

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	<b>OPINION</b>
Plaintiff-Appellee,	:	
- vs -	:	<b>CASE NO. 2011-A-0011</b>
JOSE ALICEA SEIJO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2009 CR 330.

Judgment: Affirmed.

*Thomas L. Sartini*, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

*Gregory S. Robey*, Robey & Robey, 14402 Granger Road, Cleveland, OH 44137 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Jose Alicea Seijo, appeals his conviction of Obstructing Justice in the Ashtabula County Court of Common Pleas. The issues to be determined by this court are whether Seijo’s conviction was supported by sufficient evidence and/or against the manifest weight of the evidence, whether a recording of radio traffic played for the jury constituted inadmissible hearsay, whether the prosecutor improperly misled the court into allowing the recording of radio traffic to be played, and whether Seijo was entitled to an instruction on the lesser included offense of Attempted

Obstruction of Justice. For the reasons that follow, we affirm the decision of the court below.

{¶2} On November 13, 2009, Seijo was indicted by the Ashtabula County Grand Jury on a single count of Obstructing Justice, a felony of the fifth degree in violation of R.C. 2921.32(A)(3).

{¶3} On November 24, 2009, Seijo was arraigned and entered a plea of not guilty to the charge.

{¶4} From September 21 to 23, 2010, Seijo's case was tried before a jury. The following testimony was offered on behalf of the State.

{¶5} John Bainton, a detective with the Ashtabula Police Department, testified that, on the evening of July 31 and morning of August 1, 2009, he was in charge of the investigation of Dareus Haskins. It was jointly stipulated "that Dareus Haskins was being sought by the Ashtabula Police Department for the commission of a felony offense and he was in fact indicted on a felony charge."

{¶6} Detective Bainton testified that Haskins was a resident of Bonniewood Estates, and was reported to be "causing some type of disturbance possibly on a bicycle riding around." Haskins was described as wearing "blue jeans and a white T-shirt." Detective Bainton went to Bonniewood Estates in plain clothes along with other, uniformed police officers. Detective Bainton parked his unmarked car on Glover Drive, near the intersection with Larson Lane.<sup>1</sup> Detective Bainton observed a person matching Haskins' description exit and reenter an apartment a couple of times, before exiting a third time and walking in the direction of Larson Lane.

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1. Glover Drive and Larson Lane run parallel to each other, but are connected by a bend or "dogleg" in the road at the end of Larson Lane.

{¶7} Detective Bainton left his vehicle to search for the person on foot but did not find him. While searching, Detective Bainton noticed two men and a woman exit a nearby apartment. One of the men matched Haskins' description as a light-skinned black male. The man identified himself as Seijo. Detective Bainton testified that Seijo was speaking English with a Spanish accent.

{¶8} While speaking with Seijo, Detective Bainton was joined by then-Sergeant Dennis R. Dibble and Lieutenant Rodney Blaney, who continued the questioning. Seijo was allowed to leave and walked down Larson Lane and out of sight toward Glover Drive. Detective Bainton stayed with Lieutenant Blaney and together they "observed another subject coming from the north down Glover Drive that was wearing blue jean shorts, [and] a white tank top," a few minutes after releasing Seijo. They began to close on the subject from a distance of between 90 and 120 feet, through the backyards of the Larson Drive residences.

{¶9} Detective Bainton testified that he observed Seijo approach the subject and "say something to the effect of \* \* \*, hey, man, the cops are looking for you, you need to get out of here." The subject turned and looked in the direction of the approaching officers, who had begun "double-stepping, almost running to catch up." The subject then ran toward the west, climbing a fence and escaping into the woods on the far side of Ohio Avenue.

{¶10} Detective Bainton testified that he recognized Seijo by his clothing and accent and because "he was coming from the area we had just left him." Detective Bainton met Haskins at the police department several days later and "almost immediately" recognized him as the person he had seen on the morning of August 1, 2009: "same general identification that we made that night, blue jean shorts, tank top \* \*

\*, same size, height, weight,” and “appeared to be [wearing] the same exact clothes he was wearing the night he fled from us.”

{¶11} Dennis R. Dibble, a lieutenant with the Ashtabula Police Department at the time of trial, testified that he was involved in the search for Dareus Haskins on the morning of August 1, 2009. Lieutenant (then Sergeant) Dibble joined Detective Bainton after Bainton initially detained Seijo. Lieutenant Dibble testified that Seijo was speaking English with a Spanish accent and claiming that he was not Dareus Haskins. Lieutenant Dibble took Seijo’s information back to his police cruiser and ran it through the LEADS system to confirm his identity. After releasing Seijo, Lieutenant Dibble left to search another part of Bonniewood Estates.

{¶12} After learning from Lieutenant Blaney that Seijo had warned Haskins that the police were looking for him, Lieutenant Dibble made the decision to arrest Seijo for Obstructing Justice.

{¶13} Lieutenants Dibble and Blaney located the residence where Seijo was staying. When Seijo came to the door, Lieutenant Dibble recognized him as the person they had detained earlier. They advised Seijo that he was under arrest and Seijo attempted to flee. Patrolman Christopher DeFina, just arrived on the scene, tackled Seijo and they began to struggle on the ground. Lieutenant Dibble deployed his taser on Seijo twice in order to place him in handcuffs. Lieutenant Dibble deployed the taser a third time when Seijo resisted entering the police cruiser.

{¶14} Christopher DeFina, a patrolman with the Ashtabula Police Department, testified that he was involved in the search for Dareus Haskins on the morning of August 1, 2009. Patrolman DeFina testified regarding his role in effecting Seijo’s arrest.

{¶15} Rodney Blaney, a lieutenant with the Ashtabula Police Department, testified that he was involved in the search for Dareus Haskins on the morning of August 1, 2009. Lieutenant Blaney testified that he was familiar with Haskins prior to the search on the morning of August 1, 2009, and that Haskins was believed to be staying on Glover Drive.

{¶16} Lieutenant Blaney testified that he joined Detective Bainton and Lieutenant Dibble while they were questioning Seijo. Seijo, speaking with an accent, stated that he knew who Haskins was but did not know where he was at that time. Lieutenant Blaney continued speaking with Detective Bainton after Seijo was released and Lieutenant Dibble returned to patrol.

{¶17} Lieutenant Blaney described the subject that came into view on Glover Drive as “a tall \* \* \* light-skinned black male \* \* \* wearing a white top of sorts and blue jean bottoms.” Lieutenant Blaney testified that, “by build and from my past experience with Mr. Haskins, I was very, very confident that it may be him.” He and Detective Bainton “started walking over there to verify whether it was him or not.” The closer they came, “it became apparent that it was in fact [Haskins].” As they drew closer, Lieutenant Blaney “saw Mr. Seijo crossing just across the street and \* \* \* walking up approaching Mr. Haskins.”

{¶18} Lieutenant Blaney testified that Seijo yelled, “Hey, Dareus. Better get out of here, man. The police are looking for you.” Haskins stopped, turned, and looked in the direction of the approaching officers. Seijo repeated, “You better get out of here. The police are looking for you.” Haskins then turned and fled.

{¶19} Lieutenant Blaney testified that he was certain the person they observed was Dareus Haskins from “multiple” prior encounters: “he has very distinct features”;

“he’s light-skinned”; “he had cornrows or hair in a cornrow style”; and “he had a little bit of a fade beard around his jaw line.”

{¶20} Lieutenant Blaney also testified regarding his role in effecting Seijo’s arrest for Obstructing Justice and the struggle to subdue Seijo.

{¶21} The following day, August 2, 2009, Lieutenant Blaney met Seijo at the jail for booking. Lieutenant Blaney testified that Seijo asked about the charges. Lieutenant Blaney explained the charge and Seijo responded, “you can’t do that? I said, no you can’t do that. [Seijo] said, well, I didn’t know.”

{¶22} After the State finished presenting its case, counsel for Seijo moved for acquittal pursuant to Crim.R. 29, which the trial court denied. The following testimony was offered on behalf of Seijo.

{¶23} Sue Ann Bittner, a resident of Bonniewood Estates, testified that she had seen Dareus Haskins earlier in the evening on July 31, 2009. She told Haskins that he was not welcome and she had her daughter call the police. Bittner testified that Haskins left riding a bicycle. “A few minutes later,” Bittner saw a “light-haired \* \* \* white” man run by her, wearing dark clothing, but it was not Haskins. Bittner testified that she told the police that the man they were pursuing was not Haskins. Bittner testified that she had been speaking with Seijo earlier, but that he had returned home prior to the incident with the white man.

{¶24} Brandy McDonald, a resident of Bonniewood Estates, testified that she had seen Haskins earlier that evening and had told him to go away, which he did on a bicycle. She described Haskins as wearing a white T-shirt and blue jeans, but not having cornrows. She testified that Seijo was there, speaking with her boyfriend, Miguel Vasquez. At this point, a man named Josh came walking toward them. Police officers

shined a flashlight at Josh and yelled, “stop Dareus.” Josh ran away. McDonald testified that she advised the police that the person they were chasing was not Haskins.

{¶25} Miguel Vasquez testified that he was in Bonniewood Estates that evening visiting his girlfriend, Brandy McDonald. Vasquez testified that he saw Haskins arguing with Bittner before leaving on a bicycle, and, later, the police stop and question Seijo. Vasquez testified that Seijo went home and, then, a man ran by being chased by the police.

{¶26} Dareus Haskins testified that, on the night in question, he was in Bonniewood Estates but left on his bicycle when he learned the police were looking for him. He testified that he returned to Bonniewood Estates later that evening, but that he never met Seijo or ran from the police. He testified that he was wearing a white tank top and blue jean shorts on the night in question, and several days later when he surrendered himself to police custody.

{¶27} Xavier Huertas, a resident of Bonniewood Estates, testified that he observed the police arrest Seijo.

{¶28} Joshua Annick, a white male, testified that on the morning of August 1, 2009, he was walking on Glover Drive in Bonniewood Estates and met Seijo, an acquaintance. Seijo asked him how he was doing and “about ten seconds later I got a flashlight on me, and they said, there he is right there \* \* \*. And \* \* \* I knew it was the police, and as I was running I jumped over the fence and I hid.” Annick could not recall what he was wearing that morning and did not recall seeing anyone else in the area.

{¶29} Kayla Cutlip, a resident of Bonniewood Estates at the time of the incident, testified that she observed the police question Seijo that evening. She testified that

“they had a flashlight shining it in his face,” and “then they told him that the person they were looking for had a scar on their face, that it wasn’t him.”

{¶30} Following this testimony, counsel for Seijo renewed the motion for acquittal, which the trial court again denied.

{¶31} The State, over the objection of Seijo’s counsel, called Lieutenant Blaney as a rebuttal witness.

{¶32} Lieutenant Blaney testified regarding two radio transmissions played for the jury. The first, received just before midnight on July 31, 2009, recorded the following: “-- he left on a mountain bike, green mountain bike, headed northbound on Glover. White T-shirt, blue jeans.” Lieutenant Blaney identified the speaker as a Patrolman Hildebrand. The second recorded transmission was made by Detective Bainton, following the subject’s flight from police: “-- wearing a light muscle (sic) shirt, blue jean shorts.”

{¶33} Lieutenant Blaney further testified on rebuttal that he is “very” familiar with Joshua Annick from prior encounters, and reaffirmed his earlier testimony that the subject he pursued was Haskins, not Annick.

{¶34} On September 24, 2010, the jury returned a verdict finding Seijo guilty of Obstructing Justice.

{¶35} On January 6, 2011, a sentencing hearing was held and a written Judgment Entry of Sentence was issued. The trial court sentenced Seijo to two years of community control and imposed a fine of \$300.

{¶36} On February 3, 2011, Seijo filed his Notice of Appeal. On appeal, Seijo raises the following assignments of error:



{¶37} “[1.] The jury verdict finding the Defendant-Appellant guilty is not supported by the weight of the evidence.”

{¶38} “[2.] Appellant’s right under the Sixth and Fourteenth Amendments was violated when testimonial hearsay was introduced at trial.”

{¶39} “[3.] Appellant’s right[s] to a fair trial under the Sixth and Fourteen Amendments were violated because of prosecutorial misconduct.”

{¶40} “[4.] The trial court erred to the prejudice of the Defendant-Appellant in overruling his motions for a directed verdict made in line with Ohio Rule of Criminal Procedure 29.”

{¶41} “[5.] The Defendant-Appellant was prejudiced by the Court’s failure to give an instruction on the lesser included offense of attempted obstruction of justice.”

{¶42} Seijo’s assignments of error will be considered out of order. Seijo’s first and fourth assignments of error, regarding the manifest weight and sufficiency of the evidence, will be considered jointly.

{¶43} The manifest weight of the evidence and the sufficiency of the evidence are distinct legal concepts. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 44. With respect to the sufficiency of the evidence, “[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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶44} Whereas “sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, \* \* \* weight of

the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.* An appellate court considering whether a verdict is against the manifest weight of the evidence must consider all the evidence in the record, the reasonable inferences, the credibility of the witnesses, and whether, "in resolving conflicts in the evidence, 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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶45} "Since there must be sufficient evidence to take a case to the jury, it follows that 'a finding that a conviction is supported by the *weight* of the evidence necessarily must include a finding of sufficiency.'" (Emphasis sic.) *Willoughby v. Wutchiett*, 11th Dist. No. 2002-L-165, 2004-Ohio-1177, ¶ 8, quoting *State v. Roberts*, 9th Dist. No. 96CA006462, 1997 Ohio App. LEXIS 4255, \*5 (Sept. 17, 1997); *Thompkins* at 388 ("[a] reversal based on the weight of the evidence \* \* \* can occur only after the State both has presented *sufficient evidence* to support conviction and has persuaded the jury to convict") (emphasis sic), quoting *Tibbs v. Florida*, 457 U.S. 31, 42-43, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

{¶46} In order to convict Seijo of Obstructing Justice, the State had to prove, beyond a reasonable doubt, that he, "with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime or to assist another to benefit from the commission of a crime, \* \* \* warn[ed] the other person \* \* \* of impending discovery or apprehension." R.C. 2921.32(A)(3).

{¶47} Seijo argues that his conviction is not supported by sufficient evidence because the testimony of both Detective Bainton and Lieutenant Blaney was that Haskins “did not flee until he saw the police coming for him with a police dog.” Thus, there was no evidence that Seijo’s warning was the cause of Haskins’ flight. Appellant’s Brief at 24. We disagree. The statute merely requires that Seijo warn Haskins of impending discovery or apprehension; it does not require any particular response to the warning on Haskins’ part. *State v. Mercado*, 8th Dist. No. 84559, 2005-Ohio-3429, ¶ 20 (“R.C. 2921.32 does not require that the offender’s actions actually hamper or impede the process of bringing a criminal to justice”) (citation omitted).

{¶48} Seijo argues generally that his conviction is against the manifest weight of the evidence based on the inherently improbable nature of the State’s witnesses’ testimony. Seijo maintains that the State’s testimony required the jury to conclude that Haskins would stay in the Bonniewood Estates complex and walk around in the open despite the fact that his presence was reported to the police, he was under indictment for a felony, and there were a large number of police officers patrolling the complex looking for him.

{¶49} Seijo notes that multiple witnesses testified on his behalf that it was Joshua Annick, not Dareus Haskins, who fled from police. Seijo claims the testimony of Annick himself is especially compelling, since it exposed him to potential criminal liability and there was no motive, other than the truth, for him to so testify.

{¶50} Seijo points to contradictions in the testimony of the police officers. For example, Detective Bainton testified that Seijo approached Haskins from the front and only gave him one warning without addressing him by name. Lieutenant Blaney

testified that Seijo approached Haskins from behind and gave two verbal warnings, addressing him as “Dareus” in the first of them.

{¶51} Finally, Seijo argues that the police officers had a motive to concoct the story that Seijo warned Haskins that the police were looking for him in order to avoid possible reprimand and liability for injuries suffered by Seijo during his arrest.

{¶52} These arguments, while bearing on the weight and credibility of the witnesses, do not render the jury’s decision to accept the officers’ testimony a manifest miscarriage of justice so as to require reversal. The officers’ testimony was consistent that Seijo knew that they were looking for Haskins and that, minutes later, Seijo met Haskins and warned him of their presence and purpose. There is nothing inherently improbable about the State’s version of events.

{¶53} There is also considerable inconsistency among the defense witnesses’ testimony. Bittner and Vasquez testified that Seijo had returned home prior to the flight of the subject. McDonald and Annick testified that Seijo was on the street at the time of the flight. Although he claims it improbable that Haskins would expose himself on the street if he knew the police were looking for him, Annick testified on Seijo’s behalf that he exposed himself in Bonniewood Estates despite knowing that he was not supposed to be there and that there was a warrant out for his arrest.

{¶54} In the present case, the testimony of the State’s witnesses and the testimony of Seijo’s witnesses were in direct conflict as to whether it was Haskins or Annick who fled from the police and whether Seijo gave a verbal warning. When there is competent, credible evidence supporting either party’s position, this court will not reverse a verdict for being against the manifest weight of the evidence. *State v. Hanusosky*, 11th Dist. No. 2008-L-065, 2009-Ohio-3409, ¶ 93 (“although an appellate

court must act as a ‘thirteenth juror’ when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder’s determination of the witnesses’ credibility”) (citation omitted).

{¶55} The first and fourth assignments of error are without merit.

{¶56} Under the second assignment of error, Seijo argues that the trial court committed prejudicial error by allowing two recordings of radio traffic to be played before the jury. Seijo maintains these recordings were unauthenticated and constituted testimonial hearsay.

{¶57} “[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence.” *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). Likewise, “[t]he trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception.” *State v. Dever*, 64 Ohio St.3d 401, 410, 596 N.E.2d 436 (1992).

{¶58} With respect to authentication, the Ohio Rules of Evidence provide that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evid.R. 901(A). In the case of an audio recording, “[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording,” may be made “by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.” Evid.R. 901(B)(5).

{¶59} In the present case, Lieutenant Blaney's testimony identifying the speaker and the circumstances of the radio transmissions was sufficient to authenticate the recordings.

{¶60} Both audio clips, however, contain hearsay, defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Both clips provide descriptions of what Haskins was wearing on the night of July 31, 2009, and the first clip further provides that he was riding a green mountain bike on Glover Drive.

{¶61} The State maintains that the present sense exception to the hearsay rule applies: "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Evid.R. 803(1). While this exception applies to the second audio clip, it does not apply to the first, which is the description given by a direct witness but reported by a police officer, who did not witness the event/condition described.

{¶62} The admission of the first recording, however, was harmless beyond a reasonable doubt. Bittner testified that she had her daughter contact the police to complain of Haskins' presence and that he departed by riding a bicycle north on Glover Drive. She also described him as wearing a white T-shirt and shorts. Detective Bainton testified that, prior to departing for Bonniewood Estates, he "received information from dispatch that Dareus was back down in the Bonniewood area, \* \* \* causing some type of disturbance possibly on a bicycle riding around," and wearing "blue jeans and a white T-shirt." Likewise, Lieutenant Blaney testified that he was advised by dispatch that Haskins was in the Bonniewood Estates area, wearing a white shirt and jeans. Thus,

the first recording contributed nothing that was not already contained, without contradiction, in the evidentiary record. *State v. Williams*, 38 Ohio St.3d 346, 350, 528 N.E.2d 910 (1988) (the erroneous admission of hearsay, cumulative to the testimony of other witnesses at trial, constitutes harmless error).

{¶63} The second assignment of error is without merit.

{¶64} In the third assignment of error, Seijo claims his conviction should be reversed for prosecutorial misconduct. Specifically, Seijo asserts that the prosecutor misled defense counsel regarding the nature of Lieutenant Blaney's rebuttal testimony. Seijo also asserts that the prosecutor's closing argument exceeded what the evidence in the record reasonably demonstrated.

{¶65} With respect to rebuttal testimony, "[i]t is within the trial court's discretion to determine what evidence is admissible as proper rebuttal." (Citation omitted.) *State v. McNeill*, 83 Ohio St.3d 438, 446, 700 N.E.2d 596 (1998). The purpose of rebuttal testimony is "to explain, refute, or disprove new facts introduced into evidence by the adverse party; it becomes relevant only to challenge the evidence offered by the opponent, and its scope is limited by such evidence." *Id.*

{¶66} In the present case, the prosecutor advised the trial court, during a discussion of the exhibits, that she anticipated "calling Lieutenant Blaney in rebuttal, and he was going to address the issue of what constitutes a critical incident, serious injury, and what that policy is designed to cover." After a short recess, the prosecutor advised the court that she intended to introduce, on rebuttal, recorded radio transmissions, of which defense counsel was already aware. Defense counsel objected on the grounds that "we've heard this testimony [regarding Haskins' clothing] a thousand times" and "now it comes to a point where it's cumulative."

{¶67} There was no abuse of discretion in the trial court’s decision to allow the State to go forward with its rebuttal evidence. Seijo cites no rule or authority for the proposition that a prosecutor may not reconsider what rebuttal evidence she intends to present prior to the actual calling of the rebuttal witness. Moreover, the record demonstrates that defense counsel was familiar with the recordings, inasmuch as he was able to object to their admission on the grounds that such evidence was cumulative.

{¶68} With respect to closing argument, “wide latitude is given to counsel during closing argument to present their most convincing positions.” (Citations omitted.) *State v. Phillips*, 74 Ohio St.3d 72, 90, 656 N.E.2d 643 (1995). “It is a prosecutor’s duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury.” *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

{¶69} Before a conviction is reversed for prosecutorial misconduct, a reviewing court must determine “whether the [prosecutor’s] remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.” (Citation omitted.) *Id.*

{¶70} Seijo maintains that the following portion of the prosecutor’s closing argument exceeds the evidence presented.

{¶71} Let’s talk about this CD that you just heard a few moments ago. \* \*  
\* First thing on the tape. The gentleman that they’re seeking, Dareus Haskins, is described as wearing a white shirt and blue jeans. Very, very important. Blue jeans.

{¶72} Later on in the process you hear Detective Bainton, and I assume you recognized his voice, you heard him testify, he was somewhat out of breath. He just ran after somebody who ran from the scene. What did he say he was wearing? A muscle shirt and blue jean shorts. \* \* \*



{¶73} Now, ladies and gentlemen, this is extremely important, because what was Dareus Haskins wearing when he turned himself in \* \* \*? Remember that? A muscle shirt and blue jean shorts.

{¶74} Now, you tell me using your mind here \* \* \*, how would Detective Bainton know that if he hadn't seen him? How would that information be on that CD in the context of this event? That wasn't manufactured after the fact. He said it as it was happening. You heard him. \* \* \* How would he know that five days later on Wednesday when they pick up Dareus Haskins or he's arrested, he's brought to the police station, he's going to be \* \* \* wearing the same clothes?

{¶75} According to Seijo, the prosecutor is attempting to improperly argue that the only way Detective Bainton could have known what Haskins was wearing that evening was from having personally seen him in Bonniewood Estates that evening. There is nothing improper about drawing this inference from the evidence in the record. Due to the nature of the audio clip, it cannot be demonstrated that Detective Bainton had actually observed Haskins, only that he had observed someone with a white shirt and shorts. It must still be inferred that this person was Haskins. It was not improper, however, for the prosecutor to urge this inference in her closing argument.

{¶76} The fourth assignment of error is without merit.

{¶77} In the fifth and final assignment of error, Seijo argues the trial court erred by not giving the jury instruction on the lesser-included offense of Attempted Obstructing Justice. Seijo's argument is based on the possibility that he did not actually obstruct justice, i.e., that Haskins fled from the police, not because of Seijo's warning, but because he saw the police approaching.

{¶78} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Crim.R.

30(A). The Ohio Supreme Court has similarly held: “Ordinarily, a court’s failure to submit an instruction to the jury on a lesser included offense cannot serve as a ground for reversal, unless the defendant identifies specifically the offense for which he sought such an instruction.” *State v. Parra*, 61 Ohio St.2d 236, 400 N.E.2d 885 (1980), paragraph one of the syllabus.

{¶79} In the present case, Seijo did not request an instruction on Attempted Obstructing Justice. Accordingly, he is precluded from raising this argument. We note, however, that the stated basis for such an instruction is erroneous, in that Seijo need not have actually obstructed justice in order to be convicted of Obstructing Justice, as explained above.

{¶80} The fifth assignment of error is without merit.

{¶81} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, entering judgment and sentence on Seijo’s conviction of Obstructing Justice, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.