IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NOS. 2014-1984 & 2014-2064
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL AND
V.	:	CERTIFIED CONFLICT FROM THE
	:	SCIOTO COUNTY COURT OF APPEALS,
CHELSEY BARRY,	:	FOURTH APPELLATE DISTRICT,
	:	CASE NO. 13CA3569
DEFENDANT-APPELLANT.	:	

REPLY BRIEF OF APPELLANT CHELSEY BARRY

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INTRODUCTION

Chelsey Barry is not guilty of tampering with evidence. At the time she hid drugs in her body, no one was likely to report her drug trafficking offense. So the Fourth District was wrong to affirm an instruction that *required* the jury to find that she had "constructive knowledge" of a likely investigation solely because her drug-trafficking crime was unmistakable *only to her*.

This Court should reverse the Fourth District's decision, hold that there is no such thing as an "unmistakable crime doctrine," and vacate Chelsey Barry's conviction for tampering with evidence.

ARGUMENT

Proposition of Law:

For purposes of tampering with evidence, a jury may not be instructed that it must find that 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. There is no such thing as an "unmistakable crime doctrine."

Outside of ten Ohio intermediate appellate court decisions, one of which is the decision in this case, there is nothing labeled "the unmistakable crime doctrine." In fact, the words "unmistakable crime" never appear together in any reported case from any other state or federal court in the United States.[1] And even within Ohio, only the Fourth District's decision in this case holds that a jury *must* find knowledge of a likely investigation when the defendant's underlying crime was unmistakable *only to her*.

As Table 1 on the following page shows, in eight cases involving the sufficiency and weight of the evidence, courts have used the words "unmistakable crime" to explain when a jury may infer that a defendant knows that an investigation is likely. In a ninth case, the Second District expressly held that the words "unmistakable crime " apply only to a crime that was unmistakable to someone likely to report the offense.

[1] Searches of Westlaw and Lexis databases conducted on April 14, 2015.

Table 1
All State or Federal Cases Using the Words "Unmistakable Crime" Together

Citation	Holding
State v. Schmitz, 10th Dist. Franklin No. 05AP-200, 2005-Ohio-6617.	A reasonable jury could find that the defendant knew an investigation was likely when he molested a nine-year-old and threatened the child not to report him.
State v. Barnes, 6th Dist. Wood No. WD-07-024, 2008-Ohio-1854.	A rational jury could find that the defendant knew that an investigation into his check-fraud crime was likely when he tore up a fraudulent check after a clerk asked him to leave and come back but before the police questioned him upon his return.
State v. Broadbeck, 10th Dist. Franklin No. 08AP-134, 2008-Ohio-6961.	The jury could infer that investigation was likely after the defendant shot the victim in the head.
State v. Koviac, 11th Dist. Lake No. 2010-L-065, 2012-Ohio-219.	The defendant's crime was unmistakable because he used a knife to cut someone's face causing bleeding.
State v. Pruitt, 11th Dist. Trumbull No. 2011-T-0047, 2012-Ohio-1134.	The evidence was sufficient because it showed that the defendant had robbed a JCPenny store and had been pursued by loss prevention staff before she hid the purse she had stolen.
State v. Cavalier, 2d Dist. Montgomery No. 24651, 2012-Ohio-1976, ¶ 51.	The evidence was insufficient to support a conviction because her crime was not unmistakable to anyone likely to report the offense.
State v. Nguyen, 4th Dist. Athens No. 12CA14, 2013-Ohio-3170.	The jury could find that a defendant knew that an investigation was likely when he tied up a woman, raped her, and threatened to kill her nephew.
State v. Williams, 7th Dist. Mahoning No. 11MA185, 2014-Ohio-1015.	The evidence was sufficient when the defendant hid a gun while fleeing after shooting someone.
State v. Barry, 4th Dist. Scioto No. 013CA3569, 2014-Ohio-4452.	If a defendant conceals evidence of a crime unmistakable only to her, the jury must find that she knew that an investigation was likely.

As the table shows, six Ohio appellate districts have issued ten opinions using the label "unmistakable crime," but until the Fourth District decided this case, the words were used only to describe permissive inferences when a defendant's crime was unmistakable to someone likely to report the offense.

Finally, this is a matter of substance, not just label. The State has failed to cite any other case in which a court has held that a defendant's knowledge that she committed a crime, by itself, resulted in a conclusive presumption that she knew an investigation was likely. To the contrary, this Court has noted that there are "constitutional protections against impermissible burden-shifting presumptions and conclusive presumptions[.]" *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 102, citing *Sandstrom v. Montana*, 442 U.S. 510, 527-528, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) (Rehnquist, J., concurring).

II. *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, does not support the State's position.

The State correctly explains that "that what constitutes a 'likely official investigation' requires a factual determination." Brief at 13. The State is also correct that "[l]ikelihood is determined at the time of the act of tampering." *Id.*, quoting *Straley* at ¶ 19. But what the State misses is that the jury in this case *was not allowed to make a factual determination* as to whether an investigation was likely. Once the jury found that Chelsey's crime was unmistakable to her, the trial court's instruction *required* the jury to find that she had knowledge of a likely investigation. T.p. 282.

The State also points to two cases in which lower courts applied *Straley* to sufficiency-of-the-evidence cases. Brief at 13-15. But neither case holds that the jury must find knowledge of a likely investigation solely because the defendant had committed a crime unmistakable only to the defendant. To the contrary, both cases concerned crimes committed in a public space in front of witnesses likely to report the crime. *State v. Glunt*, 11th Dist. Medina No. 13CA0050-M, 2014-Ohio-3533, ¶ 2 (the defendant hid a knife used in a bar fight); *In re. J.T.*, 2014-Ohio-5062, 21 N.E.3d 1136, ¶ 13 (1st Dist.) (the defendant threw evidence into a bush after he "looked directly at the uniformed officers who had stopped other members of [the defendant's] group.").

Further, both *J.T.* and *Glunt* involved permissive inferences—the jurors were permitted to infer knowledge of a likely investigation from the facts. *J.T.* at ¶ 12; *Glunt* at ¶ 16. By contrast, the jurors in Chelsey's case were required to convict her if they found that her crime was "unmistakable" only to her. T.p. 282.

III. The State admits that its proposed rule would expand the definition of "knowing."

The State admits that its proposed "'unmistakable crime'" doctrine "expands upon the mens rea requirement" in R.C. 2901.22(B). Brief at 16-17. The State defends this expansion because the term "knowing" "was not fully defined by the General Assembly." *Id.* at 17. But the General Assembly has instructed courts to strictly construe criminal statutes against the State, so there is no basis to "expand" the mens rea for tampering with evidence:

> We have, however, emphasized that " 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.' " *State v. Young*, 62 Ohio St.2d 370, 374, 406 N.E.2d 499 (1980), quoting *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). This canon of strict construction, also known as the rule of lenity, is codified in R.C. 2901.04(A), which provides that sections of the Revised Code that define offenses or penalties "shall be strictly construed against the state, and liberally construed in favor of the accused." Under the rule, ambiguity in a criminal statute is construed strictly so as to apply the statute only to conduct that is clearly proscribed. *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

Straley at ¶ 10.

This Court should decline the State's invitation to "expand" the meaning of a criminal statute.

IV. The State misunderstands the conclusive presumption created by its "unmistakable crime" instruction.

The State's argument that the Fourth District did not create a conclusive presumption misses the point. Brief at 18-19. Contrary to the State's assertion, Chelsey does not argue that the jury was required to find that she hid evidence. Instead, the conclusive presumption is that if the jury found that her crime was unmistakable to her, the jury was required to find that she hid the evidence knowing that an investigation was likely.

As Justice Scalia has explained, conclusive presumptions prevent the jury from fulfilling its role as fact finder:

> The Court has disapproved the use of mandatory conclusive presumptions not merely because it "'conflict[s] with the overriding presumption of innocence with which the law endows the accused,'"

> *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952)), but also because it "'invade[s] [the] factfinding function' which in a criminal case the law assigns solely to the jury," 442 U.S., at 523 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978)).

Carella v. California, 491 U.S. 263, 268, 105 L.Ed.2d 218, 109 S.Ct. 2419 (1989) (Scalia, J., concurring in judgment).

In this case, the trial court imposed a conclusive presumption that required the jury to find that Chelsey knew an investigation was likely solely because she knew she was committing a crime. Accordingly, the instruction usurped the role of the jury by requiring the jury to convict Chelsey without any evidence that she hid drugs knowing that an investigation was likely.

V. Trial counsel was ineffective for failing to object to the "unmistakable crime" instruction.

In response to Chelsey's ineffective assistances of counsel claim, the State rests its argument entirely on the assertion that the "unmistakable crime" instruction was correct. Brief at 20. But as explained above, the instruction misstates Ohio law and relieves the State of its burden to prove that she acted knowingly. As a result, the State is left with no persuasive response to Chelsey's ineffective assistance of counsel argument. This Court should vacate her conviction because there is a reasonable probability that a properly-instructed jury would have acquitted her of tampering. *See Strickland v. Washington*, 466 U. S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

VI. The State attempts to retroactively change the actus reus of Chelsey's tampering charge.

The State now makes an argument it did not make to the jury—that denying to the trooper that she had drugs could serve as the basis for her tampering charge. Brief at 22. At trial, the State's sole argument to the jury was that Chelsey committed tampering by placing and keeping the drugs in her body. T.p. 251-53. And while it's true that the State did mention her conduct with the trooper at trial, the State did so only in an effort to prove that her participation in the trafficking was not coerced by her co-defendants. T.p. 247-48.

In addition, the State's bill of particulars made no mention of any tampering during her interaction with the troopers. To the contrary, the bill explained that Chelsey "was questioned about the matter and confirmed she was concealing something on her person" and that she "*voluntarily* forfeited a plastic baggie containing approximately 70 grams of suspected brown powder heroin." (Emphasis added.) Bill of Particulars, T.d. 13 (Jun. 14, 2013). As a result, the State's appellate argument changes "the conduct of the defendant alleged to constitute the offense. . . ."Crim.R. 7(E). And while it's arguable whether the State could have amended its bill at trial, nothing permits the State to retroactively do so on appeal.

The State also asserts that Chelsey's failure to immediately remove the drugs once her car was stopped could serve as the basis for the tampering conviction. Brief at 21-22. But as this Court explained in *Straley*, the likelihood of an investigation "is

measured at the time of the act of alleged tampering." *Id.* at ¶ 19. In that case, the defendant hid the evidence within eyesight of the police, but this Court found the evidence insufficient because no investigation was likely at the time of the concealment. *Id.* at ¶ 3, 19. Accordingly, the State cannot base a tampering conviction on her failure to act during the traffic stop, which occurred long after act of concealment.

Finally, in a criminal case, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Carella v. California*, 491 U.S. 263, 269, 105 L.Ed.2d. 218, 109 S.Ct. 2419 (1989) (Scalia, J., concurring in judgment), quoting *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350 (1946). The State charged and tried Chelsey for tampering with evidence by hiding drugs in her body, not by what she said to the trooper. This Court should not permit the State to retroactively change the actus reus of the charged offense.

CONCLUSION

This Court should reverse the decision of the Fourth District, answer the certified question in the negative, and vacate Chelsey's conviction for tampering with evidence. In the alternative, this Court should either remand this case for a new trial on the tampering charge or remand this case to the court of appeals to apply this Court's decision to Chelsey's tampering charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to Assistant Prosecuting Attorney Jay Willis, jwillis@sciotocountypo.org, on this 17th day of April, 2015.

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