[Cite as *State v. Rogers*, 2017-Ohio-1248.]

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
WALTER J. ROGERS	:	Case No. 16 CA 18
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Guernsey County Court of Common Pleas, Case No. 16 CR 51
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 30, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JASON R. FARLEY Assistant Prosecuting Attorney 139 West 8th Street, P.O. Box 139 Cambridge, Ohio 43725	ROBERT MCCLELLAND Graham & Graham Co., LPA P.O. Box 340 Zanesville, Ohio 43702

Baldwin, J.

{¶1} Appellant Walter J. Rogers appeals a judgment of the Guernsey County Common Pleas Court convicting him of tampering with evidence (R.C. 2921.12) and sentencing him to twenty-four months incarceration. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 26, 2016, Trooper Joshua Zaugg of the Ohio State Highway Patrol, and two other troopers were dispatched to the area of State Route 313 and Interstate 77, in reference to a vehicle reported stolen by the Newark Police Department. The vehicle had a GPS tracking device that provided the location of the vehicle. Trooper Zaugg saw a black Chrysler Sebring matching the description of the vehicle. He ran the license plate number, which came back registered to a different type of vehicle.

{¶3} The trooper activated his overhead lights and a high speed chase ensued. During the chase, two plastic baggies were thrown from the vehicle. The baggies were empty; however, one of the baggies had appellant's name on it.

{¶4} Finally, the vehicle went off the road and became disabled in a creek bed. The occupants fled on foot into the woods. The troopers, with the assistance of the Guernsey County Sheriff's Department, used a canine officer to track the two men. The driver was first located, followed by appellant, who was the passenger in the vehicle.

{¶5} Appellant was indicted by the Guernsey County Grand Jury with one count of tampering with evidence on April 11, 2016. The case proceeded to jury trial, where he was convicted as charged and sentenced to twenty-four months incarceration with 140 days of jail time credit.

{¶6} Appellant assigns four errors on appeal:

{¶7} "I. THE DEFENDANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶8} "II. THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR AQUITTAL [SIC] PURSUANT TO CRIM. R. 29.

{¶9} "III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISSTANCE OF COUNSEL IN DEFENDANT'S REPRESENTATION.

{¶10} "IV. VENUE WAS NOT PROPER IN GUERNSEY COUNTY AND THE COURT LACKED JURISDICTION."

I., II.

{¶11} In his first assignment of error, appellant argues that the judgment is against the manifest weight and sufficiency of the evidence. In his second assignment of error, he argues that the court erred in overruling his Crim. R. 29 motion for acquittal based on the same arguments raised in his first assignment of error. We therefore address the first two assignments of error together.

{¶12} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in 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.'" *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶13} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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, paragraph two of the syllabus (1991).

{¶14} Appellant was convicted of tampering with evidence in violation of R.C. 2921.12(A)(1):

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> (1) 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[.]

{¶15} "There 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*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, ¶ 11 (2014).

{¶16} Appellant first argues that he did not have knowledge of an investigation or that one would likely be instituted. In *Straley, supra,* the defendant's car was stopped for a traffic violation. Upon further investigation, the police suspected she was driving under the influence of alcohol. When the detectives were trying to find her a ride home, she insisted that she needed to urinate. She ran to the side of a building, within the peripheral vision of the officers, in order to urinate. One of the detectives later found a urine-soaked

baggie containing crack cocaine in the area. The Ohio Supreme Court held that her conviction was not supported by sufficient evidence, as there was nothing in the record to suggest that police were conducting or likely to conduct an investigation into trafficking or possession of cocaine when Straley discarded the baggie. *Id.* at ¶19.

{¶17} In the instant case, one of the baggies bore appellant's name. Therefore, its evidentiary value was based on the baggie identifying appellant as one of the occupants of the stolen vehicle. At the time the baggie was discarded, the vehicle was involved in a lengthy high speed chase with three troopers, during which time the car was operating in a reckless manner. From this evidence, the jury could conclude that appellant knew an investigation was in progress, even in the absence of direct evidence of his awareness that the vehicle was stolen.

{¶18} Appellant next argues that the baggie was not potential evidence against appellant, as the baggies had nothing to do with the stolen car investigation. We disagree. One of the baggies had appellant's name on it, and therefore was evidence of appellant's presence in the stolen vehicle during the chase.

{¶19} Finally, appellant argues that he did not do anything to alter, destroy, or conceal the baggie with purpose to impair its value or availability, as the baggie was ultimately recovered by police, albeit later lost by the police and not admitted at trial.

{¶20} In *State v. Miller,* 10th Dist. Franklin No. 14AP-851, 2015-Ohio-4678, the defendant threw items out a car window while he was followed by police. The Court of Appeals found the tampering with evidence conviction was supported by the evidence, as from this evidence the jury could conclude that his purpose in throwing the items out

the car window was to conceal them from police, knowing an investigation was forthcoming. *Id.* at ¶32.

{¶21} Although the State ultimately recovered the baggie with appellant's name on it, as in *Miller,* the jury could have concluded that appellant threw the baggie out the car window intending to conceal evidence of his identity from police during the investigation into the circumstances surrounding the high speed chase of the vehicle.

{¶22} The State presented sufficient evidence from which a rational trier of fact could conclude that appellant committed the crime of tampering with evidence. Appellant presented no evidence in his defense, and the judgment of conviction is not against the manifest weight of the evidence presented by the State at trial.

{¶23} The first and second assignments of error are overruled.

III.

{¶24} In his third assignment of error, appellant argues that his trial counsel was ineffective.

{¶25} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley* , 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id*.

{¶26} Appellant first argues that counsel was ineffective for failing to secure evidence that proved that the baggie was not the only means available to identify appellant as an occupant of the car. He argues that counsel failed to serve a subpoena or file a pre-trial motion regarding additional evidence that would have identified appellant. Nothing in the record supports appellant's claim that such evidence existed other than his own statement to the court during the sentencing hearing. Further, pursuant to R.C. 2921.12, the State was not required to prove that the evidence appellant threw out the window was the only means by which the State could identify appellant as an occupant of the stolen vehicle.

{¶27} Appellant next argues that he was deprived of the ability to take the stand in his own defense. The decision whether to take the stand is a tactical decision, to be arrived at between the defendant and his attorney. *State v. Weatherspoon*, 8th Dist. Cuyahoga No. 89996, 2008-Ohio-2345, ¶ 17. Further, appellant has not demonstrated that the result of the proceeding would have been different had he testified in his own defense.

{¶28} Appellant next argues that he desired to have a trial to the bench instead of a jury trial. Again, appellant has not demonstrated that the result of the proceeding would have been different in a bench trial.

{¶29} Appellant argues that trial counsel failed to raise the issue of venue. For the reasons stated in our discussion of appellant's fourth assignment of error, appellant has not demonstrated that the result of the proceeding would have been different had counsel raised this issue.

{¶30} Finally, appellant argues that plea negotiations were "not relayed to the State by trial counsel at Defendant/Appellant's request." The record does not reflect that there was any failure of trial counsel to communicate plea negotiations. Further, appellant represented to the court in sentencing that he has previously always pled out on his cases, but this time chose to go to trial based on the fact that he didn't feel he was guilty. Tr. 23.

{¶31} The third assignment of error is overruled.

IV.

{¶32} In his fourth assignment of error, appellant argues that the State failed to prove that venue was proper in Guernsey County.

{¶33} R.C. 2901.12(C) provides, "When the offense involved the unlawful taking or receiving of property or the unlawful taking or enticing of another, the offender may be tried in any jurisdiction from which or into which the property or victim was taken, received, or enticed."

{¶34} While venue is not an essential element of a charged offense, courts have required that venue be proven by the State beyond a reasonable doubt unless it is waived by the defendant. *State v. Headley,* 6 Ohio St.3d 475, 477, 453 N.E.2d 716 (1983). Venue need not be proven in express terms as long as it is established by all the facts and circumstances in the case. *State v. Dickerson,* 77 Ohio St. 34, 82 N.E. 969, paragraph one of syllabus (1907).

{¶35} In *State v. Ealy,* 5th Dist. Licking No. 16-CA-31, 2016-Ohio-7927, the officer failed to testify directly that the offense occurred in Licking County. However, based on testimony that the officer was based out of the Granville Post of the Ohio State Highway

Patrol and that he encountered appellant at a rest area in Licking Township, we concluded that the court could conclude that the facts and circumstances established venue in Licking County. *Id.* at ¶25.

{¶36} Trooper Zaugg testified that they were at times "in and out" of Noble County. He testified that he saw the first baggie come out of the window as they approached the Noble/Guernsey line. Tr. 133. However, a video from the trooper's dashboard camera was admitted into evidence. On the video, the sign marking the Guernsey County line is evident prior to the baggies flying out the window. The court could therefore conclude that venue was proper in Guernsey County.

{¶37} The fourth assignment of error is overruled.

{¶38} The judgment of the Guernsey County Common Pleas Court is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Hoffman, P.J. and

Wise, J. concur.