

[Cite as *State v. McIntyre*, 2010-Ohio-2569.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. Nos.    24934 and 24945

Appellee

v.

LEWIS LEROY MCINTYRE

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CR 09 03 0647

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 9, 2010

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MOORE, Judge.

{¶1} Appellant, Lewis McIntyre, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms in part, reverses in part, and remands for proceedings consistent with this opinion.

I.

{¶2} On March 12, 2009, McIntyre was indicted on one count of tampering with evidence, a third-degree felony, in violation of R.C. 2921.12(A)(1); one count of petty theft, a first-degree misdemeanor, in violation of R.C. 2913.02(A)(3); and one count of obstructing justice, a first-degree misdemeanor, in violation of R.C. 2921.32(A)(4). McIntyre pled not guilty to these charges.

{¶3} On July 2, 2009, a supplemental indictment was filed, charging McIntyre with one count of tampering with records, a third-degree felony, in violation of R.C.

2913.42(A)(1)(B)(4); and one count of obstructing justice, a fifth-degree felony, in violation of R.C. 2921.32(A)(6). McIntyre pled not guilty to these charges.

{¶4} On July 7, 2009, the matter proceeded to a jury trial. At the close of the State's case, the trial court granted McIntyre's Crim.R. 29 motion with regard to the misdemeanor charge of obstructing justice. The jury found McIntyre guilty of tampering with evidence, petty theft, obstructing justice, and tampering with records. He was sentenced to a total of four years of incarceration. McIntyre timely appealed and has raised three assignments of error for our review.

## II.

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT VIOLATED MCINTYRE’S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY DEPRIVING HIM OF HIS RIGHT TO SELF-REPRESENTATION.”

{¶5} In his first assignment of error, McIntyre contends that the trial court violated his constitutional rights by depriving him of his right to self-representation. We do not agree.

{¶6} On April 30, 2009, McIntyre filed a pro se motion to remove counsel and for the trial court to appoint new counsel. On May 8, 2009, the trial court appointed new counsel. On June 23, 2009, McIntyre filed another pro se motion to remove counsel and to proceed pro se. McIntyre demanded to proceed pro se “as a matter of right as a matter of law.” On June 25, 2009, he filed a pro se motion withdrawing his June 23, 2009 request to remove counsel and to proceed pro se. Specifically, McIntyre stated that he “intend[ed] to move forward with counsel upon the scheduled trial in the instant case set for July 6, 2009 time 9:00 AM.” The record does not indicate that McIntyre at any time thereafter reasserted his motion to proceed pro se prior to trial. Accordingly, we conclude that McIntyre has waived this issue for purposes of appeal.

“[W]aiver is the ‘intentional relinquishment or abandonment of a known right.’” *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9, quoting *United States v. Olano* (1993), 507 U.S. 725, 733, quoting *Johnson v. Zerbst* (1938), 304 U.S. 458, 464. The waiver of an objection precludes this Court from reviewing it on appeal. *Hairston*, supra, at ¶9. McIntyre’s first assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

“THE CONVICTIONS FOR TAMPERING WITH RECORDS AND OBSTRUCTION OF JUSTICE ARE VOID BECAUSE [MCINTYRE] WAS NEVER ARRAIGNED ON THE CHARGES IN VIOLATION OF CRIMINAL RULE 10 AND THE RIGHT TO DUE PROCESS.”

{¶7} In his second assignment of error, McIntyre contends that his convictions on the supplemental indictment were void because he was not arraigned on the charges. We do not agree.

{¶8} The issue of arraigning McIntyre on the supplemental indictment was discussed on the record on July 7, 2009, prior to jury selection. At that time McIntyre indicated that he had not received service of the supplemental indictment. The trial court stated that it would “hold that matter under advisement, and leave it up to the State to prove whether the defendant was served. We’re going to start jury selection. I’m not going to swear the jury in until we resolve that issue, okay.” The trial court then proceeded with jury selection. The transcript before this Court, however, does not contain the jury selection or any proceedings prior to or including the trial court’s swearing in of the jury.

{¶9} On July 21, 2009, the trial court issued a journal entry stating that on July 7, 2009, before trial began, McIntyre was arraigned on the charges in the supplemental indictment, and that he waived the reading of the indictment. According to the trial court’s journal entry, McIntyre pled not guilty to the charges. The journal entry indicates that the plea occurred prior

to the trial court swearing in the jury. It is well established that “a trial court only speaks through [its] journal entry[.]” *State v. Overstreet*, 9th Dist. No. 21367, 2003-Ohio-4530, at ¶8. McIntyre’s contention that he was not arraigned is in direct contradiction of the trial court’s July 21, 2009 journal entry.

{¶10} Because McIntyre bears the burden of demonstrating error on appeal, it is his duty to provide this Court with the transcript of the proceedings necessary to support his contention. *State v. Skaggs* (1978), 53 Ohio St.2d 162, 163. McIntyre did not order the portion of the transcript that recorded proceedings prior to the swearing in of the jury. Therefore, we must presume regularity. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. McIntyre’s second assignment of error is overruled.

### **ASSIGNMENT OF ERROR III**

“THE TRIAL COURT COMMITTED PLAIN ERROR BY SENTENCING [MCINTYRE] ON A FELONY COUNT OF OBSTRUCTION OF JUSTICE, BECAUSE THE VERDICT FORMS FAILED TO STATE THE DEGREE OF THE OFFENSE.”

{¶11} In his third assignment of error, McIntyre contends that the trial court committed plain error by sentencing him on a felony count of obstruction of justice, because the verdict forms failed to state the degree of the offense. We agree.

{¶12} R.C. 2945.75(A)(2) provides, in relevant part, that:

“When the presence of one or more additional elements makes an offense one of more serious degree \*\*\* [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.”

{¶13} In *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶14, the Ohio Supreme Court held that a jury’s verdict form ““must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify

convicting a defendant of a greater degree of a criminal offense.” *State v. Alison*, 9th Dist. No. 24719, 2010-Ohio-1340, at ¶7. “The Supreme Court subsequently held that *Pelfrey* applies to charging statutes that contain separate sub-parts with distinct offense levels, such as” R.C. 2921.32. *Alison*, supra, at ¶7, citing *State v. Sessler*, 119 Ohio St.3d 9, 2008-Ohio-3180, at ¶1.

{¶14} In the instant case, the State concedes that the verdict form for obstructing justice did not contain either the degree of the offense or an aggravating element. The State further concedes that McIntyre’s conviction should be reversed and that he should be resentenced on a misdemeanor. Upon review of the requisite verdict form, we agree. A violation of R.C. 2921.32 can be a misdemeanor or a first, second, third, or fifth-degree felony, depending upon the underlying degree of the crime committed by the person aided. Because the verdict form did not comport with *Pelfrey*, McIntyre’s fifth-degree felony conviction and sentence must be vacated. *Alison*, supra, at ¶8. Upon remand, McIntyre may be convicted of only a misdemeanor and sentenced accordingly. *Id.* McIntyre’s third assignment of error is sustained.

### III.

{¶15} McIntyre’s first and second assignments of error are overruled. His third assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Judgment affirmed in part,  
reversed part,  
and cause remanded.

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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 equally to both parties.

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CARLA MOORE  
FOR THE COURT

CARR, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

DONALD GALLICK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.