ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	**CASE NOS.: 2014-1984 &2014-2064**
Plaintiff-Appellee,		ON DISCRETIONARY APPEAL AND CERTIFIED CONFLICT FROM THE SCIOTO COUNTY COURT OF APPEALS, FOURTH APPELLATE DISTRICT, CASE NO. 13CA3569
-vs-	*	
CHELSEY BARRY	*	
Defendant-Appellant.	*	

MERIT BRIEF OF APPELLEE

ATTORNEY FOR APPELLEE:

MARK E. KUHN, 0063392
Prosecuting Attorney

JAY WILLIS, 0064884
Assistant Prosecuting Attorney
(Counsel of Record)

SHANE TIEMAN, 0070142
Assistant Prosecuting Attorney

612 6th Street, Room E
Portsmouth, Ohio 45662
(740) 981-3112 - Telephone
(740) 876-8916 – Fax
jwillis@sciotocountypo.org

ATTORNEY FOR APPELLANT:

Office of the Ohio Public Defender
Stephen P. Hardwick, 0062932
Assistant Public Defender

250 E. Broad St., Suite 1400
Columbus, Ohio 43215
(614) 466-5394; (614) 752-5167 (Fax)
Stephen.hardwick@opd.ohio.gov

Counsel for Appellant,
Chelsey Barry

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Statement of the Case and Facts

Statement of the Case

On May 28, 2013, the Scioto County Grand Jury filed a four count indictment against the Appellant charging her with:

Count 1: Trafficking in Heroin, F-1;

Count 2: Possession of Heroin, F-1;

Count 3: Tampering with Evidence, F-3; and,

Count 4: Conspiracy to Traffic in Drugs, F-2.

On June 7, 2013, the Appellant was arraigned.

On July 15 & 16, 2013, the Appellant was tried by jury, convicted on all counts and sentenced to an aggregate 9 years in prison.

The Appellant filed a timely appeal with the 4th District Court of Appeals. The 4th District affirmed the trial court's decision in *State v. Barry*, 4th Dist., Scioto No.13CA3569, 2014-Ohio-4452 on September 30, 2014.

The Appellant timely filed an appeal with The Supreme Court of Ohio, *State v. Barry*, 2014-1984 (*State v. Barry*, 141 Ohio St.3d 1454, 2015-Ohio-239, 23 N.E.3d 1196) and the 4th District Court of Appeals certified a conflict with *State v. Cavalier*, 2nd Dist. Montgomery No. 24651, 2012-Ohio-1976, 2012 Ohio App. LEXIS 1738 in *State v. Barry*, 2014-2064 (*State v. Barry*, 141 Ohio St.3d 1452, 2015-Ohio-239, 23 N.E.3d 1195). The Supreme Court accepted Appellant's discretionary appeal and consolidated case numbers 2014-1984 and 2014-2064.

Statement of Facts

On the 28th day of February 2013, Trooper Nick Lewis of the Ohio Highway Patrol was completing paperwork on an earlier arrest while sitting in a stationary position in Lucasville, Ohio, in Scioto County when he heard the Appellant drive by.

Trooper Lewis followed the vehicle south on US 23 until they reached an area near the Highway Patrol Post where there was no guardrail so he could safely get off the well-traveled roadway. He also chose this point to be near the Patrol Post in the event the occupants of the vehicle were armed and resisted. Assistance was close by in the Post. (Tr. pp.128-129)

When he approached the vehicle and spoke with the Appellant, Trooper Lewis smelled marijuana. He asked the Appellant to get out of the vehicle and noted that she was scantily clad for that time of year. (Tr. p.129) Trooper Lewis placed the Appellant in the back of his vehicle and spoke with the other occupants. Based upon the conversations with the occupants and his experience in drug interdiction on US 23, (Tr. pp.138-139), Trooper Lewis explained to the Appellant that it was common for females to carry drugs concealed in their bodies and that he thought she was transporting drugs in her body. (Tr. pp.139) (Transcript of cruisercam begins at Tr. pp.156)

The Appellant and the occupants of the vehicle were transported to the Highway Patrol Post along with the vehicle to be searched. At the Patrol Post, Trooper Lewis again spoke with the Appellant who eventually admitted that she was carrying the drugs. Lt. Debbie Jenkins, Portsmouth Police Department, was called to the Post since there were no females officers present at the time. Lt. Jenkins went with the Appellant into the rest room where the Appellant removed from her vaginal cavity a condom containing drugs. (Tr. pp.144-146) The condom contained 56.36 grams of Diacetylmorphine

(heroin). (State's Exhibit 5) At the street level, the amount was roughly 560 hits of heroin. (Tr. p. 228).

At trial, the Appellant testified that she had gone to Middletown, Ohio, on February 25, 2013, with a friend, co-Defendant James Valero. In Middletown, they met the other two co-Defendants who were from Detroit. They began the return trip to Huntington, WV, in the evening hours of February 27, 2013. The Appellant testified that when they got in the vehicle she was handed a bag of heroin to insert in her body. The Appellant was to be paid in drugs to transport the load of heroin. (Tr. pp.203-205) The Appellant knew when they handed her the drugs that she was to insert it in her vagina and that she would be paid in drugs. (Tr. p.222)

> Q. James handed it to you?
>
> A. Um, hmm.
>
> Q. And what did he say?
>
> A. To hold it. To hold it. To put it up for them. And that –
>
> Q. Hold it, to put it up for them, and you knew that meant to stick it in your vagina?
>
> A. Yes. (Tr. p. 222)

The Appellant looked at them like they were "...all crazy. They were like, this is the whole reason that this is happening, so I don't know what you thought, but this is why you are here." (Tr. p.223)

When asked why she "stuffed" the drugs, the Appellant responded:

> Q. Why did you put it – why did you stuff it? What was the purpose of stuffing it? Why didn't you stick it up on the dashboard?

A. To conceal it. To conceal it.

Q. To conceal it. Okay, that's the normal reason. You stuck it up there to conceal it so that police wouldn't see it?

A. Yes.

Q. Okay. You stuffed it to conceal it so the police wouldn't see it. You knew that was an unmistakable crime?

A. Yes.

(Tr. II, pp. 224-225)

The Appellant concealed the drugs when she "stuffed" them before she left Middletown. She continued to conceal the drugs during the drive toward Huntington, WV, while stopped by the Highway Patrol in Scioto County, and during questioning about the odor of marijuana and the suspicion that she was transporting drugs in her body. She continued to conceal the drugs while the Troopers conducted their investigation by interviewing the Defendants and searching the vehicle at the Patrol Post. Finally, she voluntarily gave up the drugs after questioning by the Troopers, (T.pp. 192-197) was issued a summons and released (T. p. 182).

At trial, Appellant admitted her knowledge that trafficking in heroin and possession of heroin are both unmistakable crimes in the State of Ohio:

Q. Okay. You stuffed it to conceal it so the police wouldn't see it. You knew that that was an unmistakable crime?
A. Yes
Q. You have to answer? (sic)
A. Yes.
Q. Okay. You knew it was a crime to possess heroin and to stuff it.
A. Yes.
(T.p. 225.)

The jury instructions included language pertaining to the "unmistakable crime" doctrine. No objection was made at trial to the jury instructions given. The trial court instructed that the jury must convict Appellant of tampering with evidence if it found:

> ...beyond a reasonable doubt that . . .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. . . .
>
> 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.

(T.pp. 281-282.)

The jury convicted Appellant on all counts. Counts 1, 2 & 4 merged. The Appellant was sentenced to a stated prison term of six years on Count 1 and three years on Count 3, the sentences to run consecutively for an aggregate prison term of 9 years.

The only issue challenged on appeal was the Tampering with Evidence conviction. The 4th District Court of Appeals affirmed the trial court's decision and held that "[w]hen an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed" following its prior holding in *State v. Nguyen, 4th Dist.Athens No. 12CA-14, 2013-Ohio-3170* citing the 10th District's holding in *State v. Schmitz,* 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617. Appellant urged the 4th District to follow the 2nd District's decision in

State v. Cavalier 2012-Ohio-1976 which disagreed with the literal interpretation of the *Schmitz* 'constructive knowledge' imputation, which determined that in the 2nd District "we doubt that it should be taken so literally." The 4th District declined, rendered its holding despite the 2nd District decision in *Cavalier,* and certified its decision to be in conflict with *State v. Cavalier* 2nd Dist. Montgomery No. 24651, 2012-Ohio-1976, 2012 Ohio App. LEXIS 1738

Argument

Proposition of Law:

For purpose of tampering with evidence, a jury may be instructed that it must find a defendant knew an investigation was likely merely because she committed a crime that was "unmistakable" to her.

Certified Conflict Question

Does a person who hides evidence of a crime that is unmistakable to him or her commit tampering with evidence in the absence of evidence that a victim or the public would report a crime?

I. Answer to certified question.

Yes. A person who hides evidence of a crime that is unmistakable only to him or her commits tampering with evidence in the absence that someone would likely report the crime.

II. Applicable Law.

A. Tampering with Evidence Statute, R.C. §2921.12(A)(1)

> No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall . . . [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]

B. Definition of "knowing," R.C.§ 2901.22(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. Standards of Review

Appellant correctly states the standards of review applicable in this consolidated appeal pertaining to the de novo review of the interpretation of a statute pursuant to *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 9, citing *State v. Pariag*, 137 Ohio St. 3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 9, as well as the rule of lenity *Straley* at ¶ 10, citing *State v. Young*, 62 Ohio St.2d 370, 406 N.E.2d 499 (1980), quoting *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) *See also* R.C.§ 2901.04(A) (codifying the rule of lenity).

Likewise, Appellant correctly states that only when substantial rights are affected and there is plain error will the court review issues in the absence of an objection. *State v. Thompson*, Slip Op. No. 2014-Ohio-4751, ¶ 73,citing Crim.R. 52(B). Most importantly, as Appellant states, "This Court will notice plain error with "utmost caution," and it will do so "under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.* quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus."

Finally, regarding Appellant's ineffective assistance of counsel assertion, only if there is a reasonable probability that Appellant would have been acquitted of the Tampering charge if counsel had objected to the jury instruction pertaining to the 'unmistakable crime' doctrine will this court review trial counsel's alleged deficient performance. *Hinton v. Alabama*, __U.S. __, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014), citing *Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)

III. May a trial court give a jury instruction that requires a jury to find knowledge of a criminal investigation merely because the defendant had committed an "unmistakable crime."

A. The "unmistakable crime doctrine" is valid law across at least five appellate districts.

The 4th District's holding in *State v. Barry* derived from a prior decision in *State v. Nguyen,* 4th Dist.Athens No. 12CA-14, 2013-Ohio-3170. which relied upon the 10th District's decision in *State v. Schmitz*, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617: "Whether defendant had actual notice of an impending investigation is irrelevant. When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." *Id. at ¶17.*

The State contends that the 4th District's determination to uphold the "unmistakable crime" doctrine was well reasoned and should be affirmed in this action. The 4th District is not alone in its application of the "unmistakable crime" doctrine derived from *Schmitz*. The 10th District originated the "unmistakable crime" idea in two prior decisions and ". . .affirmed tampering with evidence convictions, determining that the defendants "surely knew" that official investigations would likely commence after they had fired gunshots which, in both cases, resulted in death. See *State v. Cockroft,* 10th Dist. No. 04AP-608, 2005 Ohio 748, P 11; *State v. Jones,* 10th Dist. No. 02AP-1390, 2003 Ohio 5994, P 35. *State v. Barnes*, 6th Dist. Wood No. WD-07-024, 2008-Ohio-1854.

The 6th District Court of Appeals adhered to the "unmistakable crime" doctrine in *State v. Barnes*:

> Ohio courts have ruled that a defendant's knowledge that he committed a criminal act may itself establish knowledge that an investigation is likely. . . .Based on the foregoing, we find that the state in this case need not have shown actual knowledge of an ongoing or impending investigation; appellant knew he had committed a crime and the evidence demonstrated that he therefore had constructive knowledge that an official investigation was "likely to be instituted."
>
> For the foregoing reasons, viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable jury could have found beyond a reasonable doubt that appellant, knowing that an official proceeding or investigation was likely to be instituted, did destroy the checks with purpose to impair their value or availability as evidence in such proceeding. Accordingly, there was sufficient evidence to sustain a conviction of two counts of tampering with evidence, and the trial court did not err in denying the *Crim.R. 29* motion for acquittal. Appellant's first assignment of error is not well-taken.
>
> *Barnes* at ¶14 and 15.

The 7th District Court of Appeals also followed the "unmistakable crime" doctrine in *State v. Williams,* 7th Dist. Mahoning, No. 11 MA 185,2014-Ohio-1015; 2014 Ohio App. LEXIS 928, specifically noting cases from not only the 4th District, but the 6th, and 11th District Courts of Appeals as well:

> Various Ohio appellate courts have found that it is unnecessary for an offender to have actual notice of an impending investigation, because when the offender "commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." *State v. Brodbeck, 10th Dist. No. 08AP-134, 2008-Ohio-6961, ¶51* citing *State v. Schmitz, 10th Dist. No. 05AP-200, 2005-Ohio-6617, ¶17*; *State v. Barnes, 6th Dist. No. WD-07-024, 2008-Ohio-1854*; *State v. Kovacic, 11th Dist. No. 2010-L-065, 2012-Ohio-219, 969 N.E.2d 322*; *State v. Nyugen, 4th Dist.Athens No. 12CA-14, 2013-Ohio-3170.*
>
> *State v. Williams, id* at ¶24.

The *Williams* court even cites a pre-*Cavalier* decision in the 2nd District Court of Appeals in support of the "unmistakable crime" doctrine:

> Convictions under this section have been upheld simply when a defendant told the investigating detective she "threw the gun away" after the shooting. *State v. Powell,,* 2nd Dist., 176 Ohio App. 3d 28, 39, 2008-Ohio-1316, 889 N.E.2d 1047,.*State v. Williams,* 7th Dist. Mahoning, No. 11 MA 185,2014-Ohio-1015; 2014 Ohio App. LEXIS 928

While Appellant attempts to minimize the "unmistakable crime" doctrine and "constructive knowledge" relating to tampering with evidence as "inartful wording" describing a "permissive inference" (Merit Brief of Appellant, p. 8), the fact remains that at least five different appellate districts across the state have relied upon these holdings despite the 2nd District's position in *State v. Cavalier*. Accordingly, Appellee requests this court answer the certified question in the affirmative and uphold the law as it currently stands in the 4th, 6th, 7th, 10th, and 11th Appellate Districts.

B. The 4th District decision does not bypass this Court's decision in *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175.

The decision in *State v. Straley* held:

> A conviction for tampering with evidence pursuant to R.C. 2921.12(A)(1) requires proof that the defendant intended to impair the value or availability of evidence that related to an existing or likely official investigation or proceeding. *Id.*

Appellant mistakenly contends that *Straley* stands for the proposition that "a person is guilty of tampering only when she has knowledge of a likely investigation directly related to the hidden evidence." (Merit Brief of Appellant, p. 9)

Appellant ignores *Straley's* conclusion that what constitutes a 'likely official investigation' requires a factual determination. "Likelihood is measured at the time of the act of alleged tampering." *Straley*, id at ¶ **19.** Further, *Straley* does not go so far as to define, or limit the intent of the defendant in a tampering case.

The Appellee contends that the determination of a defendant's intent, as well as the likelihood of an official investigation in a tampering case necessarily require factual determinations by the trier of fact on both issues.

The 1st District Court of Appeals, in *In re JT*, 1st Dist., 2014-Ohio-5062; 21 N.E.3d 1136; 2014 Ohio App. LEXIS 4924 adjudicated a juvenile a delinquent child for

a Tampering with Evidence charge, finding that the decision in *Straley* was distinguishable:

> The present case is distinguishable [from *Straley*]. In this case, the police were working in the Northside neighborhood because multiple robberies had occurred there. Police officers saw a group of young men covering their faces, as if to participate in a robbery. Officer Graham saw J.T., who was wearing a black mask, cross the street and stand with his hand in his pocket. The police suspected that a robbery was about to occur and were investigating that possibility. Thus, there was evidence from which the trier of fact could have concluded that the handgun was related to an existing or likely investigation of a robbery. *See State v. Turner, 5th Dist. Stark No. 2014CA00058, 2014-Ohio-4678, ¶ 63-68*; *State v. Glunt, 9th Dist. Medina No. 13CA0050-M, 2014-Ohio-3533, at ¶ 6-16.*
>
> J.T. also argues that the state did not show that he knew that an official proceeding or investigation was in progress or about to occur at the time he removed the handgun from his pocket. We disagree. J.T. had just split off from a group of young men who were putting masks over their faces. Officer Graham testified that J.T. had looked directly at the uniformed officers who had stopped the other members of the group. Then, he had reached in his pocket, had walked toward some bushes, and had thrown something shiny into the bushes. Thus, there was circumstantial evidence to show that he knew that an investigation was ongoing or likely to occur. See *State v. Sharp, 3d Dist. Putnam No. 12-13-01, 2014-Ohio-4140 ¶ 31-32*; *Glunt at ¶ 16.*
>
> *In re JT*, at ¶12 and 13

Likewise, the 9th District Court of Appeals has distinguished the facts in the *Straley* case, finding a defendant guilty of tampering with evidence in *State v. Glunt*, *9th Dist. Medina No. 13CA0050-M* ,2014-Ohio-3533. In *Glunt*, the defendant was the girlfriend of a man involved in a bar fight with a knife. Surveillance video showed the defendant take the fully-extended knife, close it and put it in her coat pocket. After the incident the police searched the bar looking for the knife in question. Defendant was questioned and asked defendant specifically if she had the knife. Ms. Glunt answered in the affirmative and gave it to the officer. The investigating officer testified that the defendant in that case did not volunteer the fact that she had the knife, neither did she

immediately pull the knife out of her pocket when he approached her and began questioning.

The *Glunt* court held:

> Viewing the evidence in a light most favorable to the State, this Court concludes that there was sufficient evidence to convict Ms. Glunt of tampering with evidence in violation of *Revised Code Section 2921.12(A)(1)*. A rational trier of fact could have found that Ms. Glunt knew that an investigation was likely to ensue given that Mr. Robinson attempted to harm Mr. Talpas with a knife and that the knife would be potential evidence in his likely future prosecution. . . .While Ms. Glunt gave the knife to Sergeant Simpson when he asked for it, the jury could reasonably infer from the video and witness testimony that Ms. Robinson concealed and removed the knife from the scene with the purpose of impairing its availability for use as potential evidence in the investigation.
> *State v. Glunt, 9th Dist. Medina No. 13CA0050-M* ,2014-Ohio-3533

In both *In re JT* and *State v. Glunt,* the appellate courts reviewed the factual deteminations and upheld the tampering convictions while distinguishing *Straley*. In particular, the facts in *Glunt* are similar to those in the case at bar.

Appellant in this matter, as in *Glunt*, hid evidence prior to the initiation of an investigation, continued to hide the evidence once questioning began, failed to voluntarily release the hidden evidence until confronted directly, then voluntarily released the evidence to the investigating officer. Despite the fact the 9th District did not utilize the "unmistakable crime" doctrine in *Glunt*, circumstantial evidence was available in both cases from which a reasonable trier of fact could determine each defendant had knowledge that an investigation was likely to ensue given the situation.

"[I]t is not necessary for the State to set forth direct evidence of a tampering with evidence offense. . . (citations omitted) Circumstantial evidence may suffice." *Id.*

Appellee contends that the long-term significance of the decision in *State v. Straley* is minimal inasmuch as it can be limited to its unusual facts. In the matter sub

judice, the holding of *State v. Barry* does not bypass this Court's decision in *State v. Straley.*

C. The substance of the 4th District's alleged error.

1. Constructive knowledge is not a negligence standard contradicting the knowing mental state required for a tampering conviction.

Appellant argues that the 4th District decision in this matter created results inconsistent with *Straley*. In effect, Appellant contends that the 4th District watered down the "knowing" mental state specified in R.C.§2901.22(B) replacing it with a negligence standard. Appellant's argument simply goes too far.

R.C.§2901.22(B) states:

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C.§2901.22(D) states:

> A person acts negligently when, because of a substantial lapse from due care, the person fails to perceive or avoid a risk that the person's 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, the person fails to perceive or avoid a risk that such circumstances may exist.

R.C.§2901.22(B) is framed in terms of probability, whereas R.C.§2901.22(D) is couched in terms of possibility. This distinction is subtle, but important.

The constructive knowledge imputed to a defendant by the "unmistakable crime" doctrine, as in this case, falls squarely in line with the probability standard required by

R.C.§2901.22(B) for acting knowingly, not the possibility standard of R.C.§2901.22(D) for acting negligently.

For Tampering with Evidence "[t]here are three elements of this offense: (1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation." *State v. Straley, id.*.

The decision in *Straley* did not address the knowledge element of the offense. The certified conflict question in that case was: "Whether a tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related to the investigation." *Id.* That particular question specifically addresses only the third element of the subject offense, that of purpose to impair the availability or value of evidence in an investigation. Therefore, the decision in *Barry* is not, and cannot be inconsistent.

The General Assembly has not seen fit to limit, or define the knowledge requirement in question. "Constructive knowledge" does not replace the "knowing" mental state with a negligence standard which the General Assembly has not adopted. Rather, the "unmistakable crime" doctrine expands upon the mens rea requirement which was not fully defined by the General Assembly.

2. The 4th District use of a jury instruction did not create an irrebuttable presumption.

The commission of an unmistakable crime remains a factual determination to be made by the jury. The matter before the jury was whether a person who has committed

an unmistakable crime is considered to have constructive knowledge that an investigation is likely to be instituted. As stated previously, knowledge is an element of the offense. The instruction given is an accurate statement of the law. See *State v. Nguyen* State v. Nguyen, 4th Dist.Athens No. 12CA-14, 2013-Ohio-3170

The Appellant's testimony referenced previously indicated that the Appellant had, and knew she had, committed an unmistakable crime. It is up to the jury to determine whether the Appellant actually committed an unmistakable crime. The instruction states "When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation." (Tr. 282.) The jury was instructed immediately thereafter that the State must prove beyond a reasonable doubt each element of the crime to find the Appellant guilty. The jury was free to believe or disbelieve the testimony concerning "stuffing" the heroin.

In *State v. Nguyen*, infra. at ¶¶89, 91 the 4th District wrote:

> {¶89} …."When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation of the crime committed." *State v. Schmitz*, at ¶ 1 7. The victim's testimony, which again, the jury was free to believe, establishes that Nguyen committed unmistakable crimes.
>
> …
>
> **{¶91}** In addition, Nguyen argues there was no evidence he "did anything 'to impair the evidence's availability' " in an official proceeding or investigation. But under the statute, the offender does not have to actually impair the evidence's value or availability. It is sufficient that the offender alters, destroys, conceals, or removes the item "with purpose" to impair its value or availability. Moreover, the jury could logically conclude that was Nguyen's purpose because he committed unmistakable crimes and removed items used to facilitate those crimes from the victim's apartment before he left. And he expressed concern about the victim contacting law enforcement. Therefore, the evidence reasonably supports the conclusion that Nguyen tampered with evidence.

The jury was free to believe or disbelieve whether the Appellant had committed an unmistakable crime by "stuffing" the heroin in her vagina. The jury could reasonably conclude that her purpose was to conceal the heroin from any efforts by law enforcement to interdict the transport of the drugs or otherwise investigate drug trafficking on the highways, particularly when they stopped her vehicle for traffic violations and smelled marijuana. It becomes a jury question whether the Appellant committed an unmistakable crime. The instruction was proper and accurate and there was no irrebuttable presumption.

D. The terms "unmistakable crime" and "constructive knowledge" did not mislead the jury.

This Court recently analyzed the proper role and use of jury instructions by the trial court in *State v. White*:

> A trial court has broad discretion to decide how to fashion jury instructions, but it must "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), 553 N.E.2d 640 (1990), paragraph two of the syllabus. We require a jury instruction to present a correct, pertinent statement of the law that is appropriate to the facts. *State v. Griffin,* ___ Ohio St.3d ___, 2014-Ohio-4767, ___ N.E.3d ___, ¶ 5; *State v. Lessin,* 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993).

State v. White, Slip Opinion No. 2015-Ohio-492.

Appellee argues that the trial court's jury instructions in the case at bar were all relevant and necessary. Specifically, the inclusion of the instruction pertaining to knowledge of the commission of an unmistakable crime was a correct statement of the law, as well as wholly applicable to the facts in issue.

> The relevant principle for jury instructions is not one of abstract correctness, but is whether an instruction—even if a correct statement of law—is potentially misleading. *See State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981) ("Abstract rules

> of law or general propositions, even though correct, ought not to be given unless specifically applicable to facts in issue").
> *State v. White, id.*

There was absolutely nothing misleading about the jury instruction at issue. Furthermore, trial counsel made no objection to the use of this jury instruction. There was no plain error in the instruction given. The statement of law in the jury instruction was correct and any objection to the same would have been overruled. Therefore, an objection to the jury instruction most likely would not have resulted in an acquittal. Accordingly, Appellant's ineffective assistance assertion should not be subject to review by this Court.

Nonetheless, Appellant contends that counsel was ineffective by failing to object to the jury instruction at issue: "When an offender commits an unmistakable crime, the offender has constructive knowledge of an impending investigation." (Tr. 282.) That instruction reflects the law in the Fourth District. See *Nguyen*, supra.

In proving ineffective assistance of counsel, the Appellant must:

> 'first show that counsel's performance was deficient.' *Doles*, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. In satisfying the first prong, defendant must prove that his attorney 'made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.' Id. In satisfying the second prong, the defendant must show that his attorney's 'errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'

State v. Johnson, 4th Dist., No. 06CA650, 2007-Ohio-2176

The Appellant has not shown that counsel was not functioning as counsel guaranteed by the Sixth Amendment nor that his errors were so serious as to deprive Appellant of a fair trial. In fact, as argued above, the instruction recites the law. An objection would have been meritless.

Therefore, the State urges the Court to deny this assignment.

IV. Chelsey Barry's conviction was not based on insufficient evidence and was not against the manifest weight of the evidence.

A. The evidence was sufficient to support a conviction.

Appellant contends there was insufficient evidence to support the tampering conviction: "Here, the State presented no evidence that Chelsey hid the drugs after the troopers began investigating her for potential drug charges." (Merit Brief of Appellant p.14) The Appellee argues that more than sufficient evidence was presented at trial, including Appellant's own testimony regarding her reasons for hiding the drugs in question. (see *Statement of Facts*, *infra* at pp. 6-7) Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Beverly*, Slip Op. No. 2015-Ohio-219, ¶ 15, quoting *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 70, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

Furthermore, Appellant had the opportunity to admit to the concealment of the drugs during the investigation itself, but only chose to voluntarily surrender the hidden drugs after the officer questioned her. Even assuming arguendo Appellant's argument regarding "constructive knowledge" is correct, after the traffic stop and commencement of the actual investigation Appellant continued to conceal the contraband drugs with full knowledge that an investigation was under way.

In other words, though the initial act of concealment started in Middletown, Ohio, Appellant continued to conceal the contraband drugs well into the investigation, after the traffic stop, after she was placed in the cruiser, after questioning commenced, even after being handcuffed and told by Trooper Lewis that he would obtain a body cavity search

warrant if necessary. (T. p. 139) Appellant did not voluntarily make an admission that she was concealing heroin until after being transported to the Patrol Post and being separated from the other passengers in the vehicle.

Therefore, a plethora of evidence was presented that Appellant concealed the drugs "knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted[.]" R.C. §2921.12(A). The evidence presented fully supported both the Appellee's position that Appellant's initial act of concealment was done with "constructive knowledge" based upon her knowledge of an "unmistakable crime", and that concealment continued after the actual commencement of the investigation.

Given the evidence presented there was no reasonable probability that a motion to dismiss would have been granted. Therefore, Appellant's assertion that trial counsel was ineffective in that regard has no merit.

Accordingly, the Appellant's conviction was fully support by sufficient evidence and this assignment of error should be denied.

B. Chelsey's conviction is not against the manifest weight of the evidence.

Appellant's second assignment of error addresses the manifest weight of the evidence. Reviewing the entire record there simply is no indication the jury 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. Beverly*, Slip Op. No. 2015-Ohio-219, ¶ 15, quoting *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 70, quoting *State v. Jenks*, 61 OhioSt.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

Appellant states in her brief that "no evidence creates a reasonable inference that [Appellant] hid the drugs knowing that an investigation to find the drugs was likely." (Merit Brief of Appellant p.17) Appellant stated in her testimony that she was placing the heroin in her vagina to conceal it from the police. (Tr. pp. 224-225)

In addition, Appellant testified that she looked at her co-Defendants like they were "...all crazy. They were like, this is the whole reason that this is happening, so I don't know what you thought, but this is why you are here." (Tr. p. 223)

According to her testimony, the purpose of Appellant's presence was to conceal the heroin from the police during the trip from Middletown to Huntington, WVA. The "whole purpose" was to hide the drugs from officers patrolling the highways in an effort to stem to flow of drugs in the State of Ohio. The fact that she hid the drugs is evidence that she knew an investigation could be instituted.

Therefore, the State contends that the trier of fact did not clearly lose its way and create such a manifest miscarriage of justice that the conviction must be reversed.

The State urges the Court to deny this assignment.

Conclusion

Appellee respectfully requests this Court affirm the 4th District Court of Appeals decision in this matter, answer the certified question in the affirmative, and uphold Appellant's conviction and sentence for Tampering with Evidence.

Jay S. Willis
Assistant Prosecuting Attorney
Scioto County, Ohio
612 Sixth Street, Rm E
Portsmouth, OH 45662
Sup. Ct. # 0064884
740-981-3112

Shane A. Tieman
Assistant Prosecuting Attorney
Scioto County, Ohio
612 Sixth Street, Rm E
Portsmouth, OH 45662
Sup. Ct. # 0070142
740-981-3112

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon Stephen Hardwick, Attorney for Chelsey Barry, Assistant Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio 43215, by regular US mail service this 1st day of April, 2015.

Respectfully submitted,

By: _____

Jay S. Willis, #0064884
Shane A. Tieman, #0070142

Assistant Prosecuting Attorney
612 Sixth St., Room E Courthouse Annex
Portsmouth, Ohio 45662
Telephone: 740.529.1118
Facsimile: 740.876.8916