[Cite as *State v. Webber*, 2009-Ohio-3309.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-11-142
	:	O P I N I O N
- vs -		7/6/2009
	:	
MICHAEL L. WEBBER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR24945

Rachel A. Hutzel, Warren County Prosecuting Attorney, Keith W. Anderson, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

David A. Chicarelli Co., L.P.A., Barbara A. Lahmann, 614 East Second Street, Franklin, Ohio 45005, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Michael L. Webber, appeals a conviction for tampering with evidence from the Warren County Court of Common Pleas.

{¶2} Around midnight on March 15, 2008, three young men were breaking bottles under a bridge in a public park in Springboro behind appellant's home. According to the men, an individual in a trench coat walking a dog approached them. The individual

confronted the men and asked them to shine their flashlight at him. When the light was directed at the individual, the men saw that the individual was holding a small gun at his side. One of the men identified the gun as a "snub-nose .38." The individual then indicated that he would release his dog on them if they did not leave. The men reported the matter to the Springboro police. Appellant testified that he merely lectured the men about being in the park after midnight, but he did not brandish the gun.

{¶3} Two officers from the Springboro Police Department responded to the complaint and went to appellant's home to gather information. The officers asked if he owned any guns, but appellant responded that he did not wish to answer that question.

{¶4} Shortly after the officers left, appellant contacted the Springboro Police Department, but did not discuss any details of the incident. On the evening of March 15, 2008, one of the officers contacted appellant and requested that appellant come to the police station. Around 11:30 p.m., the police interviewed appellant. Appellant provided a written statement, claiming that he had a cell phone in his hand when he encountered the three young men in the park.

{¶5} On March 17, detectives from the police department applied for and received a warrant to search appellant's home. Appellant was out of state on business at the time, but his wife let the detectives in the home to perform the search. While the detectives searched the premises, appellant's wife contacted him via telephone. With assistance from appellant via phone, the police discovered a box designed to hold a gun similar to the 2-inch barrel .38 identified during the incident. Shortly thereafter, appellant's wife handed the phone to Lieutenant Tim Parker. The lieutenant asked appellant about the whereabouts of the gun. Appellant initially replied that he no longer had a "snub nose." The officer then asked about his wife's "Bodyguard," a 2-inch barrel .38 caliber Smith & Wesson handgun, for which the box was designed. According to the lieutenant, appellant replied, "I no longer have that

anymore." The lieutenant testified that appellant was "real evasive in his answers, never really told me, other than he had gotten rid of it years ago."

{¶6} At that point, Lt. Parker handed the phone to Det. Lisa Walsh. Det. Walsh requested the gun that appellant carried the night of the incident and that, if he refused to cooperate, they would seek a warrant to search his employer. After a long delay, appellant responded that he would call the officer back. A few moments later, appellant called the house again. Det. Walsh answered the phone and appellant told the officer that he had taken the gun to his workplace.

{¶7} The officers drove to appellant's place of employment. One of appellant's co-workers stated, "I know why you are here. I have the item." The co-worker then gave the officers a plastic case. Inside the case was the snub nose revolver wrapped in paper.

{¶8} Appellant was charged with three counts of aggravated menacing and one count of tampering with evidence. Following a jury trial, appellant was found not guilty of the menacing charges, but the jury convicted him of tampering with evidence. Appellant was sentenced to three years community control with thirty days of house arrest. Appellant timely appeals, raising three assignments of error. In the interest of convenience, we will address appellant's assignments of error out of order.

{¶9} Assignment of Error No. 1:

{¶10} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION FOR TAMPERING WITH EVIDENCE."

{¶11} Assignment of Error No. 3:

{¶12} "APPELLANT'S CONVICTION FOR TAMPERING WITH EVIDENCE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} Tampering with evidence is defined as, "[n]o person, knowing that an official

proceeding or investigation is in progress, or is about to be or likely to be instituted, shall * * * 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." R.C. 2921.12(A)(1).

{¶14} Under his first and third assignments of error, appellant argues that his conviction for tampering with evidence should be overturned because there was insufficient evidence to convict and because the conviction was against the manifest weight of the evidence.

{¶15} "While the test for sufficiency requires an appellate court to determine whether the state has met its burden of production at trial, a manifest weight challenge examines the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Suggs*, Butler App. Nos. CA2008-02-052, -053, 2009-Ohio-95, ¶14. A "determination that a conviction is supported by the weight of the evidence will be dispositive of the issue of sufficiency," as sufficiency is required to take a case to the jury and a "finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35.

{¶16} To determine whether a conviction is against the manifest weight of the evidence an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12. As the jury is in the best position to clearly evaluate the evidence, "an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial

weighs heavily in favor of acquittal. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. In the case at hand, evidence was provided to the jury for all three elements of the charge of tampering with evidence, thus showing that the jury did not lose its way in convicting the appellant.

Knowledge of Official Proceeding

{¶17} "Knowledge that a criminal investigation is under way or is imminent is based upon a reasonable person standard." *State v. Mann*, Clermont App. No. CA2006-05-035, 2007-Ohio-1555, ¶11. Shortly after the confrontation in the park, officers from the Springboro Police Department went to appellant's home, inquiring about the incident and questioning appellant about the gun. A Springboro police officer informed appellant that he could be charged with a felony in this matter and appellant was also informed that the case was being transferred to detectives for further investigation. Appellant clearly knew that an official proceeding or investigation was in progress or likely to be instituted.

Concealment and Removal

{¶18} "[T]o 'conceal' physical evidence requires some overt act of concealment on the part of the defendant." *State v. Csizma* (Apr. 13, 1987), Montgomery App. No. 9649, 1987 WL 10157, *3. In *Csizma*, the defendant, a police officer, was involved in a raid of a house which resulted in the death of an individual. Id. at *1. The defendant had made a tape recording of the raid but did not reveal this information to others. Id. Although immediately after the raid the defendant was asked by members of the police department if "there was anything else that we should talk about," the defendant did not reveal the existence of the tape. Id. at *3. For 18 months afterwards, the defendant did not report the existence of the tape and was, consequently, charged and found guilty of tampering with evidence due to concealment of the tape. Id. at *1. The Second Appellate District held that, although a mere failure to volunteer information as to the existence of something is insufficient of a finding of

tampering with evidence, "the totality of the evidence of defendant's conduct in this case was sufficient for a jury finding of concealment." Id. at *3.

{¶19} In the case at bar, appellant initially refused to answer questions relating to his ownership of a gun. Appellant argues that he was invoking his right to remain silent by refusing to answer questions relating to the gun and his refusal to answer was insufficient to prove concealment. Further, appellant urges that the gun was his personal property and, as a result, he had the right to remove the gun from his home and transport it to his place of employment.

{¶20} We recognize that the gun was appellant's personal property, but it became the subject of a police investigation following the incident in the park behind appellant's home. Appellant was fully aware that the police were interested in locating the gun, as he was directly asked about it during the initial investigation. However, regardless of whether appellant had the right to remove the gun from the home once it became the subject of the police investigation, the record reflects that appellant committed an overt act of concealment.

{¶21} Appellant wrapped the gun in paper, put it in a reel case, and placed it on a high shelf in a storage area at his place of employment. Upon obtaining a search warrant for appellant's home, the police once again questioned appellant about the gun. Appellant did not merely invoke his right to remain silent. Rather, appellant overtly provided deceptive responses to the questions. Appellant claimed that he "no longer owned the gun" and had "gotten rid of it years ago," clearly attempting to conceal the location of the gun.

Purpose of Impairing Value or Availability

{¶22} Once again appellant argues that the gun was his property and that he was justified in moving the gun to his place of employment. Further, appellant claims that he merely transported the gun to the office because all responsible gun owners "should conceal a gun, so that it does not fall into the wrong hands."

{¶23} A defendant's state of mind may be inferred from the totality of the surrounding circumstances. *State v. Jones*, Summit App. No. 23234, 2006-Ohio-6963, ¶15. In *Suggs* and *Mann*, this Court found that the discarding of a gun in addition to a statement of the defendant relating to the location of the gun and why it was thrown from the scene are enough to establish tampering with evidence. *Suggs* at ¶23; *Mann* at ¶21.

{¶24} In this case, the jury was presented with evidence that appellant clearly knew that a pending investigation was underway following the incident. The police questioned appellant about the incident and the whereabouts of the gun. Appellant replied that he did not wish to answer the question. Knowing that the police wished to recover the gun, appellant transported the gun to his office. The gun was wrapped in paper, put in a reel case, and hid on a high shelf in a storage area.

{¶25} Further, when questioned by the police, appellant indicated that he no longer owned the gun. Only when threatened with the likelihood of a search warrant for his place of employment did appellant reveal the location of the gun. Accordingly, a reasonable jury could infer from the totality of the evidence that appellant removed the gun from his home and transported it to his office with the purpose to impair its availability to the police investigation. Since evidence was presented, not only that appellant moved the gun from his home to his office, but that he hid the gun at the office and lied to the police about its whereabouts, there is no indication that the jury lost its way in the conviction of appellant. Under the facts of this case, it was not against the manifest weight of the evidence for the jury to determine that appellant was guilty of tampering with evidence.

{¶26} Accordingly, having found that appellant's conviction is not against the manifest weight of the evidence, appellant's conviction necessarily satisfies the sufficiency of the evidence. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35.

{¶27} Appellant's first and third assignments of error are overruled.

{¶28} Assignment of Error No. 2:

{¶29} "THE PROSECUTOR MADE SEVERAL COMMENTS DURING CLOSING ARGUMENT THAT VIOLATED APPELLANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT."

{¶30} In his second assignment of error, appellant alleges prosecutorial misconduct. Specifically, appellant challenges several comments by the prosecutor during closing argument, claiming that the prosecutor improperly commented upon his right to remain silent.

{¶31} "The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused's substantial rights." *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶228. Although considerable latitude is permitted in closing argument, a prosecutor must not equate a defendant's silence to guilt. *State v. Thompson* (1987), 33 Ohio St.3d 1, 4.

{¶32} At the outset, we note that no objection was made at the trial level to any allegedly prejudicial comments. Accordingly, our review is limited to a plain error analysis. *State v. Hill*, 92 Ohio St.3d 191, 196, 2001-Ohio-141.

{¶33} "Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. An error does not rise to the level of a plain error unless, but for the error, the outcome of the trial would have been different. *State v. Krull*, 154 Ohio App.3d 219, 2003-Ohio-4611, ¶38. Notice of plain error must be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Long* (1978) 53 Ohio St.2d 91, 95.

{¶34} Appellant cites the following statements by the prosecutor as improper commentary upon his right to remain silent:

{¶35} "Now, the defense wants you to believe that Mr. Webber was completely cooperative. That's what I asked him on cross-examination, 'were you completely cooperative with the police?'

{¶36} "Yes.

{¶37} "Then why don't we find out where the gun is until after they find that box? Only when they have the box, and the box has on it, the case has on it that it's a .38, it has a two-inch barrel, then he knows they've got him. That's not cooperating with the police."

{¶38} "The first time that he admitted that, in fact, he had a gun when he was down there was after they found that blue box. Does that sound like someone who has been cooperative with the police?"

{¶39} Later the prosecutor stated, "And what I want you to recall, what I want you to think about, is that a lie of omission is still a lie."

{¶40} "Members of the jury, lies of omission are still lies. He lied to Officer Clark, he lied to Officer Faulkner, he lied in his written statement, he lied to Lieutenant Parker."

{¶41} Appellant claims these comments were improper because he never lied to the police, merely remaining silent about whereabouts of the gun and invoking his Fifth Amendment right.

{¶42} After review, we find nothing improper about these comments by the prosecutor, as they are supported by the record. Although, he initially invoked his Fifth Amendment right to silence at the outset of the investigation, appellant did not merely remain silent throughout the investigation. Both Lt. Faulkner and Det. Walsh testified that appellant lied about the whereabouts of the gun. The officers testified that appellant claimed that he no longer had the gun and that he had "gotten rid of it years ago." The evidence admitted at trial demonstrates that appellant made deceptive comments to the police during the investigation. Accordingly, the prosecutor's statements listed above, urging that appellant

lied to the police or omitted the location of the gun, are supported by the record and do not violate the Fifth Amendment.

{¶43} However, one comment of the prosecutor cited by appellant is troublesome. During the closing statement, the prosecutor stated, "[t]he Defendant had an opportunity, at least four, to talk truthfully about what happened that night and he chose not to."

{¶44} To the extent that this comment may have referenced appellant's refusal to discuss the incident or whereabouts of the gun when he invoked his right to remain silent during the initial investigation, the comment was improper. The prosecutor referenced four occasions where appellant refused to "talk truthfully." On one of those occasions, specifically the initial investigation, appellant invoked his constitutional right to remain silent. As such, the statement equated appellant's silence to untruthfulness in the presence of the jury.

{¶45} However, since our standard of review is limited to plain error, we cannot say that "but for" the prosecutor's statement, the outcome of appellant's trial would have been different. As explained under the previous assignments of error, evidence was presented that, while discussing the whereabouts of the gun on the phone with the officers, appellant repeatedly lied or was deceptive, claiming that he no longer owned the gun.

{¶46} Appellant's second assignment of error is overruled.

{¶47} Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

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