 13-0544
Plaintiff-Appellant,	:	
-vs-	:	On Appeal from the Clark County Court of Appeals, Second Appellate District
AMANDA STRALEY	:	
Defendant-Appellee	:	Court of Appeals Case No. 2012-CA-34

NOTICE OF CERTIFIED CONFLICT OF APPELLANT STATE OF OHIO

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Notice of Certified Conflict of Appellant State of Ohio

Pursuant to Section 8(A) of the Supreme Court Rules of Practice, Plaintiff-Appellant the State of Ohio gives this Court notice that the Clark County Court of Appeals, Second Appellate District has certified a conflict to this Court (copy attached). Said certification is based on the conflict between the opinions of the Second Appellate District and the Ninth Appellate District (copies attached). The issue for review is:" Whether a tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related to the investigation".

This case is one of public or great general interest.

Respectfully,

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This is to certify that a copy of this Memorandum was mailed by regular U.S. mail to counsel of record for Defendant-Appellee, Gregory K. Lind, Attorney at Law, One S. Limestone St. Ground Floor—Suite D Springfield, Ohio 45502 on this 4th day of April 2013.

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	Appellate Case No. 2012-CA-34
v.	:	Trial Court Case No. 2012-CR-39
AMANDA STRALEY	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . . .

OPINION

Rendered on the 15th day of February, 2013.

. . . . . .

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HALL, J.

{¶ 1} Amanda Straley appeals from her conviction and sentence on charges of trafficking in crack cocaine, possession of crack cocaine, and tampering with evidence. In two related assignments of error, she challenges the legal sufficiency and manifest weight of the evidence to support the tampering conviction.

{¶ 2} The record reflects Straley pled no contest to the crack-cocaine trafficking and possession charges, both fifth-degree felonies, after the trial court denied a pre-trial suppression motion. The case proceeded to a jury trial on the evidence-tampering charge, a third-degree felony. The State's evidence established that two plain-clothes detectives in an unmarked car stopped Straley's vehicle after seeing it go left of center. One of the detectives, Will Speakman, approached the stopped vehicle and asked Straley, the driver and sole occupant, for her license. Upon discovering that Straley lacked a license, Speakman ordered her out of the car. At that point, he suspected she was intoxicated based on her driving, slurred speech, and the smell of alcohol. Speakman and his partner, detective Jason Via, obtained permission to search Straley's vehicle and found no contraband.

{¶ 3} Speakman testified at trial that he stopped Straley's vehicle because of the potential safety issue her driving posed. He was not on traffic patrol when he made the stop. Because he was in plain clothes in an unmarked car, he decided not to pursue charges for driving without a license or driving under the influence of alcohol. Speakman informed Straley he simply wanted to find her a ride home. He unsuccessfully attempted to contact her mother and aunt. Speakman then decided to ask his supervisor for permission to drive Straley home. While detective Via was calling the supervisor, Straley announced that she had to use the restroom. Speakman advised her to wait because no restrooms were nearby. Straley responded that she had to relieve herself. Despite Speakman's admonition that she could not do it there, Straley "trotted" twenty or thirty feet away to the corner of a building, pulled down her pants, and urinated. As she did so, she told Speakman, "I don't care if you have to arrest me; I gotta pee." To give Straley some

privacy, Speakman kept her in his peripheral vision but avoided looking at her. It was dusk at the time, and the sun had set. After Straley finished, Speakman walked over to where she had urinated. He noticed a cellophane baggie on the ground covered in urine. The baggie contained crack cocaine. When Straley saw Speakman retrieve the baggie, she told him, "I forgot I had that. I wasn't trying to hide it from you." Speakman arrested Straley based on his discovery of the crack cocaine.

{¶ 4} Straley ultimately was charged with trafficking in crack cocaine, possession of crack cocaine, and tampering with evidence. The tampering charge involved her act of dropping the baggie while urinating. Following her no-contest plea to the trafficking and possession charges, a jury convicted her on the tampering charge. The trial court merged the trafficking and possession convictions for purposes of sentencing, and the State elected to proceed on the trafficking conviction. The trial court imposed concurrent nine-month prison sentences for the trafficking conviction and the tampering conviction. This appeal followed.

{¶ 5} In her first assignment of error, Straley contends the State presented legally insufficient evidence to sustain the tampering conviction. She argues that dropping drugs on the ground in full view of a police officer, with knowledge of the officer's presence, does not constitute tampering with evidence. In support, she cites *State v. Delaney*, 3d Dist. Union No. 14-04-10, 2004-Ohio-4158, and *State v. Henderson*, 9th Dist. Lorain No. 02CA008052, 2003-Ohio-1470.

{¶ 6} As relevant here, the evidence-tampering statute provides: "No person, knowing that an official * * * investigation is in progress, or is about to be or likely to be instituted, shall * * * [a]lter, destroy, conceal, or remove any * * * thing, with purpose to

impair its * * * availability as evidence in such * * * investigation." R.C. 2921.12(A)(1).

{¶ 7} In *Delaney*, the defendant removed a packet of drugs from his sock and dropped the packet on the floor directly in front of a police officer. The Third District reasoned: "In this case, Delaney's actions were done in full view of [the officer]. When all of the actions occur within full view of law enforcement officials, and the defendant knows that the officers are there, the evidence is insufficient to prove tampering with evidence." *Delaney* at ¶7.

{¶ 8} In *Henderson*, police stopped a vehicle for a firearm offense. After the vehicle stopped, the defendant opened the passenger's door, reached his arm out, and placed a gun in the road. He did this in full view of officers who had surrounded the vehicle. The Ninth District found no evidence tampering based on the defendant's act of placing the gun in the road. It reasoned: "The officers provided no testimony that they witnessed appellant altering, concealing, or attempting to destroy the gun when they stopped the vehicle. Rather, the officers' testimony was clear that appellant openly deposited the gun on the road in their plain view." *Henderson* at ¶56.

{¶ 9} Upon review, we find *Delaney* and *Henderson* to be distinguishable. Unlike the defendant in those cases, Straley did not drop her crack cocaine in full view of Speakman. She distanced herself from him by moving twenty to thirty feet away and dropped a baggie near a building where she was urinating. It was dusk at the time, and Speakman was not watching her closely. Under these circumstances, the State presented legally sufficient evidence to establish that Straley either concealed or removed the drugs within the meaning of the evidence-tampering statute. A defendant's act of removing contraband from his or her person can constitute concealment or removal if done to avoid discovery. *See*,

e.g., *State v. Colquitt*, 2d Dist. Clark No. 98-CA-71, 1999 WL 812313 (Sept. 24, 1999) ("The jury could reasonably infer that, by throwing the baggie over the fence, Colquitt was seeking to prevent the baggie's disclosure by placing it out of sight, or getting rid of it."). Straley's only argument in this first assignment of error is that the evidence is insufficient because she discarded drugs in plain view of a police officer. We disagree that the evidence supports the conclusion she acted in the officer's plain view. Accordingly, her first assignment of error is overruled.

{¶ 10} In her second assignment of error, Straley contends her evidence-tampering conviction is against the manifest weight of the evidence. In support, she reiterates her argument that she did not alter, destroy, conceal, or remove the baggie of drugs. But even if she did one of those things, Straley further asserts that the weight of the evidence fails to show she did so (1) with knowledge that an investigation was in progress or was likely to be instituted or (2) with the purpose to impair the baggie's availability as evidence in such investigation.

{¶ 11} Upon review, we believe the weight of the evidence supports the factual finding that Straley concealed or removed the baggie of drugs within the meaning of R.C. 2921.12(A)(1). As discussed above, she distanced herself from Speakman and dropped the baggie in a dark area when he was not paying close attention to her.

{¶ 12} We also believe the weight of the evidence supports a finding that Straley knew *an* investigation was likely to be instituted. For present purposes, we will assume, arguendo, that Speakman's investigation into her apparent act of driving under the influence of alcohol and driving without a license had been completed. When Straley went to urinate, Speakman was simply trying to find her a ride home. Nevertheless, the

evidence supports a finding that Straley knew when she dropped the baggie that a second "investigation" was likely to occur.

{¶ 13} This court has recognized that a police officer may conduct an investigative detention based on an observed act of urinating in public. *State v. Broom*, 2d Dist. Montgomery No. 22468, 2008-Ohio-5160, ¶8; *see also State v. Minton*, 6th Dist. Sandusky No. S-93-25, 1994 WL 39057, *1 (Feb. 11, 1994) (finding "that a police officer who observes someone urinating in a public place is justified in conducting a brief investigative detention of that individual"). Straley appears to have been aware that her act of urinating in public could lead to at least an investigative detention. When going to urinate, Straley told Speakman, "I don't care if you have to arrest me; I gotta pee." Under these circumstances, the jury reasonably could have found that Straley knew some "investigation" into her public urination was likely.

{¶ 14} In addition to Straley concealing or removing the baggie with knowledge that an investigation was likely, R.C. 2921.12(A)(1) obligated the State to prove that she acted "with purpose to impair its * * * availability *as evidence in such * * * investigation*[.]" (Emphasis added). Here the record does not support a finding that Straley discarded the baggie to impair its availability as evidence in an investigation of her public urination—or, for that matter, an investigation of her driving under the influence of alcohol or driving without a license. In *State v. Moulder*, 2d Dist. Greene No. 08-CA-108, 2009-Ohio-5871, this court reasoned that the evidence at issue in a tampering case must be related to the subject of the investigation. In *Moulder*, the defendant was stopped for speeding and placed in a police cruiser, where he dropped a small bag of cocaine on the floorboard. This court found no evidence-tampering, explaining:

> * * * Moulder argues that his tampering with evidence conviction is against the manifest weight of the evidence. We agree. When Moulder allegedly dropped the cocaine on the floorboard of the cruiser, the only "investigation" that had taken place was his alleged speeding violation. The cocaine could not have been used in proving the speeding violation. * * *

Id. at ¶7.

{¶ 15} Similarly, when Straley dropped the baggie of crack cocaine, the investigation that had already taken place involved apparent driving under the influence of alcohol and driving without a license. The only investigation still likely to take place concerned public urination which could amount to either Disorderly Conduct in violation of R.C. 2917.11(B)(1), or Public Indecency in violation of R.C. 2907.09(A)(1).[1] The contraband Straley dropped had no use or value as "evidence" in an investigation of these offenses. Because R.C. 2921.12(A)(1) required Straley to conceal or remove the baggie with knowledge that an investigation was likely *and* "with purpose to impair its * * * availability *as evidence in such * * * investigation*[,]" we believe the baggie had to have some relevance to an investigation into public urination, driving under the influence of alcohol, or driving without a license. *Moulder* at ¶7. To be convicted under the statute, a defendant must "impair" evidence in an investigation that is ongoing or likely to occur by tampering in some way with evidence related to the investigation. In reaching this conclusion, we are mindful that "[s]ections of the Revised Code defining offenses shall be strictly construed

[1] We do not need to determine whether, under the circumstances, Straley would be found guilty of either offense, only that an investigation was likely to be instituted.

in favor of the accused." *Id.* at ¶8.[2]

{¶ 16} Although appellant's second assignment of error refers to the manifest weight of the evidence, our analysis actually determines the insufficiency of the evidence. Sufficiency involves whether the state produced evidence to meet its burden on an issue, manifest weight evaluates the greater amount of credible evidence. Here, we determine that there is no evidence to support a finding that Straley acted with purpose to impair the baggie's availability as evidence in any ongoing or likely investigation. Therefore, she did not "tamper" with evidence in violation of R.C. 2921.12(A)(1). Instead, she merely discarded contraband, unrelated to any investigation, in the hope that police would not see it. Thus, although weight and sufficiency are separate concepts, when evidence is insufficient, it is also necessarily against the manifest weight. *State v. Spears*, 178 Ohio App.3d 580, 2008–Ohio–5181, 899 N.E.2d 188, ¶ 24 (2d Dist.). Straley's second assignment of error is sustained.

{¶ 17} The trial court's judgment is reversed, and the cause is remanded for vacation of the evidence-tampering conviction.

. . . . . .

FAIN, P.J. and FROELICH, J., concur.

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Lisa M. Fannin
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Hon. Douglas M. Rastatter

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[2]*But see State v. Skorvanek*, 182 Ohio App.3d 615, 2009-Ohio-1709, 914 N.E.2d 418, ¶23 (9th Dist.2009) ("This court has never held that a defendant commits the offense of tampering with evidence only if he tampers with an item directly related to a police officer's purpose for investigating the defendant.").

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Current through Legislation passed by the 130th Ohio General Assembly
and filed with the Secretary of State through File 24
*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2901.04 (2013)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

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*** Annotations current through April 22, 2013 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
CRIMINAL LIABILITY

Go to the Ohio Code Archive Directory

ORC Ann. 2901.22 (2013)

§ 2901.22. Culpable mental states

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element.

HISTORY:

134 v H 511. Eff 1-1-74.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
PERJURY

Go to the Ohio Code Archive Directory

ORC Ann. 2921.12 (2013)

§ 2921.12. Tampering with evidence

(A) 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:

(1) 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;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

HISTORY:

134 v H 511. Eff 1-1-74.

STATE OF OHIO, Appellee v. JOHN ALONZO HARPER, Appellant

C.A. NO. 19632

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

2000 Ohio App. LEXIS 1266

March 29, 2000, Decided

PRIOR HISTORY: [*1] APPEAL FROM JUDGE ENTERED IN THE COURT OF COMMON PLEAS. COUNTY OF SUMMIT, OHIO. CASE NO. CR 99 01 0132.

DISPOSITION: Judgment affirmed.

COUNSEL: NICHOLAS SWYRYDENKO, Attorney at Law, Akron, Ohio, for Appellant.

MICHAEL T. CALLAHAN, Prosecuting Attorney, and PAUL MICHAEL MARIC, Assistant Prosecuting Attorney, Akron, Ohio, for Appellee.

JUDGES: LYNN C. SLABY, BAIRD, P.J., WHITMORE, J., CONCUR.

OPINION BY: LYNN C. SLABY

OPINION

DECISION AND JOURNAL ENTRY

Dated: March 29, 2000

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

SLABY, Judge.

Defendant-appellant, John A. Harper, appeals his conviction in the Summit County Court of Common Pleas for assault on a police officer. We affirm.

On January 21, 1999, Akron police officers Lauri Natko and William Campbell were conducting a routine patrol of the District 18 area of Akron in a marked police cruiser. As part of their patrol that evening, the officers monitored the intersection of Peckham and Madison Avenue in response to resident concern about the high level of drug activity in the area. At approximately 10:15 p.m., the officers noticed Defendant at [*2] the intersection and observed as he approached several automobiles and appeared to reach inside the vehicle as if to exchange something with the occupants. The officers suspected that Defendant was engaging in illegal drug transactions and determined that the circumstances justified further investigation.

Officer Natko exited from the passenger side of the cruiser onto the sidewalk. Defendant stood approximately fifteen to twenty feet from her. She told Defendant to walk toward the front of the cruiser and to remove his hands from his pockets. At that point, Defendant began to approach Officer Natko. She repeated her instruction, but Defendant maintained his course. Defendant gestured with his left hand and appeared to make a comment to someone located behind Officer Natko. As she glanced behind her, Defendant ran toward her with arms raised and struck her torso, sending her to the ground. He stumbled, then fled on foot with Officer Campbell in pursuit.

Officer Campbell apprehended Defendant as other units were called to the scene. On January 28, 1999, Defendant was indicted on one count of assault on a police officer, a felony of the fourth degree, in violation of *R.C. 2903.13(A)*, [*3] and one count of criminal damaging, a misdemeanor of the second degree, in violation of *R.C. 2909.06(A)(1)*. Defendant pleaded not guilty to the charges. Following a jury trial, Defendant was convicted of assault on a police officer and sentenced to a prison term of fourteen months. [1] Defendant timely appealed, raising one assignment of error. ASSIGNMENT OF ERROR I

1 The trial court granted Defendant's motion for acquittal on the criminal damaging charge.

[Defendant's] conviction for assault was based upon insufficient evidence as a matter of law, and was against the manifest weight of the evidence.

Defendant's assignment of error maintains that his conviction for assaulting a police officer was based on insufficient evidence and was against the manifest weight of the evidence because the State failed to demonstrate that he acted with the required degree of culpability. An evaluation of the weight of the evidence is dispositive of both issues in this case.

Evaluations of the [*4] sufficiency of the evidence put forth by the state and the weight of the evidence adduced at trial are separate and legally distinct determinations. *Crim.R. 29(A)* provides:

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal *** if the evidence is insufficient to sustain a conviction of such offense[.]

If the evidence is such that reasonable minds could differ as to whether the state has proven each element of the offense beyond a reasonable doubt, then the trial court may not grant a motion for acquittal. *State v. Bridgeman (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184*, syllabus. The function of an appellate court on review is to assess the sufficiency of the evidence "to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d 492*, paragraph two of the syllabus. In making this determination, a reviewing court must view the evidence in the light most favorable to the prosecution. *Id.*; *State v. Feliciano (1996), 115 Ohio App. 3d 646, 652, 685 N.E.2d 1307*. [*5]

While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state met its burden of persuasion. *State v. Thompkins (1997), 78 Ohio St. 3d 380, 390, 678 N.E.2d 541* (Cook, J., concurring). In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we 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, 515 N.E.2d 1009. A new trial is warranted only in the exceptional case where the evidence weighs heavily in favor of the defendant. *Id. at 340*. "Because *sufficiency* is required to take a case to the jury, a finding that a conviction is supported by the *weight* of the evidence must necessarily include a finding of sufficiency." [*6] *State v. Roberts, 1997 Ohio App. LEXIS 4255*, *5 (Sept. 17, 1997), Lorain App. No. 96CA006462, unreported.

Defendant was convicted of assault on a police officer in violation of *R.C. 2903.13(A)* and *(C)(3)*, which prohibit any person from knowingly causing or attempting to cause physical harm to a peace officer during the performance of official duties. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result *** ." *R.C. 2901.22(B)*. A defendant's state of mind may be inferred from the totality of the surrounding circumstances. *State v. Ratajczak, 1992 Ohio App. LEXIS 4021*, *4 (Aug. 5, 1992), Lorain App. No. 91CA005245, unreported.

In this case, Officers Campbell and Natko testified that Defendant ran toward Officer Natko from a distance of fifteen to twenty feet after she instructed him to approach the front of the police cruiser with his hands in view. Officer Natko recalled that Defendant positioned his left arm in a defensive position and made a "pushing motion" with his right arm as he ran toward her. She noted that Defendant maintained his course toward her despite the fact that:

there were plenty [*7] of avenues which [he] could have taken to escape us. He could have went [*sic*] backwards, he could have went [*sic*] sideways. There were at least six or seven different avenues he could have chosen for escape.

She stated that Defendant struck her upper torso and characterized his actions as a "tackle" that forced her to the ground. Officer Natko testified that she did not have opportunity to deescalate the situation or to employ defensive measures before the impact.

The import of the officers' testimony is that Defendant distracted Officer Natko's attention, adopted an offensive posture, ran toward her, and made contact with her of sufficient force to send her to the ground. We are unable to conclude that the evidence with respect to Defendant's state of mind weighs heavily in his favor. Accordingly, this is not an exceptional case in which the weight of the evidence warrants a new trial. The appellant's assertion that the state did not produce sufficient evidence to support a conviction, therefore, is also without merit. See *State v. Roberts, 1997 Ohio App. LEXIS*

4255, *3 (Sept. 17, 1997), Lorain App. No. 96CA006462, unreported.

The appellant's assignment of error is overruled, and [*8] the judgment of the trial court is affirmed.

Judgment affirmed.

The Court finds that 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 Summit, 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)*.

Costs taxed to Appellant.

Exceptions.

LYNN C. SLABY

FOR THE COURT

BAIRD, P.J.

WHITMORE, J.

CONCUR

STATE OF OHIO, Appellee v. MICHAEL E. SULLIVAN, Appellant

C. A. No. 07CA0076-M

COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT, MEDINA COUNTY

2008 Ohio 2390; 2008 Ohio App. LEXIS 2048

May 19, 2008, Decided

PRIOR HISTORY: [**1]
APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO. CASE No. 06CR0478.

DISPOSITION: Judgment affirmed.

COUNSEL: CHRISTOPHER C. ESKER and PETER T. CAHOON, Attorneys at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL HOPKINS, Assistant Prosecuting Attorney, for Appellee.

JUDGES: MOORE, Presiding Judge. SLABY, J., WHITMORE, J., CONCUR.

OPINION BY: CARLA MOORE

OPINION

DECISION AND JOURNAL ENTRY

MOORE, Presiding Judge.

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MOORE, Presiding Judge.

[*P1] Appellant, Michael Sullivan, appeals the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

[*P2] On August 15, 2006, Appellant, Michael Sullivan, was indicted on one count of attempted tampering with evidence, in violation of *R.C. 2923.02* and *R.C. 2921.12(A)(1)*, a felony of the fourth degree. He waived his right to a jury trial and his case proceeded to a bench trial on February 12 and 13, 2007. On February 28, 2007, the trial court entered its order finding him guilty of attempted tampering with evidence. Mr. Sullivan was sentenced to three years of probation and community control sanctions. He timely appealed [**2] his conviction, raising two assignments of error for our review. We have combined his assignments of error to facilitate our review.

II.

ASSIGNMENT OF ERROR I

"APPELLANT'S CONVICTION IN THIS CASE WAS BASED ON INSUFFICIENT EVIDENCE AND, THEREFORE, SHOULD BE REVERSED."

ASSIGNMENT OF ERROR II

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

[*P3] In Appellant's assignments of error, he contends that his conviction was not supported by sufficient

evidence and was against the manifest weight of the evidence. We disagree.

[*P4] "While the test for sufficiency requires a determination of 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." *State v. Gulley (Mar. 15, 2000), 9th Dist. No. 19600, 2000 Ohio App. LEXIS 969, at *4*, citing *State v. Thompkins (1997), 78 Ohio St.3d 380, 390, 1997 Ohio 52, 678 N.E.2d 541* (Cook, J., concurring). Further,

> "[b]ecause sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that [a] conviction is supported by the weight of the [**3] evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts (Sept. 17, 1997), 9th Dist. No. 96CA006462, 1997 Ohio App. LEXIS 4255, at *5.*

Therefore, we will address his claim that his conviction was against the manifest weight of the evidence first, as it is dispositive of his claim of insufficiency.

[*P5] When a defendant asserts that his conviction is against the manifest weight of the evidence,

> "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, 515 N.E.2d 1009.*

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

[*P6] Mr. Sullivan was convicted of attempted tampering with evidence, in violation of *R.C. 2923.02* and *R.C. 2921.12. R.C. 2923.02(A)* defines attempt and states that "[no] person, purposely or knowingly, and when purpose or knowledge is sufficient [**4] culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

[*P7] Under *R.C. 2921.12(A)(1)*, which proscribes tampering with evidence,

> "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall *** Niter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]"

[*P8] The Ohio Supreme Court has held that a criminal attempt occurs when the offender commits an act constituting a substantial step towards the commission of an offense. *State v. Woods (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059*, paragraph one of the syllabus, overruled in part by *State v. Downs (1977), 51 Ohio St.2d 47, 364 N.E.2d 1140.* In defining substantial step, the *Woods* Court indicated that the act need not be the last proximate act prior to the commission of the offense. *Id. at 131-132.* However, the act "must be strongly corroborative of the actor's criminal purpose." *Id. at paragraph one of the syllabus.*

[*P9] *R.C. 2901.22(A)* states that "[a] person acts purposely when it is his specific intention to cause a certain [**5] result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

[*P10] To determine if the purposeful elements exist, "[a] defendant's state of mind may be inferred from the totality of the surrounding circumstances" *State v. Harper (Mar. 29, 2000), 9th Dist. No. 19632, 2000 Ohio App. LEXIS 1266, at *6.* The surrounding facts and circumstances were presented by the State through the testimony of Medina Sheriff Deputies Dan Kohler and Robert Locher.

[*P11] Dep. Kohler testified that on August 4, 2006, he and Dep. Locher drove to Donald Sullivan's ("Donald") house in Westfield Township to serve an arrest warrant on Donald arising from a domestic violence complaint. The house was dark when the officers arrived. The officers heard two people on the porch whispering. They listened for about two minutes. The officers observed two men standing near a table on the porch talking and drinking beer. One of the men was later identified as Donald's brother, Michael Sullivan.

The officers observed Michael walk off the porch to urinate.

[*P12] Dep. Kohler approached Michael and asked him [**6] where Donald was. Michael nodded towards the porch and indicated that Donald was on the porch. Dep. Kohler approached Donald to confirm his identity. He pointed his flashlight at Donald. At that point, Donald backed up towards the open door and removed his shirt. Dep. Kohler drew his Taser from his holster and instructed Donald to stop. Dep. Locher moved behind Donald to prevent him from retreating into the house. The officers then handcuffed Donald and informed him that he had an arrest warrant arising out of a domestic violence complaint. Dep. Kohler noticed that Donald was intoxicated.

[*P13] Dep. Kohler observed Donald twist his body in an apparent attempt to reach his right, front pocket. At that point, Michael offered to take Donald's cell phone. Dep. Kohler instructed Michael at least twice not to worry about 'the phone and that he would retrieve the phone from Donald. Dep. Kohler testified that he had no doubt that he had given this instruction loudly enough for Michael to hear it. Despite Dep. Kohler's instruction, Michael repeatedly stated that he wanted to obtain Donald's cell phone. Michael then placed one hand into Donald's right front pant pocket. He did not reach for Donald's [**7] cell phone which was clipped to the back of his pants. Dep. Kohler believed that Michael was reaching for something in the pocket. Dep. Kohler pushed Michael away. Dep. Locher, who was holding his Taser gun, ordered Michael to his knees. Dep. Locher then handcuffed Michael.

[*P14] Dep. Kohler opened Donald's right, front pocket and found a small, clear plastic bag containing a white powder. Tests later revealed that the substance was cocaine. Dep. Kohler also testified that there was a piece of black glass with a white powder substance on it on a table on the porch. The officers arrested the brothers.

[*P15] On re-cross examination, Dep. Kohler stated that neither he nor Dep. Locher ever gave Michael permission to approach Donald to retrieve his cell phone.

[*P16] Dep. Locher largely corroborated Dep. Kohler's testimony. Dep. Locher testified that there was either a rifle or a shotgun leaning against the wall of the door to the house. Dep. Locher testified that he was certain that Michael was not reaching for Donald's cell phone when Michael pulled on one of Donald's pant pockets to look inside. Dep. Locher stated that it appeared that Michael was trying to get something from inside Donald's pocket. He [**8] further testified that as Michael started to reach into the pocket, Dep. Kohler shoved Michael with a forearm. He said that if Michael's hand had entered Donald's pocket, he would have stunned him with a Taser. He explained that at the time Michael reached for Donald's pocket, Dep. Locher had no way of knowing whether Michael was reaching for a weapon or something else. Dep. Locher testified that he knew for tertain that Michael was not reaching for Donald's cell phone but that he was reaching for something inside the pocket.

[*P17] Donald Sullivan testified for the defense. He denied trying to reach into his pocket after he was handcuffed. He also denied that Michael was trying to reach into his pocket. He stated that Michael did not know anything about the cocaine and more specifically, that Michael did not know anything about the cocaine in his pocket. According to Donald, Michael had arrived at his house a few minutes before the police arrived. He stated that Michael had come to his house to provide moral support for his domestic problems. Further, he testified that when the police arrived, he and Michael were talking about a mechanical project.

[*P18] Donald also testified that he lied to the [**9] police when he told them that he did not know how the cocaine got into his pocket. He testified that he actually did know how the cocaine got into his pocket and that he had lied because he was trying to avoid a drug charge. Donald also testified that he always keeps his cell phone in his right front pocket, not clipped to the back of his pants, as Dep. Locher testified. He stated that he told Michael that he wanted him to ask the officers if Michael could have his cell phone because he used it for business calls and, because he was being arrested and could not take those calls, he wanted Michael to take the calls for him. Donald denied that Michael approached him after he was handcuffed and placed under arrest. On re-direct, Donald testified that the police gave Michael permission to take the telephone from him.

[*P19] Michael Sullivan also testified. According to Michael, Donald was inside the house, not on the porch, when police arrived. He testified that he asked permission to retrieve the cell phone from Donald and that Dep. Kohler told him that he could do so. According to Michael, when he reached for the phone, Dep. Locher pushed him away and arrested him. He also testified that Dep. [**10] Kohler "fished around" in Donald's pocket and pulled out the bag of cocaine. Michael testified that he did not at any time reach inside Donald's pocket to obtain something.

[*P20] On cross-examination, Michael admitted that he was convicted of a drug offense in 1997. He stated that during the incident involving his brother, he did not touch his brother at any time, but that he only made a motion towards his brother.

[*P21] On appeal, Michael contends that the State introduced no credible evidence that he specifically in-

tended to commit the underlying offense of tampering with evidence and further, that the State introduced no credible evidence that Michael took a substantial step toward completing the offense that was strongly corroborative of his criminal purpose. Michael points out that the officers' trial testimony that Donald's cell phone was clipped to the back of his pants contradicts their statements in their supplemental reports on the incident that the cell phone was clipped to the right front pocket of Donald's pants.

[*P22] The supplemental report is largely consistent with the officers' testimony at trial that (1) while handcuffed, Donald repeatedly tried to reach into the right front area [**11] of his pants, (2) despite Dep. Kohler's repeated warnings to Michael not to approach Donald, Michael continued to approach his brother, (3) Michael pulled out Donald's right front pocket with one hand and attempted to reach inside with the other hand, (4) Michael did not touch the cell phone and (5) Dep. Kohler found a plastic bag in Donald's right front pocket which contained cocaine. The supplemental report also reflects that Dep. Locher stated that Donald's cell phone was attached to his right front pocket, not to the back of his pants as he testified at trial.

[*P23] After careful review of the entire record, weighing the evidence and all reasonable inferences and considering the credibility of the witnesses, this Court cannot conclude that the judge clearly lost his way when he found Michael guilty of attempted tampering with evidence. The record contained evidence from which the judge could have found that Michael was trying to remove incriminating evidence from his brother's pocket despite Dep. Kohler's instruction that he refrain from approaching his brother. The record reflects that the officers had to use force to move Michael away from his brother as Michael reached for his brother's [**12] right front pant pocket. Contrary to Michael's assertions on appeal, the officers consistently stated that Michael was not reaching for Donald's cell phone but was instead, reaching for Donald's right front pocket -- the same pocket in which the officers discovered the bag of cocaine. We agree with the judge's decision to disbelieve Michael and Donald's testimony.

[*P24] The record reflects that the officers' testimony was consistent. Upon review of the record, we cannot conclude that the judge created a manifest miscarriage of justice in finding that Michael acted purposefully or knowingly in trying to conceal evidence from the police. Michael's act of pulling out Donald's right front pocket with one hand and attempting to reach inside with the other hand constituted a substantial step in the course of his plan to conceal the cocaine from the police.

[*P25] We find that the judge's verdict convicting Michael of attempted tampering with evidence was not against the manifest weight of the evidence. As this Court has disposed of Michael's challenge to the weight of the evidence, we similarly dispose of his challenge to its sufficiency. *Roberts, supra, at *5.* Necessarily included in this court's determination [**13] that the judge's verdict was not against the manifest weight of the evidence, is a determination that the evidence was also sufficient to support the conviction. Id. Accordingly, Michael's assignments of error are overruled.

[*P26] Michael's assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that 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 Medina, 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

SLABY, J.

WHITMORE, J.

CONCUR