Supreme Court of Ohio Clerk of Court - Filed December 01, 2014 - Case No. 2014-2064

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO.
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
V.	:	SCIOTO COUNTY COURT OF APPEALS,
	:	FOURTH APPELLATE DISTRICT,
CHELSEY BARRY,	:	CASE NO. 13CA3569
	:	
DEFENDANT-APPELLANT.	:	

NOTICE OF CERTIFIED CONFLICT OF APPELLANT CHELSEY BARRY

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Chelsey Barry

NOTICE OF CERTIFIED CONFLICT OF APPELLANT CHELSEY BARRY

Appellant Chelsey Barry, hereby gives notice to the Supreme Court of Ohio that on November 24, 2014, the Scioto County Court of Appeals, Fourth Appellate District, in Court of Appeals Case No. 13CA3569, certified a conflict with *State v. Cavalier*, 2d Dist. Montgomery No. 24651, 2012-Ohio-1976.

As the Fourth District explained, it's "prior decision conflicts on the same question of law presented in" *Cavalier*. Decision and Judgment Entry Granting Motion to Certify a Conflict (Nov. 24, 2014), p. 3, Apx. A-3. The conflict is whether the "unmistakable crime" doctrine applies to tampering-with-evidence cases when no one is likely to report the underlying offense.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Stephen P. Hardwick
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Counsel for Appellant, Chelsey Barry

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Assistant Prosecuting Attorney Pat Apel, PApel@sciotocountypo.org, on this 1st day of December, 2014.

/s/ Stephen P. Hardwick
Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellant, Chelsey Barry

#431187

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO.
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE
V.	:	SCIOTO COUNTY COURT OF APPEALS,
	:	FOURTH APPELLATE DISTRICT,
CHELSEY BARRY,	:	CASE NO. 13CA3569
	:	
DEFENDANT-APPELLANT.	:	

APPENDIX TO
NOTICE OF CERTIFIED CONFLICT OF APPELLANT CHELSEY BARRY

State v. Barry, Scioto County Court of Appeals Case No. 13CA3569 (November 24, 2014) Decision and Judgment Entry Granting Motion to Certify Conflict A-1

State v. Barry, Scioto County Court of Appeals Case No. 13CA3569 (September 30, 2014) Decision and Judgment Entry A-5

State v. Cavalier, 2d Dist. Montgomery No. 24651, 2012-Ohio-1976 ..... A-25

THE COURT OF APPEALS OF OHIO
SCIOTO COUNTY
OHIO
FILED

2014 NOV 24 PM 1:25

Lisa Novinger
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CHELSEY BARRY,

Defendant-Appellant.

Case No. 13CA3569

NOV 24 2014
LISA NOVINGER, CLERK
BY C. Shenhurlo DEPUTY

DECISION AND JUDGMENT ENTRY GRANTING MOTION TO CERTIFY CONFLICT

APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Assistant Public Defender, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Pat Apel, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

McFarland, J.

{¶1} Appellant, Chelsey Barry, filed a Motion to Certify a Conflict, pursuant to App.R. 25, asserting that this Court's Decision and Judgment Entry in *State v. Barry*, 4th Dist. Scioto No. 13CA3569, 2014-Ohio-4452, conflicts with the appellate court decision and judgment entry in *State v. Cavalier*, 2nd Dist. Montgomery No. 24651, 2012-Ohio-1976.

{¶2} Section 3(B)(4), Article IV of the Ohio Constitution permits an appellate court to certify an issue to the Ohio Supreme Court for review and final determination when "the judges of a court of appeals find that a judgment upon

which they have agreed is in Conflict with a judgment pronounced upon the same question by any other court of appeals of the state."

{¶3} In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993), the Supreme Court of Ohio clarified the requirements that an appellate court must find before certifying a judgment as being in Conflict:

> "First, the certifying court must find that its judgment is in Conflict with the judgment of a court of appeals of another district and the asserted Conflict must be 'upon the same question.' Second, the alleged Conflict must be on a rule of law--not facts. Third, the journal entry or opinion must clearly set forth that rule of law which the certifying court contends is in Conflict with the judgment on the same question by other district courts of appeals."

{¶4} In her Motion to Certify a Conflict, Appellant contends that our decision is in conflict with the reasoning of the Second District in *State v. Cavalier*, supra, on the following question: "Whether a person who hides evidence of a crime that is unmistakeable to him or her commits tampering with evidence in the absence of evidence that a victim or the public would report a crime?" In the case sub judice, we believe that our decision conflicts with the case Appellant cites. In our prior decision, we adhered to precedent from our district and held that " '[w]hen an offender commits an unmistakeable crime, the offender has constructive knowledge of an impending investigation of the crime committed[,]' " and thus affirmed Appellant's conviction for tampering with evidence. *State v. Barry* at ¶ 10; quoting *State v. Nguyen*, 4th Dist. No 12CA14, 2013-Ohio-3170,

¶ 89; citing *State v. Schmitz*, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617, ¶ 17. We applied this legal theory despite Appellant's argument and the holding in *State v. Cavalier*, supra, that this legal theory should not be applied to cases involving crimes in which victims are unlikely to make reports.

{¶5} Essentially, Appellant argues and the *Cavalier* court reasoned that constructive knowledge of an impending investigation should not be imputed to a defendant when the crime at issue involves a victim who is unlikely to make a report. In adhering to precedent in our district and not making an exception to the application of this legal theory based upon the nature of the crime at issue, our decision is in conflict with the decision of Second District Court of Appeals in *State v. Cavalier*, supra. Thus, because our prior decision conflicts on the same question of law presented in the cited case, we encourage further review and determination by the Supreme Court of Ohio. Accordingly, we grant Appellant's motion for certification of conflict.

MOTION GRANTED.

Abele, P.J.: Concurs.
Harsha, J.: Concurs in Part and Dissents in Part with Opinion on Motion to Certify Conflict.

For the Court,

BY: Matthew W. McFarland
Matthew W. McFarland, Judge

Harsha, J., concurring in part and dissenting in part:

{¶6} I agree that a conflict exists between our judgment in the direct appeal and that of the Second District in *State v. Cavalier, supra*. However, I do not concur in the entry that certifies the matter to the Supreme Court of Ohio.

THE COURT OF APPEALS OF OHIO
SCIOTO COUNTY
OHIO
FILED
2014 SEP 30 AM 8:35
Lisa D. Noringer
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA3569
vs.	:	
CHELSEY BARRY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Stephen P. Hardwick, Assistant Public Defender, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecutor, and Pat Apel, Assistant Scioto County Prosecutor, Portsmouth, Ohio, for Appellee.

McFarland, J.

{¶1} Chelsey Barry appeals from her conviction in the Scioto County Court of Common Pleas after a jury found her guilty of trafficking in drugs/heroin, possession of drugs, tampering with evidence and conspiracy to traffic drugs. On appeal, Appellant contends that 1) the trial court erred by convicting her of tampering with evidence despite the lack of an investigation or likely investigation when she concealed drugs; 2) her conviction for tampering with evidence was against the manifest weight of the evidence; 3) trial counsel was ineffective for failing to make a Crim.R. 29 motion to dismiss the tampering charge; 4) the trial

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court committed plain error by instructing the jury that knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime; and 5) trial counsel was ineffective for failing to object to the trial court's "unmistakable crime" jury instruction.

{¶2} Because we conclude that Appellant's conviction for tampering with evidence is supported by sufficient evidence and is not against the manifest weight of the evidence, her first and second assignments of error are overruled. Further, because we find no plain error with respect to the jury instruction provided by the trial court regarding tampering with evidence, Appellant's fourth assignment of error is overruled. Likewise, because Appellant's third and fifth assignments of error raise claims of ineffective assistance of counsel which are premised upon the arguments raised under assignments of error one, two and four, which we have already overruled, we find no merit to Appellant's third and fifth assignments of error and they are, therefore, overruled. Having found no merit to any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

FACTS

{¶3} The appellant was stopped by the Ohio State Highway Patrol while driving a vehicle not owned by her, as she was heading south on State Route 23 in Scioto County, Ohio. In addition to Appellant, three males were in the vehicle,

two of whom it was later revealed were from Detroit, Michigan and one of whom was from Phoenix, Arizona. Upon being stopped for loud exhaust and driving on the fog line, Appellant was removed from the vehicle, placed in the back of the cruiser, and was questioned regarding the smell of marijuana coming from inside the vehicle as well as the names of the passengers and her whereabouts earlier that day. After the trooper spoke with some of the other passengers and confirmed that conflicting information was being provided, he placed Appellant and the others under arrest, called for backup and searched the vehicle.

{¶4} Only a small amount of marijuana residue was located during the search, however, receipts indicating the occupants had been in Detroit, Michigan earlier that day were found in the vehicle. This fact contradicted statements given by the occupants which indicated they had been Middletown, Ohio, not Detroit. Appellant was further questioned and denied having drugs on her person. Appellant, the others and the vehicle were eventually taken to the patrol post for a further search and additional questioning. Although she denied having drugs on her person multiple times, she eventually admitted that she was carrying drugs. She stated that upon leaving Middletown earlier that day she was instructed to put the drugs away, meaning to insert them into her vagina. A female officer from the Portsmouth Police Department was contacted and assisted in removing a baggie full of what was later determined to be heroin from Appellant's vaginal cavity.

{¶5} Subsequently, on May 28, 2013, Appellant was indicted for trafficking in drugs/heroin, a felony of the first degree, in violation of R.C. 2925.03(A) & (C)(6)(f); possession of drugs, a felony of the first degree, in violation of R.C. 2925.11 (A)/(C)(6)(e); tampering with evidence, a felony of the third degree, in violation of R.C 2921.12 (A)(1); and conspiracy to traffic drugs, a felony of the second degree, in violation of R.C. 2923.01 (A)(2)/2925.03(A). After a jury trial, Appellant was convicted on all counts. The trial court merged the trafficking, possession and conspiracy counts for purposes of sentencing and sentenced Appellant to six years in prison. The trial court also imposed a three year term of imprisonment on the tampering with evidence count, and ordered that it be served consecutively to the six years, for a total prison term of nine years. It is from the trial court's July 18, 2013, judgment entry that Appellant now brings her timely appeal, setting forth the following assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED BY CONVICTING CHELSEY BARRY OF TAMPERING WITH EVIDENCE DESPITE THE LACK OF AN INVESTIGATION OR LIKELY INVESTIGATION WHEN SHE CONCEALED DRUGS.

II. CHELSEY BARRY'S CONVICTION FOR TAMPERING WITH EVIDENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MAKE A RULE 29 MOTION TO DISMISS THE TAMPERING CHARGE.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR BY INSTRUCTING THE JURY THAT KNOWLEDGE OF AN UNMISTAKABLE CRIME WAS THE SAME AS KNOWLEDGE OF AN INVESTIGATION INTO THAT CRIME.

V. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE TRIAL COURT'S 'UNMISTAKABLE CRIME' JURY INSTRUCTION."

ASSIGNMENTS OF ERROR I AND II

{¶6} For ease of analysis, we address Appellant's first two assignments of error together, and the remaining assignments of error out of order. Appellant's first two assignments of error allege that her conviction for tampering with evidence was not supported by sufficient evidence and was against the manifest weight of the evidence. "A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. "In reviewing such a challenge, '[t]he 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.' " Id.; quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds.

{¶7} " '[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.' " *Hunter* at ¶ 118; quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Accordingly, "a reviewing court is not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.' " *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 12; quoting *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541(1997) (Cook, J., concurring).

{¶8} When an appellate court concludes that the weight of the evidence supports a defendant's conviction, this conclusion necessarily also includes a finding that sufficient evidence supports the conviction.[1] *State v. Markins*, 4th Dist. Scioto No. 10CA3387, 2013-Ohio-602, ¶ 28. Therefore, we first consider whether Appellant's conviction is against the manifest weight of the evidence. Appellant was convicted of tampering with evidence, a third degree felony in violation R.C. 2921.12(A)(1). R.C. 2921.12 provides, in pertinent part, as follows:

> "(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] The inverse proposition is not always true. See *State v. Thompkins*, 78 Ohio St.3d 380, 387-388, 678 N.E.2d 541 (1997).

(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[.]"

{¶9} Appellant contends under these assignments of error that she should not have been found guilty of tampering with evidence when she concealed evidence of an "unmistakable crime" without actual knowledge of any pending or likely investigations. Appellant argues that although the State presented evidence that she concealed drugs in her vagina, it presented no evidence "that she did so knowing that an official proceeding or investigation [was] in progress, or [was] about to be or likely to be instituted[.]" Appellant further argues that "no evidence creates a reasonable inference that [she] hid the drugs knowing that an investigation to find the drugs was likely."

{¶10} Contrary to Appellant's argument, this Court has previously reasoned that " '[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed.' " *State v. Nguyen*, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170, ¶ 89; citing *State v. Schmitz*, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617, ¶ 17. In *Nguyen*, the appellant removed tape, rope and scissors from the crime scene after he committed the unmistakable crimes of rape and kidnapping, but argued that he could not be found guilty of tampering with evidence because no official

proceeding was in progress at the time he removed the items, and he did not know an official proceeding or investigation was about to be or likely to be instituted. *Nguyen* at ¶¶ 88-89. This Court rejected that argument, reasoning that unmistakable crimes were committed and that as such, Nguyen had constructive knowledge of an impending investigation. Id.

{¶11} Appellant acknowledges our holding in *State v. Nguyen*, but requests that we depart from our prior reasoning on the basis that the unmistakable crime committed sub judice differs from other cases where courts have imputed knowledge of an impending investigation. The crimes committed herein are drug possession and trafficking. The crimes at issue in *Nguyen* were rape and kidnapping and the crime at issue in *Schmitz* was gross sexual imposition. Appellant claims that the present case is factually distinguishable from *Nguyen* and *Schmitz* in that those cases involved crimes which involved victims who were likely to make reports, which would have put the defendants on notice of a likely investigation. Appellant argues that this Court should instead adopt the reasoning set forth in *State v. Cavalier*, 2nd Dist. Montgomery No. 24651, 2012-Ohio-1976, ¶ 50, where the court cast doubt on the *Schmitz* holding, reasoning that although the *Schmitz* opinion does state that "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed[,]' " "we doubt that it should be taken so literally." The

Cavalier court went on to discuss the fact that the cases relied upon by the *Schmitz* court both involved fatal shootings, as opposed to solicitation, which was at issue in *Cavalier*. Id. at ¶ 51.

{¶12} Despite Appellant's argument and the reasoning set forth in *Cavalier*, supra, we decline to depart from our prior reasoning in *State v. Nguyen*, supra. Appellant committed unmistakable crimes of drug trafficking, drug possession and conspiracy to traffic in drugs. She admitted as much through her testimony at trial and does not challenge those convictions on appeal. Those crimes, while they may not have victims likely to make reports, are not victimless crimes. Appellant knew at the time she concealed the drugs at issue and climbed into a vehicle to drive from Middletown, Ohio to Huntington, West Virginia that she was committing the unmistakable crimes of drug possession and trafficking. She admitted at trial that her intended purpose in putting the drugs into her vagina was to conceal them. Thus, she had constructive knowledge of an impending investigation.

{¶13} Based upon the foregoing, the evidence reasonably supports the conclusion that Appellant tampered with evidence. Appellant's conviction is not against the manifest weight of the evidence. As set forth above, the determination that the weight of evidence supports a defendant's conviction necessarily includes a finding that sufficient evidence supports the conviction. Having determined that Appellant's conviction for tampering with evidence is not against the manifest

weight of the evidence, we necessarily determined that her conviction was also supported by sufficient evidence and therefore overrule her first and second assignments of error.

ASSIGNMENT OF ERROR IV

{¶14} In her fourth assignment of error, which we address out of order, Appellant contends that the trial court committed plain error by instructing the jury that knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime. Under Crim.R. 30(A) "a party may not assign as error the giving or failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." When a party fails to properly object, then the party waives all but plain error. See *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 51; *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus (1983). In the case at bar, it is undisputed that Appellant failed to object to the trial court's instruction to the jury regarding tampering with evidence. Thus, except for plain error, Appellant has waived this issue.

{¶15} Plain error exists when the error is plain or obvious and when the error "affect[s] substantial rights." Crim.R. 52(B). The error affects substantial rights when " 'but for the error, the outcome of the trial [proceeding] clearly would have been otherwise.' " *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416,

868 N.E.2d 1018, ¶ 11; quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Courts ordinarily should take notice of plain error "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 78; *State v. Patterson*, 4th Dist. No. 05CA16, 2006-Ohio-1902, ¶ 13. A reviewing court should consider noticing plain error only if the error " ' "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." ' " *Barnes* at 27; quoting *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508, (1993); quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, (1936). In the case sub judice, we do not believe that plain error exists.

{¶16} Generally, a trial court has broad discretion to decide how to fashion jury instructions. The trial court must not, however, fail to "fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if such instruction is " 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.' " *State v. Lessin*, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993); quoting *State v. Nelson*, 36 Ohio St.2d 79, 303 N.E.2d 865 (1973), paragraph one of the syllabus.

{¶17} "In examining errors in a jury instruction, a reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.' " *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995); quoting *Becker v. Lake Cty. Mem. Hosp. W.*, 53 Ohio St.3d 202, 208, 560 N.E.2d 165 (1990). Whether the jury instructions correctly state the law is a question of law which we review de novo. *State v. Neptune*, 4th Dist. No. 99CA25, 2000 WL 502830 (Apr. 21, 2000).

{¶18} In the case sub judice, Appellant argues that the trial court erred when it instructed the jury that "knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime." The pattern Ohio Jury Instruction for the offense of tampering with evidence reads as follows:

> "1. The defendant is charged with tampering with evidence. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the _____ day of _____, _____, and in _____County, Ohio, the defendant, knowing that an official (proceeding)(investigation) was (in progress)(about to be instituted)(likely to be instituted)

> (A)(1) (altered)(destroyed)(concealed)(removed) a (record)(document)(thing) with purpose to impair its value or availability as evidence in the (proceeding)(investigation)."

The pattern jury instruction goes on to provide or reference definitions for the words "purposely," "knowingly," "official proceeding," and "public official."

{¶19} At issue herein is the definition of "knowingly," which was provided to the jury by the trial court. The pattern jury instruction does not include any statement regarding "unmistakable crimes." A review of the record reveals that the trial court instructed the jury as follows:

> "The Defendant is also charged with Count 3 Tampering with Evidence. Before you can find the Defendant guilty, you must find beyond a reasonable doubt that on or about the 28th day of February, 2013, and in Scioto County, Ohio, the Defendant, knowingly – knowing that an official investigation was in progress or about to be instituted or was likely to be instituted, altered, concealed or removed, or was an accomplice in concealing or removing a thing with purpose to impair its value or availability as evidence in the investigation.
>
> A person acts purposely when it is her specific intention to cause a certain result. It must be established in this case that at the

time in question there was present in the mind of the Defendant a specific intention to impair it's availability as evidence.

The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, and all the other facts and circumstances in evidence.

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when he is aware that circumstances probably exist.

When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed.

If you find that the State proved beyond a reasonable doubt all the essential elements of the offense of Tampering with Evidence, your verdict must be guilty.

If you find the State failed to prove beyond a reasonable doubt any one of the essential elements of Count 3 Tampering with Evidence, then your verdict must be not guilty." (Emphasis added).

{¶20} Comparing the two instructions, it is clear that they are not identical. However, "[a]lthough appellant cites the pattern jury instructions to support his

argument, those instructions are not binding upon this court." *State v. Bundy*, 974 N.E.2d 139, 2012-Ohio-3934, ¶ 53; citing *State v. Nucklos*, 171 Ohio App.3d 38, 2007-Ohio-1025, 869 N.E.2d 674, ¶ 57 (stating that the Ohio jury instruction handbook is "a respected and authoritative source of the law, but it is merely a product of the Ohio Judicial Conference and not binding on the courts").

{¶21} As indicated above, Appellant's complaint with the jury instruction provided by the trial court relates to the definition of "knowingly." In particular, Appellant takes issue with the following statement: "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." Appellant argues that this statement erroneously instructed the jury that "knowledge of an unmistakable crime was the same as knowledge of an investigation into that crime." However, in light of our prior holding in *State v. Nguyen*, supra, which we adhered to in our analysis of Appellant's first and second assignments of error, we conclude that portion of the trial court's instruction which stated that "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed[,]" was not given in error, but rather, was a correct statement of the law.

{¶22} For these reasons, we find no error, let alone plain error, in the instructions provided by the trial court for the offense of tampering with evidence.

As such, we find no merit to Appellant's fourth assignment of error and it is, therefore, overruled.

ASSIGNMENTS OF ERROR III AND V

{¶23} Appellant's third and fifth assignments of error both allege claims of ineffective assistance of trial counsel and, thus, will be addressed together. Criminal defendants have a constitutional right to counsel, and this right includes the right to effective assistance from trial counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, (1970); *In re C.C.*, 4th Dist. No. 10CA44, 2011-Ohio-1879, ¶ 10. To establish ineffective assistance of counsel, a defendant must show (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, (1984); see also *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 200.

{¶24} Both prongs of the *Strickland* test need not be analyzed, however, if a claim can be resolved under one prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000); see also *State v. Saultz*, 4th Dist. No. 09CA3133, 2011-Ohio-2018, ¶ 19. In short, if it can be shown that an error, assuming arguendo that such an error did in fact exist, did not prejudice an appellant, an ineffective assistance claim can be resolved on that basis alone. To establish the existence of prejudice, a defendant must demonstrate that a reasonable probability exists that,

but for his counsel's alleged error, the result of the trial would have been different. See *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus (1989).

{¶25} Appellant's fifth assignment of error argues that counsel was ineffective for the reasons raised under her fourth assignment of error, which related to the jury instruction provided for tampering with evidence. However, in light of the fact that we found no merit to that argument and overruled her fourth assignment of error, we do not find any constitutionally ineffective assistance of counsel. As such, Appellant's fifth assignment of error is overruled.

{¶26} Appellant's third assignment of error argues that trial counsel was ineffective for failing to make a Crim.R. 29 motion for acquittal. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. Because we have already determined that Appellant's conviction was supported by sufficient evidence, we conclude that a Crim.R. 29 motion for acquittal, had it been made by trial counsel, would have failed. Thus, any alleged deficient performance in failing to move the trial court for an acquittal pursuant to Crim.R. 29 did not affect the outcome of the trial. Consequently, we reject Appellant's argument that trial

counsel was ineffective in that regard. Thus, Appellant's third assignment of error is overruled.

{¶27} Having found no merit in any of the assignments of error raised by Appellant, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

Harsha, J., concurring in part and dissenting in part:

{¶28} I would sustain the first and second assignments of error and in doing so would distinguish *State v. Nguyen, supra*, and not apply its holding here. See *State v. Cavalier, supra*, which correctly cautions against applying the dicta in *Schmitz, supra*, too literally or to situations where the crime and the act of tampering are in essence one and the same.

{¶29} In all other regards, I concur in judgment and opinion.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Part and Dissents in Part with Opinion.

THE STATE OF OHIO
SCIOTO COUNTY, SS.
LISA KOVINGER
CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SCIOTO COUNTY
I HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL DOCUMENT NOW ON FILE IN MY OFFICE WITNESS MY HAND SEAL OF SAID COURT
OCT 01 2014
LISA KOVINGER, CLERK
BY _____ DEPUTY

For the Court,

BY: Matthew W. McFarland
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *State v. Cavalier*, 2012-Ohio-1976.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 24651
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2010-CR-2859
v.	:	
	:	
AMY CAVALIER	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 4th day of May, 2012.

. . . . . .

MATHIAS H. HECK, JR., by JOHNNA M. SHIA, Atty. Reg. #0067685, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Amy Cavalier appeals from her conviction and sentence for Tampering with Evidence and for Possession of a Drug Abuse Instrument. She

contends that the trial court erred by overruling her motion to suppress evidence obtained as the result of an unlawful search; that the trial court erred by admitting, over her objection, a lab report in evidence at her trial; that the evidence in the record is insufficient to support her conviction for Tampering with Evidence; and that the trial court erred by excluding evidence she proffered that a police officer at the scene, who testified as a witness at the trial, had squeezed her throat and threatened to kill her.

{¶ 2} We conclude that there was probable cause for Cavalier's arrest for Solicitation and for Loitering to Solicit, so that the search of her person was incident to her arrest, and therefore lawful. We conclude that the lab report was disclosed to Cavalier sufficiently in advance of the trial, as continued by the trial court, to comply with Crim. R. 16(K), and that the trial court's continuance of the trial date was within its discretion.

{¶ 3} We conclude that there is insufficient evidence in this record to support Cavalier's conviction for Tampering with Evidence. Finally, we conclude that the trial court did err in excluding evidence, proffered by Cavalier, that a police officer at the scene, who testified at the trial, had squeezed Cavalier's throat and threatened to kill her, since this was admissible to show the bias of the witness. But we conclude that this error was harmless, since the only conviction surviving this appeal is Cavalier's conviction for Possession of a Drug Abuse Instrument, which did not depend in any significant way upon that police officer's testimony.

{¶ 4} Accordingly, Cavalier's conviction and sentence for Tampering with Evidence is Reversed; she is Discharged as to that offense; and her conviction for Possession of a Drug Abuse Instrument is Affirmed. Because the imposition of sentence in the judgment

entry did not distinguish between the two offenses of which Cavalier was convicted, this cause is Remanded for sentencing for Possession of a Drug Abuse Instrument.

I. Cavalier Is Arrested and Searched

{¶ 5} Dayton Police officer Gregory Orick was patrolling an area of North Main Street, in Dayton, in the early morning hours of September 9, 2010, when he noticed Cavalier walking north on North Main. Orick recognized her as "a known prostitute that we've done FIs [field interviews] and written tickets to." He knew her by her first name, only. Orick got out of his cruiser and began to surveil her. He concluded from the manner of her walking that she was soliciting.

{¶ 6} Cavalier got into a vehicle, described by one officer as a Chevy Blazer. Orick got back into his cruiser and followed. The vehicle drove a circuitous route. Eventually, two other police officers, Robert Orndorff and Joshua Campbell, each in his own cruiser, joined in following the Blazer, in radio contact with one another and with Orick.

{¶ 7} The Blazer stopped near the intersection of Elizabeth and Rockford. Cavalier got out and went inside an apartment building known for heavy narcotics activity. Two to three minutes later, she came back outside and got back in the Blazer, which drove off.

{¶ 8} Orick had left his cruiser when Cavalier got out of the Blazer. He radioed Orndorff and Campbell, and the three officers took positions calculated to pick up the Blazer in whichever direction it might take. Campbell and Orndorff did pick up the Blazer and followed it.

{¶ 9} The Blazer stopped at Otterbein, near Stamford. At this point, Orick was two to three minutes away. Cavalier got out of the Blazer. Campbell stopped the Blazer. Orndorff arrested Cavalier.

{¶ 10} Orndorff conducted a cursory pat-down of Cavalier, but did not handcuff her. He put her in the back seat of his cruiser and contacted Dayton Police officer Jennifer Stack, who was on duty in a nearby district, to come and conduct a thorough search incident to arrest.

{¶ 11} Stack asked Cavalier, before conducting the search, whether she had any knives, needles, weapons, or anything else that could hurt Stack, on her person. Cavalier said she did not. Stack started with Cavalier's head and shoulders and worked down. As Stack was getting to the area of Cavalier's waistband, Orndorff told Stack that Cavalier had a prior FIC (field investigation card) reflecting that Cavalier had had syringes. Stack again asked Cavalier if she had any needles, etc., and Cavalier again said no. And as Stack was searching Cavalier's leg, Stack again inquired, and Cavalier again said no.

{¶ 12} As Stack began the pat-down of Cavalier's crotch area, Stack "felt a scratch and a slight prick on my right forearm." Stack finished the pat-down, and began feeling a burning sensation on her right forearm. Stack had one of the other officers shine a flashlight on her forearm, and noticed "a scratch and a small prick-like small blood droplet" on her right forearm.

{¶ 13} In the meantime, Campbell and Orick had searched the Blazer, with the consent of the driver. Orick found a rolled up paper towel in the passenger-side door pocket. He had previously seen paper towels used to roll up hot crack pipes, as well as syringe needles. He retrieved it as evidence. Nothing else was found having any evidentiary

significance.

{¶ 14} By the time Stack had been pricked, Campbell, Orick and Orndorff were all in the vicinity where Stack was searching Cavalier, although they had given the women some space for the sake of Cavalier's privacy. All three officers could tell from the change in tone of Stack's voice that she was upset.

{¶ 15} Even though Stack "pretty much knew" that she had been pricked by a syringe needle in Cavalier's pants, she again asked Cavalier, several times, if she had a needle in her pants, and Cavalier kept saying no, she didn't. Finally, Cavalier offered to open up her pants so that Stack could see for herself, and the women moved behind the rear of one of the police cruisers, for more privacy. When Cavalier opened up her pants, Stack saw an orange syringe cap and part of a syringe inside Cavalier's underwear. Stack told Cavalier to get it out. Cavalier removed the orange cap and started to hand it to Stack. Stack told Cavalier to place it on top of the cruiser trunk. Cavalier complied.

{¶ 16} Stack then told Cavalier to get the rest of it out, and Cavalier said she didn't have anything else. Stack asked Cavalier repeatedly if she had any needles, and Cavalier said no. Finally, Orndorff came over and told Cavalier that they would take her to the hospital for hospital personnel to retrieve the needle, if Cavalier would not do it herself. Cavalier then retrieved the syringe and placed it on the trunk of the cruiser.

{¶ 17} Stack characterized her pat-down search of Cavalier as a search incident to arrest.

{¶ 18} Cavalier proffered the testimony of both Orick and Campbell that at some point after the pat-down search was complete, Orick placed his hand or hands on Cavalier's

neck, squeezed, and said to Cavalier something to the effect that if anything happened to Stack, he would "personally f***ing kill you myself." The trial court did not permit this testimony to be presented to the jury.

II. The Course of Proceedings

{¶ 19} Cavalier was charged by indictment with one count of Tampering with Evidence, in violation of R.C. 2921.12(A)(1), a felony of the third degree; one count of Harassment of a Law Enforcement Officer by Means of Contact with a Bodily Substance, in violation of R.C. 2921.38(B), a felony of the fifth degree; and one count of Possession of a Drug Abuse Instrument, in violation of R.C. 2925.12(A), a misdemeanor of the second degree.

{¶ 20} Cavalier moved to suppress evidence, contending that it was obtained as a result of an unlawful search and seizure. Following a suppression hearing, this motion was overruled.

{¶ 21} Cavalier moved to exclude a lab report concerning the contents of the syringe, which tested positive for cocaine, upon the ground that the State had not disclosed the contents of the report to her at least 21 days before trial, as required by Crim. R. 16(K). The trial court continued the trial date to a date beyond the 21-day requirement, and overruled Cavalier's motion to exclude this evidence.

{¶ 22} At trial, the trial court did not allow Cavalier to present evidence of Orick's act of having choked her and having threatened to kill her, which Cavalier offered to show bias on the part of Orick, who was called as a witness at trial.

{¶ 23} When the State rested, Cavalier moved for a judgment of acquittal on both the

Tampering with Evidence and Harassment counts. The trial court overruled this motion. Cavalier did not present any evidence in her defense.

{¶ 24} The jury found Cavalier not guilty of the Harassment count, but guilty of both Tampering with Evidence and Possession of a Drug Abuse Instrument. The trial court entered a judgment convicting Cavalier of Tampering with Evidence and Possession of a Drug Abuse Instrument. The trial court sentenced Cavalier to community control sanctions for a period not to exceed five years, including 30 days in jail, and suspended her driver's license for six months. The trial court did not differentiate between the two counts upon which Cavalier was convicted in imposing sentence.

{¶ 25} From her convictions and sentence, Cavalier appeals.

III. There Was Probable Cause to Arrest Cavalier for Soliciting and for Loitering to Solicit, So That the Search Leading to the Seizure of Evidence Was Proper As a Search Incident to Arrest.

{¶ 26} Cavalier's First Assignment of Error is as follows:

{¶ 27} "THE TRIAL COURT ERRED WHEN IT OVERRULED THE APPELLANT'S MOTION TO SUPPRESS BECAUSE THE OFFICER LACKED PROBABLE CAUSE TO ARREST THE APPELLANT, AND THEREFORE THE ARREST AND SUBSEQUENT SEARCH OF THE DEFENDANT WAS ILLEGAL UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶ 28} The State's justification for the warrantless search of Cavalier's person leading to the discovery of the syringe was predicated upon its having been a search incident

to arrest. Although the State argues in its brief that the officers also had justification to conduct a limited pat-down search for the safety of the officers, Stack testified that the search she conducted was not a limited pat-down search, but a more thorough search, incident to Cavalier's arrest. Cavalier argues that there was no probable cause justifying the arrest, and therefore the search incident to arrest.

{¶ 29} Soliciting, a misdemeanor of the third degree, is proscribed by R.C. 2907.24(A), which provides as follows: "No person shall solicit another to engage with such other person in sexual activity for hire."

{¶ 30} Loitering to Solicit, a misdemeanor of the third degree, is proscribed by R.C. 2907.241(A), which provides, in pertinent part, as follows:

> (A) No person, with purpose to solicit another to engage in sexual activity for hire and while in or near a public place, shall do any of the following:
>
> (1) Beckon to, stop, or attempt to stop another;
>
> (2) Engage or attempt to engage another in conversation;
>
> (3) Stop or attempt to stop the operator of a vehicle or approach a stationary vehicle;
>
> * * *

{¶ 31} "Whether [an] arrest [is] constitutionally valid depends * * * upon whether, at the moment the arrest was made, the officers had probable cause to make it — whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. State of Ohio* 379 U.S. 89,

91, 85 S.Ct. 223, 225-226, 13 L.Ed.2d 142 (1964) (Citations omitted).

{¶ 32} Before Cavalier was arrested, Orick had observed her walking on the street for fifteen to twenty minutes. At the suppression hearing, Orick described the activity he observed that led him to conclude that Cavalier was a prostitute looking for customers:

> Walking up and down the street, North Main Street, making eye contact with cars as they would pass both northbound and southbound. This is not only this night, but previous nights. Again, as I tried to testify, women will generally try to time their location to a corner so the vehicle will have an opportunity to go on to a side street. As they walk into a side street, she would walk – especially like at Fairview for this particular night, as the car would come she would start walking on East Fairview. As soon as the car would pass by, then she'd come back out on Main Street and just continue her travel.

{¶ 33} Not only did Orick observe Cavalier acting in this way on the night of her arrest, he had observed her behaving similarly "numerous times" previously. Cavalier stayed within "her block, half block" while walking in this fashion.

{¶ 34} The behavior Orick observed, the time of day – 1:50 a.m., and the reputation of the area for prostitution, led him to conclude that Cavalier was Loitering to Solicit. When the Chevy Blazer stopped for Cavalier to get in, after flashing its brake lights in a manner Orick recognized as a signal customers use to tell a prostitute to get in the car, Orick concluded that Cavalier was Soliciting the driver of the Blazer. We conclude that Orick's own observations warranted a prudent person in believing that Cavalier was committing these offenses. Therefore, there was probable cause for Cavalier's arrest.

{¶ 35} Cavalier's First Assignment of Error is overruled.

IV. The Trial Court Did Not Err in Overruling Cavalier's Motion to Exclude the Lab Report.

{¶ 36} Cavalier's Second Assignment of Error is as follows:

{¶ 37} "THE TRIAL COURT ERRED TO THE APPELLANT'S PREJUDICE WHEN IT FAILED TO EXCLUDE THE LAB REPORT FROM EVIDENCE AT THE TRIAL AND INSTEAD IN AN EFFORT TO COMPLY WITH CRIM. R. 16(K) ORDERED THE TRIAL DATE CONTINUED WITHOUT GOOD CAUSE SHOWN."

{¶ 38} A laboratory report concerning the contents of the syringe, which had tested positive for cocaine, was generated on September 16, 2010. Cavalier filed a motion for discovery on September 24, 2010. Crim. R. 16(K) provides as follows:

> An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

{¶ 39} The State provided Cavalier with a copy of the lab report the day before the scheduled trial date of January 25, 2011. Cavalier sought to exclude the lab report and the expert's testimony from evidence upon the ground that Crim. R. 16(K) was violated. The

trial court declined to do so, but continued the trial date until March 4, 2011, more than 21 days later.[1]

{¶ 40} Cavalier argues that Crim. R. 16(K) imposes an absolute obligation on the part of a party with an expert witness to produce a written report to the opposing party at least 21 days before trial, and that the necessary consequence of the party's failure to do so is the exclusion of the expert's testimony, citing the final sentence of the Rule. But the preceding sentence of the Rule recognizes that the trial court has some leeway in the matter, as long as neither party is prejudiced thereby.

{¶ 41} Furthermore, once the trial court continued the trial date, Crim. R. 16(K) was literally complied with. The lab report was disclosed to Cavalier more than 21 days before trial. Her complaint is with the trial court's decision to continue the trial, which both parties assert to have been at the State's request.

{¶ 42} A trial court generally has discretion in the matter of continuances. That this discretion may be exercised in connection with failures to comply with Crim. R. 16 is recognized in Crim. R. 16(L)(1):

The trial court may make orders regulating discovery not inconsistent with this rule. *If* at any time during the course of the proceedings *it is brought to the attention of the court that a party has failed to comply with this rule* or with an order issued pursuant to this rule, *the court may* order such party to permit the discovery or inspection, *grant a continuance*, or prohibit the party from introducing in evidence the material not disclosed, or it may make such

[1]The record does not directly reflect these actions, but Cavalier asserts that they occurred, both in her brief on appeal and in a motion to exclude she filed on January 26, 2011, and the State corroborates her assertion in its brief on appeal. Therefore, we will take these assertions to be true.

other order as it deems just under the circumstances. (Emphasis added.)

{¶ 43} We see no abuse of discretion. The only prejudice Cavalier asserts is that she was subject to electronic home monitoring detention pending her trial, which was extended during the period of this continuance. But if this circumstance is deemed sufficiently prejudicial to bar the granting of a request by the State for a continuance, then a trial court could never properly grant the State's request for a continuance where a defendant is subject to pre-trial confinement.

{¶ 44} Here, the State asserted, and the trial court appears to have agreed, that its failure to have complied with Crim. R. 16(K) was inadvertent. Expert testimony concerning the contents of the syringe was obviously important, if not essential, evidence for the jury to consider concerning the Possession of a Drug Abuse Instrument charge. Under these circumstances, the trial court did not abuse its discretion by granting the State's request for a continuance.

{¶ 45} Cavalier's Second Assignment of Error is overruled.

V. The Evidence in the Record Is Insufficient to Support Cavalier's Conviction for Tampering with Evidence.

{¶ 46} Cavalier's Third Assignment of Error is as follows:

{¶ 47} "THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION FOR TAMPERING WITH EVIDENCE."

{¶ 48} Cavalier was convicted of Tampering with Evidence, in violation of R.C. 2921.12(A), which provides as follows:

> 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.

{¶ 49} There is no evidence to establish when Cavalier put the hypodermic syringe inside her underwear, but she clearly did not do so after she was arrested, or the officers would have noticed.

{¶ 50} Police officers Orick, Orndorff, and Campbell testified at trial that when they had Cavalier under observation, before she was arrested, they were attempting not to be noticed by her, and they believed that she did not notice them. The State contends that Cavalier nevertheless knew that an official investigation was about to be, or was likely to be, instituted. The State cites *State v. Schmitz*, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617, ¶ 17, for the proposition that: "When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." While *State v. Schmitz* does contain this quoted sentence, we doubt that it should be taken so literally. To begin with, this proposition was not necessary to the court's holding, which was that there was insufficient evidence that the defendant in that case had intended to delete the evidence, which were photographs, from a computer disc.

{¶ 51} The quoted sentence in *State v. Schmitz* cites two previous Tenth District

cases, *State v. Cockroft*, 10th Dist. Franklin No. 04AP-608, 2005-Ohio-748; and *State v. Jones*, 10th Dist. Franklin No. 02AP-1390, 2003-Ohio-5994. Both of those cases involved fatal shootings, where it was reasonable to suppose that the shootings would be investigated. *Schmitz* at least involved a crime, Gross Sexual Imposition, with a person likely to complain. By contrast, the offense Cavalier had committed – Loitering to Solicit, or even Solicitation – was a crime without anyone who was likely to complain. Cavalier had no great reason to suppose that she would be the subject of an official investigation.

{¶ 52} The State argues that anyone who commits an offense is on constructive notice that an official investigation will ensue. In our view, this argues too much. If the State is correct, then anyone who commits the offense of changing lanes without signaling, continues on home, and then parks in a closed garage, would be guilty of Tampering with Evidence, a third-degree felony, since the offender would be on constructive notice that an official investigation is likely to result, and by parking the vehicle used in the commission of the offense in a closed garage, the offender has impaired its availability as evidence – an investigating police officer will be less likely to find it.

{¶ 53} We conclude that the evidence in this record does not support a finding that Cavalier knew, before she was arrested, that an official investigation was likely to be instituted.

{¶ 54} The State also argues that when Cavalier was asked, both before and during, Stack's pat-down search, whether she had any needles on her person, and answered in the negative, she committed the offense of Tampering with Evidence. Obviously, Cavalier knew, during the pat-down search, that she was the subject of an official investigation. The issue is

whether her denials constituted a concealment of the syringe, in violation of R.C. 2921.12(A)(1), or the making, presentation or use of any record, document, or thing, knowing it to be false, and with the intention of misleading an official engaged in an official investigation, in violation of R.C. 2921.12(A)(2).

{¶ 55} In construing R.C. 2921.12(A), we are guided by the familiar principle that criminal statutes must be construed strictly against the State. R.C. 2901.04(A). The making of a false statement to mislead a public official is the subject of R.C. 2921.13 – Falsification, which is generally punishable as a misdemeanor. This suggests that R.C. 2921.12(A) is intended, by contrast, to deal with the concealment, destruction, alteration, or falsification of tangible evidence, possibly including electronic data, as opposed to a false oral statement.

{¶ 56} Furthermore, to give R.C. 2921.12(A) the broad reach argued by the State would lead to a self-incrimination problem identified in *State v. Sowry*, 155 Ohio App.3d 742, 2004-Ohio-399, 803 N.E.2d 867 (2d Dist.), ¶ 21. If the State's argument were accepted, a police officer could ask any person about the existence and location of potential incriminating evidence, and if the person were to falsely deny the existence of the incriminating evidence, he or she would be guilty of Tampering with Evidence, a third-degree felony. This would exert a compulsion on the person to disclose the location and existence of incriminating evidence, in violation of that person's right, under both the Fifth Amendment to the United States Constitution, and Article I, Section 10, of the Ohio Constitution, not to be compelled to testify against himself or herself.

{¶ 57} Theoretically, the person asked about potential incriminating evidence could assert the constitutional privilege, rather than respond falsely, but this is unrealistic in view of

the fact that in almost all such situations, the person being interrogated will not have had an opportunity to consult counsel.

{¶ 58} In view of the strict construction of criminal statutes, and the principle of construing a statute, where reasonably possible, to avoid constitutional issues, we conclude that R.C. 2921.12 is not intended to encompass the false oral statements in this case.

{¶ 59} Cavalier's Third Assignment of Error is sustained.

VI. The Trial Court Erred in Excluding Evidence of the Bias of the Witness Orick, But this Error Was Harmless in View of this Court's Disposition of Cavalier's Third Assignment of Error.

{¶ 60} Cavalier's Fourth Assignment of Error is as follows:

{¶ 61} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT BARRED THE DEFENDANT FROM ENTERING AT TRIAL EVIDENCE THAT OFFICER ORICK BOTH CHOKED AMY CAVALIER AND THREATENED TO KILL HER[,] THEREFORE WAS A BIASED WITNESS."

{¶ 62} Before trial, the State moved in limine to exclude evidence that Orick had choked Cavalier, or had squeezed her throat, and had threatened to kill her. Cavalier argued at that time that if Orick should testify as a witness, then she should be permitted to elicit this evidence to show Orick's bias as a witness. The trial court disagreed.

{¶ 63} At trial, Cavalier renewed her request to pursue this line of questioning. The trial court would not permit it, but did permit a proffer, outside of the presence of the jury, at which Cavalier established the facts of Orick's having squeezed her throat, and having

threatened to kill her if anything should happen to Stack, both through the testimony of Orick and through the testimony of Campbell.

{¶ 64} Evidence of the bias of a witness is expressly permitted by Evid. R. 616(A). Although the Ohio Rules of Evidence frequently involve a weighing process that gives a trial court some discretion – Evid. R. 403(B), for example – the Rules of Evidence have the force of law, and may not be ignored. Evidence of a witness's bias also has significance under the Confrontation clauses of both the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. The prohibition of any inquiry concerning the possibility that a witness is biased has been held to violate the Sixth Amendment Confrontation clause. *Delaware v. Van Arsdell*, 475 U.S. 673, 678-679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

{¶ 65} The proffered evidence was probative of Orick's ill-feeling toward Cavalier. This was understandable in view of Cavalier's conduct that exposed Stack, a fellow police officer, to a serious risk of harm. This evidence was competent to show to the jury that Orick might not be approaching his testimony with the same detached neutrality that should ordinarily accompany a police officer's testimony in a criminal trial. The jury should have had this evidence, to make of it what they would, and it was error not to have permitted it.

{¶ 66} But we conclude that the error in excluding this evidence is necessarily harmless. In view of our disposition of Cavalier's Third Assignment of Error, the only conviction surviving this appeal is Cavalier's conviction for Possession of a Drug Abuse Instrument. That conviction did not depend upon Orick's testimony in any significant way. It was Stack who observed the syringe in Cavalier's underwear, and who saw Cavalier retrieve

it from there and place it on top of the cruiser trunk, not Orick. Although Orick testified that he straightened the bent needle somewhat, for the protection of all concerned, it was Campbell who took charge of the evidence and got it to the property room.

{¶ 67} Even if Orick's testimony had been totally discredited by the jury, there is no reason to believe that their verdict on the charge of Possession of a Drug Abuse Instrument (upon which Cavalier conceded guilt in her closing argument) would have been affected.

{¶ 68} Cavalier's Fourth Assignment of Error is overruled as harmless.

VII. Conclusion

{¶ 69} Cavalier's Third Assignment of Error having been sustained, her First and Second Assignments of Error having been overruled, and her Fourth Assignment of Error having been overruled as harmless, her conviction for Tampering with Evidence is Reversed, and she is Discharged as to that offense. Her conviction for Possession of a Drug Abuse Instrument is Affirmed. Because the judgment entry does not distinguish between the Tampering with Evidence and Possession of a Drug Abuse Instrument convictions for sentencing purposes, this cause is Remanded for sentencing upon Cavalier's Possession of a Drug Abuse Instrument conviction.

. . . . . .

DONOVAN and FROELICH, JJ., concur.

Copies mailed to:

Mathias H. Heck/Johnna M. Shia
Tina McFall
Hon. Mary K. Huffman