

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 16AP-620
Plaintiff-Appellee,	:	(C.P.C. No. 14CR-3463)
	:	and
v.	:	No. 16AP-621
	:	(C.P.C. No. 14CR-3352)
Quentin Robertson,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 14, 2017

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

On brief: *Toki M. Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BRUNNER, J.

{¶ 1} Defendant-appellant, Quentin Robertson, appeals two judgment entries of the Franklin County Court of Common Pleas entered February 19, 2016. One entry is for a criminal conviction and sentence for tampering with evidence pursuant to R.C. 2921.12, and the other entry is a criminal conviction and sentence for failure to provide notice of a change of address pursuant to R.C. 2950.05. Robertson was sentenced to two 30-month prison terms, one for each offense, to be served concurrently. Robertson appeals, arguing that the trial court erred in permitting one indictment to be amended outside his presence and that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Because Robertson expressly waived his right to be present for the trial at which the indictment was amended, because his counsel did not object to the amendment, and because the amendment lowered the degree of the offense to Robertson's benefit, we find no plain error in amending the indictment outside

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Robertson's presence. Because we find, in addition, that Robertson's convictions were sufficiently supported and not against the manifest weight of the evidence, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 25, 2014, a Franklin County Grand Jury indicted Robertson in what would become Franklin C.P. No. 14CR-3352 ("Case No. 1") for murder and tampering with evidence in connection with the death of his roommate, Michael Freeman. (Case No. 1, June 25, 2014 Indictment.) Approximately one week later, on July 1, 2014, Robertson was also indicted for failing to notify authorities of a change of address based on having taken a trip to Atlanta, Georgia ("Case No. 2") without notifying the Franklin County Sheriff's Office as required of him as an adjudicated sex offender. (Case No. 2, July 1, 2014 Indictment.)

{¶ 3} Robertson was tried by a jury for the indictments against him for Case No. 1 in January 2016. He declined to participate or leave his jail cell and was tried in absentia. (Case No. 1, Jan. 25, 2016 Tr. Vol. 1 at 19-24; Jan. 26, 2016 Tr. Vol. 2 at 51-64, filed June 8, 2016.) He was acquitted of murder charge but convicted of tampering and failure to notify. We discuss only the evidence at the jury trial relevant to the tampering conviction.

{¶ 4} According to that evidence, Robertson, Freeman, and another man, Paul Krego, all shared a small house at 444 Holton Avenue, Columbus, Ohio. (Case No. 1, Tr. Vol. 2 at 86-87.) The three men lived there as placed by the Open Shelter, an organization to aid homeless individuals. (Case No. 1, Tr. Vol. 2 at 89.) On May 22, 2014, at the request of Krego, the premises' landlord and a maintenance man came to the property to address an unknown source of rancid odor. (Case No. 1, Tr. Vol. 2 at 94-95.)

{¶ 5} When the landlord and maintenance man first came to the house on the day the body was discovered, May 22, 2014, they knocked on Krego's door and also on the doors and windows of the house with no results. (Case No. 1, Tr. Vol. 2 at 100, 115-16.) The maintenance man eventually entered the premises through a broken window to Freeman's room because no one was home and he had difficulty gaining entry by the doors. (Case No. 1, Tr. Vol. 2 at 115-18.) After beginning to clean and bag clothes and refuse, he discovered Freeman's body in a blue plastic storage tote in Freeman's closet. (Case No. 1, Tr. Vol. 2 at 115-21; State's Ex. A38.)

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{¶ 6} Both the landlord and maintenance man testified that the front door of the house was often left unlocked. (Case No. 1, Tr. Vol. 2 at 94, 137.) Kregos's testimony countered their testimony about the front door, in that, Kregos stated the front door was always locked when he was home and often locked, in any event. (Case No. 1, Tr. Vol. 2 at 159.)

{¶ 7} Freeman had lost his keys in Spring 2014, shortly before his death. (Case No. 1, Tr. Vol. 2 at 139-40.) According to Kregos, the landlord, and the maintenance man, Freeman often had company, both women and men in his room. (Case No. 1, Tr. Vol. 2 at 104-05, 136, 162, 165-66.) Kregos elaborated that Freeman, "flashed his money out to a lot of people. He had people in and out of the house, people -- he had too many people in and out of his room." (Case No. 1, Tr. Vol. 2 at 162.)

{¶ 8} Freeman's body was badly decomposed when it was recovered but the coroner and an anthropologist estimated, respectively, that he had been stabbed approximately 41 times in the torso and 13 to 15 times in the head. (Case No. 1, Jan. 27, 2016 Tr. Vol. 3 at 315-16, 322-23, 370-71.) The coroner also noted that Freeman had suffered eight broken ribs. (Case No. 1, Tr. Vol. 3 at 318.) Despite the extent of Freeman's injuries, no areas of large blood pooling or splatter were found. Rather, blood was found on six towels and also places like the undersides of shelves in Freeman's room which might have been difficult for someone cleaning the murder scene to see. (Case No. 1, Tr. Vol. 2 at 253-54; Jan. 28, 2016 Tr. Vol. 4 at 441; State's Exs. A97-A105.)

{¶ 9} When police personnel arrived, they announced themselves loudly and, after knocking, kicked in Kregos's door, fearing another possible victim. (Case No. 1, Tr. Vol. 2 at 175-77.) Despite having summoned the landlord and maintenance man, Kregos was either asleep or feigning sleep. (Case No. 1, Tr. Vol. 2 at 150-51, 165-66, 176-77.) The police arrested him. (Case No. 1, Tr. Vol. 2 at 173.)

{¶ 10} Police searchers found some cleaning supplies and rubber gloves in Robertson's bedroom. (Case No. 1 Tr. Vol. 2 at 222; State's Exs. A161-A162.) But the gloves did not test positive for blood. (Case No. 1, Tr. Vol. 4 at 438.) Police found but did not test a pair of sneakers in Robertson's closet on which there appeared to be bloodstains. (Case No. 1, Tr. Vol. 2 at 263; Tr. Vol. 4 at 449, 472; State's Ex. A-189.) Inside the sneakers, police found socks that tested positive for blood and contained

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genetic material matching both Freeman's and Robertson's. (Case No. 1, State's Exs. AA1-AA2, Z-Z3.) No testimony was offered on the size of the shoes or in an attempt to show they were of Robertson's shoe size.

{¶ 11} Robertson was not home when the police arrived. He had been arrested in Atlanta, Georgia, on April 25, 2014. (Case No. 1, Tr. Vol. 3 at 338-40.) The arresting officer testified that Robertson was traveling with a woman and possessed a pocket knife and a large sum of cash when he was arrested. (Case No. 1, Tr. Vol. 3 at 340.) The woman Robertson was with when he was arrested also testified. She explained that she had to leave a homeless shelter after staying there for an extended time and that she met Robertson and stayed at his house. (Case No. 1, Tr. Vol. 4 at 393-97, 405-06.) During her stay with Robertson, he suggested they travel to Atlanta and Miami. She reluctantly acquiesced. (Case No. 1, Tr. Vol. 4 at 401-02, 409-12.) She cashed a check for back-payments of social security and Robertson, whom she described as "antsy," took control of the cash and purchased Greyhound tickets. (Case No. 1, Tr. Vol. 4 at 406-12.) Robertson was arrested the day the two of them arrived in Atlanta. Atlanta police gave her the money Robertson had been holding and she returned by bus to Columbus. (Case No. 1, Tr. Vol. 4 at 413.) She did not recall Robertson having a knife at the time he was detained. (Case No. 1, Tr. Vol. 4 at 414.)

{¶ 12} Robertson was arrested a second time in early June 2014 and extradited to Columbus from Atlanta. The Columbus police interviewed Robertson about Freeman's death. (Case No. 1, Tr. Vol. 4 at 496.) Despite the interviewer's continual insistence that Robertson killed Freeman and that the interview was Robertson's only opportunity to help himself by explaining why, Robertson did not confess and steadfastly declared his innocence. (Case No. 1, Tr. Vol. 4 at 499; State's Ex. T. at 48:00-48:41.) When the interviewer incorrectly and repeatedly stated that Freeman's body had been found in Robertson's closet, Robertson reacted strongly and then giggled, saying that there was no way the body had been found in his closet and that if it had been, "somebody's playing games." (Case No. 1, State's Ex. T at 42:19-43:41.) Several times throughout the interview (particularly when the interviewer strongly accused or implied that Robertson had murdered Freeman), Robertson lapsed into speaking gibberish. *See, e.g.*, Case No. 1, State's Ex. T at 48:40-49:10. But the maintenance man testified that Robertson was often

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prone to bouts of speaking gibberish and frequently needed to be reminded to speak English. (Case No. 1, Tr. Vol. 2 at 110.)

{¶ 13} On February 1, 2016, following deliberation, the jury adjudged Robertson not guilty of murder but guilty of tampering with evidence. (Case No. 1, Tr. Vol. 4 at 621.)

{¶ 14} On February 4, 2016, the day before his trial in Case No. 2, the trial judge held proceedings in the Franklin County Jail at Robertson's cell (which Robertson still refused to leave). (Case No. 2, Feb. 4, 2016 Tr. at 4-5, filed June 8, 2016.) Robertson waived his right to be present at trial and his right to a jury both orally and in writing. *Id.*; Case No. 2, Feb. 5, 2016 Jury Trial Waiver; Case No. 2, Feb. 5, 2016 Presence Waiver. On February 5, 2016, the trial court convened a bench trial in absentia on the charge of failure to notify. At the bench trial, the prosecution amended the indictment to reflect that the proper degree of the crime charged was a third, rather than a second, degree felony. (Case No. 2, Tr. at 11-12.) The defense did not object to the amendment. *Id.* Next the parties stipulated that Robertson had been convicted on March 28, 1996 of an offense requiring registration, that he was arrested in Atlanta on April 25, 2014, and again on June 5, 2014, and that he was ultimately extradited to Ohio on June 17, 2014. (Case No. 2, Tr. at 15-16.)

{¶ 15} Only one witness testified in the bench trial, an officer with the Franklin County Sheriff's Office who worked at the Sex Offender Registration and Notification Unit at the times in question as named in the indictment. (Case No. 2, Tr. at 17.) The officer testified that Robertson was subject to registration requirements. (Case No. 2, Tr. at 20.) She explained that after seeing a story in the news that Robertson was sought in connection with a homicide, she sent a notice to his house on June 3, 2014 requesting that Robertson report to her office to change his address if he was no longer living at that location. (Case No. 2, Tr. at 18-22.) Robertson (who was again in custody in Atlanta as of June 5) did not respond. She interviewed Robertson following his extradition to Ohio on June 17, 2014. (Case No. 2, Tr. at 22-24.) Robertson repeatedly stated in the interview that he had not moved to Atlanta, and the officer admitted that Robertson was not found to be in possession of luggage or other indicators of an intent to relocate from Columbus. (Case No. 2, Tr. at 25-27.) But it was her testimony that he had admitted being in Atlanta for two weeks before being arrested in June 2014 and extradited. (Case No. 2, Tr. at 23.) The letter she sent to Robertson at 444 Holton Avenue was not returned as undeliverable

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but neither did Robertson provide any positive proof that 444 Holton Avenue continued to be his address or the place to which he intended to return. (Case No. 2, Tr. at 29.) On this evidence, the trial court found Robertson guilty. (Case No. 2, Tr. at 34-35.)

{¶ 16} On February 18, 2016, the trial court held a single sentencing hearing on both cases in the Franklin County Jail at Robertson's cell and sentenced Robertson to a total of 30 months in prison for each offense with each sentence to be served concurrently with the other. (Feb. 18, 2016 Sentencing Tr., filed June 8, 2016.) The trial court found that Robertson had 624 days of jail-time credit at the time of sentencing. (Case No. 1, Feb. 19, 2016 Jgmt. Entry at 2; Case No. 2, Feb. 19, 2016 Jgmt. Entry at 2.) Robertson has now finished his prison term in these cases. An optional period of post-release control of 3 years could have been imposed following his release, but the record before us does not reflect whether it was or not. (Case No. 1, Feb. 19, 2016 Jgmt. Entry at 2; Case No. 2, Feb. 19, 2016 Jgmt. Entry at 2.)

{¶ 17} Robertson now appeals.¹

II. ASSIGNMENTS OF ERROR

{¶ 18} Robertson sets forth two assignments of error for review:

[1.] THE VERDICT OF GUILTY IS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF EVIDENCE.

[2.] IT IS A DUE PROCESS VIOLATION FOR A PROSECUTOR TO AMEND AN INDICTMENT WITH NO NOTICE TO A DEFENDANT APPEARING IN ABSENTIA [sic].

III. DISCUSSION

A. First Assignment of Error—Whether the Convictions are Insufficiently Supported or Against the Manifest Weight of the Evidence

{¶ 19} The Supreme Court of Ohio has "carefully distinguished the terms 'sufficiency' and 'weight' * * *, declaring that 'manifest weight' and 'legal sufficiency' are

¹ Robertson previously untimely appealed these decisions in case Nos. 16AP-225 and 16AP-228. This Court dismissed them for want of jurisdiction and denied subsequently-filed motions for leave to appeal. *State v. Robertson*, 10th Dist. Nos. 16AP-225 and 16AP-228 (July 12, 2016) (journal entry); *State v. Robertson*, 10th Dist. Nos. 16AP-225 and 16AP-228 (Aug. 24, 2016) (journal entry). When Robertson again attempted to untimely appeal his convictions in the current cases, he filed a motion for leave which was granted. *State v. Robertson*, 10th Dist. Nos. 16AP-620 and 16AP-621 (Oct. 6, 2016) (memorandum decision).

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'both quantitatively and qualitatively different.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 10, quoting *State v. Thompkins*, 78 Ohio St.3d 380 (1997), paragraph two of the syllabus.

{¶ 20} Sufficiency is:

"[A] term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.

Eastley at ¶ 11, quoting *Thompkins* at 386; *Black's Law Dictionary* 1433 (6th Ed.1990). "In reviewing a record for sufficiency, '[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. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 21} By contrast:

Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict * * * . Weight is not a question of mathematics, but depends on its effect in inducing belief."

(Emphasis sic.) *Eastley* at ¶ 12, quoting *Thompkins* at 387; *Black's* at 1594. In manifest weight analysis "the appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." *Thompkins* at 388, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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." *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

1. Tampering with Evidence

{¶ 22} The crime of tampering with evidence is proscribed by the Ohio Revised Code according to the following elements:

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(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.

R.C. 2921.12.

{¶ 23} No one disputes that someone cleaned the presumed scene of Freeman's murder and stuffed his body in a blue storage tote in his closet. (Case No. 1, Tr. Vol. 2 at 115-21; State's Ex. A38.) Evidence showed blood stained towels were present and articles of furniture were cleaned of blood except in hard-to-notice places like the undersides of shelves. (Case No. 1, Tr. Vol. 2 at 253-54; Tr. Vol. 4 at 441; State's Exs. A97-A105.) Whether the individual who had cleaned was the murderer or someone else, blood had been cleaned from 54 to 56 stab wounds sustained by Freeman and his body stuffed into a storage bin. (Case No. 1, Tr. Vol. 2 at 115-21; Tr. Vol. 3 at 315-16, 322-23, 370-71; State's Exs. A38, A97-A105.)

{¶ 24} From these facts, it may fairly be inferred that whoever cleaned anticipated that Freeman's death would trigger an investigation or prosecution. It also is a fair inference that failing to notify the police and instead hiding the body and trying to clean the blood bore a purpose to impair the value of the scene as evidence in any future investigation of the murder. The only question that was open to potentially reasonable doubt on the facts of this case was whether the person who cleaned was Robertson or someone else.

{¶ 25} Bloody socks found inside shoes inside a bag in Freeman's closet contained both Robertson's and Freeman's DNA. (Case No. 1, State's Exs. A189, Z-Z3, AA1-AA2.) Though photographs of the house showed debris strewn throughout, Freeman's room contained cleaning supplies including rubber gloves, one of which was found in an attitude as if it had just been used. (Case No. 1, Tr. Vol. 2 at 222; State's Exs. A-161, A-162.) When he was interviewed about the murder, Robertson reacted as though he knew the interviewer had lied in stating that police had found Freeman's body in Robertson's closet; he giggled and said if the body was found in his closet, someone was "playing games." (Case No. 1, State's Ex. T at 42:19-43:41.) Though the maintenance man

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confirmed that Robertson was prone to bouts of speaking gibberish, during the police interview, Robertson spoke gibberish when strongly accused of involvement in the crime and he never attempted to explain how socks with his and Freeman's mixed DNA could have been found in his closet. (Case No. 1, Tr. Vol. 2 at 110; State's Ex. T at 48:40-49:10.) The jury "could have found the essential elements of the crime proven beyond a reasonable doubt." *Monroe* at ¶ 47. And under these facts we also cannot find that "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.

{¶ 26} Robertson's conviction for tampering was neither insufficiently supported nor against the manifest weight of the evidence.

2. Failure to Provide Notice of Residence Address Change

{¶ 27} The Ohio Revised Code requires that registered sex offenders notify the appropriate authorities of address changes in relevant part as follows:

(A) If an offender * * * is required to register * * * [the offender] shall provide notice of any change of residence * * * address, to the sheriff with whom the offender * * * most recently registered the address * * * [.] [T]he offender * * * shall provide the written notice at least twenty days prior to changing the address of the residence[.] * * * If a residence address change is not to a fixed address, the offender * * * shall include in that notice a detailed description of the place or places at which the offender * * * intends to stay and, not later than the end of the first business day immediately following the day on which the person obtains a fixed residence address, shall provide that sheriff written notice of that fixed residence address.

(B) If an offender * * * is required to provide notice of a residence * * * address change under division (A) of this section * * * the offender * * * , at least twenty days prior to changing the residence * * * address, as applicable, also shall register the new address in the manner, and using the form, described in divisions (B) and (C) of section 2950.04 or 2950.041 of the Revised Code, whichever is applicable, with the sheriff of the county in which the offender's * * * new address is located, subject to division (C) of this section. If a residence address change is not to a fixed address, the offender * * * shall include in the registration a detailed description of the place or places at which the offender * * * intends to stay and, not later than the end of the first business

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day immediately following the day on which the person obtains a fixed residence address, shall register with that sheriff that fixed residence address.

(C) Divisions (A) and (B) of this section apply to a person who is required to register pursuant to division (A)(2), (3), or (4) of section 2950.04 or 2950.041 of the Revised Code regardless of whether the new residence, school, institution of higher education, or place of employment address is in this state or in another state. If the new address is in another state, the person shall register with the appropriate law enforcement officials in that state in the manner required under the law of that state and within the earlier of the period of time required under the law of that state or at least seven days prior to changing the address.

* * *

(F)

(1) No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section * * * shall fail to notify the appropriate sheriff in accordance with that division.

(2) No person who is required to register a new residence, school, institution of higher education, or place of employment address with a sheriff or with an official of another state pursuant to divisions (B) and (C) of this section shall fail to register with the appropriate sheriff or official of the other state in accordance with those divisions.

(I) As used in this section, and in all other sections of the Revised Code that refer to the duties imposed on an offender * * * relative to a change in the offender's * * * residence * * *, "change in address" includes any circumstance in which the old address for the person in question no longer is accurate, regardless of whether the person in question has a new address.

R.C. 2950.05.

{¶ 28} In this case, Robertson had been absent from 444 Holton Avenue from April 24, 2014 until after his second arrest in Atlanta on June 5, 2014 and his extradition to Ohio. (Case No. 2, Tr. at 15-16.) There was little in evidence to indicate Robertson intended to reside in Atlanta (and he told the interviewing officer that was not his

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intention). But the duty of an adjudicated sex offender to notify authorities of a change in location is not predicated on establishing a new residence. (Case No. 2, Tr. at 25-27.) As R.C. 2950.05(I) indicates, " 'change in address' includes any circumstance in which the old address for the person in question no longer is accurate, regardless of whether the person in question has a new address." In accordance with this statutory language, the Eighth District Court of Appeals held that where a person maintains a house but the evidence shows that the person is not physically present there much of the time, a conviction for failure to register the address where the person actually spends his time is sufficiently supported. *State v. Johnson*, 8th Dist. No. 93553, 2010-Ohio-2474. Similarly, in *State v. Bourn*, 8th Dist. No. 92834, 2010-Ohio-1203, the Eighth District found a conviction sufficiently supported where a defendant reportedly maintained an address with his parents but was actually spending his time with his girlfriend at her house. In Robertson's case, by spending over a month in Atlanta, even though he did not take his possessions with him, Robertson created a "circumstance in which the old address[, 444 Holton Avenue.,] no longer [was] accurate, regardless of whether [Robertson] ha[d] a new address." R.C. 2950.05(I). This triggered the duty to register and the evidence showed that Robertson had not registered at any address other than 444 Holton Avenue. (Case No. 2, Tr. at 23.)

{¶ 29} There are affirmative defenses to this offense set forth within the same statute for persons who learn of the address change without time to meet the notification deadlines set forth in R.C. 2950.05(A) and (B) but who do provide prompt notification after learning of the change. R.C. 2950.05(G). However, Robertson presented no evidence at the bench trial and made no attempt to show that he had provided prompt notification of his departure from 444 Holton Avenue, even assuming that his decision to depart was too sudden for him to have given the requisite 20 days advance notice otherwise required. (Case No. 2, Tr. in passim.) R.C. 2950.05(A) and (G).

{¶ 30} Robertson's conviction for failure to notify of an address change was neither insufficiently supported nor against the manifest weight of the evidence.

{¶ 31} Robertson's first assignment of error is overruled.

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B. Second Assignment of Error—Whether the Trial Court Erred in Permitting Amendment of the Indictment without the Defendant Present

{¶ 32} On February 4, 2016, the day prior to trial on the offense of failure to notify of a change in address, the trial judge held proceedings in the Franklin County Jail at Robertson's cell and Robertson both orally and in writing waived his right to be present during the trial. (Case No. 2, Tr. at 4-5; Case No. 2 Feb. 5 2016 Presence Waiver.) At the bench trial the next day, the prosecution amended the indictment to reflect that the proper degree of the crime charged was a third, rather than a second, degree felony. (Case No. 2, Tr. at 11-12.) The defense did not object to the amendment. *Id.* Robertson now argues that it was a violation of his due process rights that the indictment was amended outside his presence. (Robertson Brief at 11-13.)

{¶ 33} The right to Due Process and the Confrontation Clause of the Sixth Amendment, as applicable against the states through the Fourteenth Amendment, guarantee a criminal defendant's "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Tennessee v. Lane*, 541 U.S. 509, 523 (2004), quoting *Faretta v. California*, 422 U.S. 806, 819 (1975), fn. 15. However, Robertson explicitly waived that right both orally and in writing. (Case No. 2, Tr. at 4-5; Case No. 2 Feb. 5 2016 Presence Waiver.) Nor did his counsel object to the amending of the indictment. Any error would have to be plain for this Court to reverse on appeal. *See State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 21-22.

{¶ 34} Robertson's waiver could arguably be deemed not to be a knowing waiver, since he did not likely foresee that the indictment might be amended. *See Rogers* at ¶ 20, quoting *United States v. Olano*, 507 U.S. 725, 733 (1993); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *State v. Quarterman*, 140 Ohio St. 3d 464, 2014-Ohio-4034, ¶ 15 (defining waiver as " 'intentional relinquishment or abandonment of a known right' "). But unlike, for example, amending charges from theft to aggravated robbery, the amendment in Robertson's case lowered the degree or severity of the offense and inured to Robertson's benefit. Assuming *arguendo* that an error occurred, it was harmless, not plain.

{¶ 35} Robertson's second assignment of error is overruled.

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IV. CONCLUSION

{¶ 36} A jury could have inferred from the evidence that while Robertson did not kill Freeman, he did clean the murder scene and acted to impair evidence in an official proceeding. The trial court could also have inferred from the length of Robertson's stay in Atlanta that 444 Holton Avenue was no longer an accurate address for him despite his insistence that he did not intend to relocate permanently. Robertson's convictions were supported by the evidence and not against its manifest weight. It is not plain error that the indictment was amended to a lesser degree of offense outside of his waived presence at a bench trial during which his defense counsel did not object to the amendment. It is the decision of this Court that the judgments of the Franklin County Court of Common Pleas are affirmed.

Judgments affirmed.

BROWN and HORTON, JJ., concur.
