[Cite as *State v. Rardon*, 2009-Ohio-3361.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. AARON J. RARDON Appellant	C.A. No. 24478 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2008-05-1591

DECISION AND JOURNAL ENTRY

Dated: July 8, 2009

CARR, Judge.

{¶1} Appellant, Aaron Rardon, appeals his conviction from the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Rardon was indicted on one count of tampering with evidence under R.C. 2921.12(A)(1), a felony of the third degree, and one count of carrying a concealed weapon under R.C. 2923.12(A)(3), a felony of the fourth degree.

{¶3} On May 12, 2008, Rardon and a friend were driving on Market Street when they noticed that they had a flat tire. Rardon and his friend began walking to the nearby home of his cousin, Christopher Cox, who lived with his wife, Jennifer Cox. While en route to the Cox residence, Rardon saw Jennifer's sister, Emily. Rardon explained to Emily that he and his friend were on their way to see Chris and Jennifer Cox because they needed to use a telephone. After this conversation, Emily called Jennifer to alert her of Rardon's impending arrival. Because

Jennifer did not have an amicable relationship with Rardon, the Coxes turned off everything in the house to make it appear as though they were not home. When Rardon arrived, he knocked on the front door. When he did not get an answer, Rardon attempted to get the attention of his cousin by yelling for him repeatedly as he knocked on the back door and several windows. The Coxes went to the second floor of their home and watched Rardon from a window. They observed Rardon pacing back and forth in a nearby vacant lot. When it did not appear that Rardon had any intention of leaving, the Coxes called their neighbor, Matthew Friend, and asked him to approach Rardon and tell him that they were not home. Several minutes later, Friend, along with his wife and children, came to the backdoor of the Cox residence and Chris let them inside. At this point, Friend informed Chris and Jennifer that Rardon had a gun on him. Friend proceeded to use the telephone to call 911. The voices of both Friend and Jennifer could be heard during the 911 call.

{¶4} Akron Police Officers Charles Artis and David Long responded to the 911 call. According to dispatch, a white male wearing a blue windbreaker with a gun stuffed in his pants was in the area of Crosby Street. Upon arriving at the location, the officers observed a man matching the description of the suspect. Officer Long was in the passenger seat of the cruiser. When Officer Long exited the cruiser, the suspect, who was later identified as Rardon, turned around and began walking in the opposite direction. Officer Long asked Rardon to "stop" and "get down on the ground." Rardon continued to walk in the same direction.

{¶5} At this point, Officer Artis began to pursue Rardon in the cruiser. Officer Artis observed Rardon walking, talking on a cell phone, digging in his pocket and throwing an object into the overgrown grass of a vacant lot. Officer Artis would later testify that, based on his experience, the motion used by Rardon to toss the object was consistent with an attempt to

discard evidence. Rardon was taken into custody soon thereafter. Officer Long subsequently searched the area and found a flare-gun in the overgrown grass. The flare-gun, which is typically manufactured in an orange color, had been spray painted black and resembled an actual firearm.

{¶6} This case proceeded to a bench trial on August 28, 2008. Thereafter, on September 25, 2008, the trial court filed a judgment entry granting Rardon's Crim.R. 29 motion to dismiss with regard to the carrying a concealed weapon charge. However, the trial court found Rardon guilty of tampering with evidence. It is that conviction from which Rardon appeals. Rardon has raised one assignment of error.

II.

ASSIGNMENT OF ERROR

> "THERE WAS INSUFFICIENT EVIDENCE TO FIND APPELLANT GUILTY OF TAMPERING WITH EVIDENCE."

{¶7} In his only assignment of error, Rardon contends that his conviction for tampering with evidence was not supported by sufficient evidence. This Court disagrees.

{¶8} When reviewing the sufficiency of the evidence, a reviewing court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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." Id. at paragraph two of the syllabus.

{¶9} Rardon was convicted of tampering with evidence in violation of R.C. 2921.12(A)(1), which provides:

> "(A) No person, knowing that an official proceeding or investigation is in progress, or is about 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[.]"

{¶10} Rardon concedes that he knew, or at least should have known, that an official investigation was in progress. Rardon also concedes that the act of throwing the flare-gun into the weeds could be construed as an attempt to conceal the flare-gun. Therefore, the critical issue in this case is whether the flare-gun should be considered evidence under R.C. 2921.12(A)(1). Rardon argues that because possessing a flare-gun is not a criminal act, the flare-gun itself does not have any evidentiary value and cannot be used to support a conviction of tampering with evidence.

{¶11} The language of Ohio's tampering with evidence statute informs our discussion of whether Rardon's conviction should be upheld. R.C. 2921.12(A)(1) makes it a crime to conceal a "thing" with "purpose to impair its value or availability as evidence in a proceeding or investigation." For something to be considered evidence under the statute, it is only required that the State prove that the object of the tampering was of value in either a proceeding or an investigation. The text of the statute does not suggest that something should not be considered "evidence" for the purposes of an investigation simply because it cannot be offered as proof of criminal conduct at a subsequent criminal proceeding. Attempting to impair the availability of a piece of evidence that is within the scope of an on-going investigation is a violation of R.C. 2921.12(A)(1).

{¶12} In this case, it is undisputed that a criminal investigation had commenced in response to a 911 call regarding a man on Crosby Street with a gun. Specifically, Officer Long testified that the dispatch call indicated there was a white male wearing a blue windbreaker around 307 Crosby Street who was in possession of a black handgun. The flare-gun was clearly a piece of evidence that fell within the scope of the subsequent investigation. Officer Charles Artis testified that, as he approached Rardon, he observed Rardon dig in his pocket and then throw something into the overgrown grass in a vacant lot. Officer Long testified that when he searched the area minutes later, he found the flare-gun. Officer Long described the grass as being between a foot and a foot and a half high. Photographs of the flare-gun were taken by Officer Long prior to removing it from the grass. It is undeniable that by tossing the flare-gun into the overgrown grass, Rardon had the clear purpose of impairing the availability of the flare-gun as evidence in the investigation.

{¶13} It follows that Rardon's argument that the flare-gun lacked evidentiary value must be rejected. The police investigation was in specific response to a 911 call regarding a man in possession of a gun. Within the scope of that investigation, no fact was of greater value than the fact that the subject of the 911 call was in possession of a flare-gun, and not a firearm. In addition to impacting law enforcement's initial charging decision, knowing that Rardon was in possession of a flare-gun allowed law enforcement to accurately assess the level of danger surrounding the situation. Furthermore, law enforcement was able to directly respond to the concerns raised in the 911 call and maintain order by informing the people who felt compelled to contact law enforcement that Rardon was not, in fact, in possession of a deadly firearm.

{¶14} The flare-gun was a piece of evidence which fell within the scope of an on-going criminal investigation. Therefore, the evidence presented by the State was sufficient to support Rardon's conviction of tampering with evidence. The assignment of error is overruled.

III.

{¶15} Rardon's sole assignment of error is overruled. The Judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶16} I respectfully dissent. The majority holds that for something to be considered as evidence, "it is only required that the state prove that the object of the tampering was of value in either a proceeding or an investigation." Accordingly, it reasons that since the police investigation was in specific response to a report that a man was in possession of a gun, there was no fact of greater value than the fact that the subject of the report was in possession of a flare gun and not a firearm. However, many objects that are perfectly legal to possess can nonetheless be of some value in a police investigation especially since in many instances it can confirm or negate the existence of a crime. Thus, under this broad interpretation of the statue, a legally benign act of a person can constitute tampering. For example, if Appellant had thrown a toy gun into the grass, although he could not have been convicted of carrying a concealed weapon, see R.C. 2923.11-.12, he could nonetheless be convicted of a felony offense of tampering with evidence given that the police investigation was in specific response to a person believed to be in possession of a gun and no fact would be of greater value than to know that the Appellant in fact did not possess a deadly firearm. Likewise, if a citizen reported to police that a person was in possession of a crack cocaine pipe, a criminal offense under R.C. 2925.14, the suspect could be convicted of tampering with evidence if he threw a tobacco pipe in the grass during the course of the police investigation since the tobacco pipe would be of value in the police investigation.

{¶17} In construing the language of a criminal statute, it is axiomatic that criminal statutes must be strictly construed against the state. See *City of Akron v. Davenport*, 9th Dist. No. 21552, 2004-Ohio-435, at ¶11, quoting R.C. 2901.04. R.C. 2901.04(A) provides that

"sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." In my view, the majority has lost sight of this statutory mandate in construing the statute. Furthermore, "[p]enal statutes must be construed in a sense which best harmonizes with their intent and purpose." *State v. Knadler* (1957), 105 Ohio App. 135, 139. Accordingly, we must keep in mind the conduct that the statute seeks to proscribe is tampering with evidence, namely, tampering with those objects that can serve as proof of the commission of a crime. The word "evidence" can be given a very broad meaning and can literally encompass most any object. However, the statute at issue seeks to proscribe the offense of tampering with evidence, which logically suggests that the evidence tampered with would be something of a character that would be offered in a criminal proceeding as evidence of a crime as opposed to an object that could not serve as evidence of an illegal act. It is illogical to convict a person of tampering with an object that ultimately cannot serve as evidence in a proceeding or investigation of the commission of a criminal offense. The word evidence does not stand alone in the statute, but must be read in the context of the words that precede it. Thus, I would hold that for an object to be "evidence in [a] proceeding or investigation" under R.C. 2921.12(A)(1), it must be capable of serving as evidence (whether direct or circumstantial) of an underlying criminal offense.

APPEARANCES:

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SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.