[Cite as *State v. Clements*, 2010-Ohio-4801.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-277
	:	O P I N I O N
- vs -		10/4/2010
	:	
BILL DAVID CLEMENTS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2009-03-0365

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Samuel D. Borst, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Bill David Clements, appeals from his conviction in the Butler County Court of Common Pleas for attempted aggravated burglary with a firearm specification, tampering with evidence, and possessing criminal tools. For the reasons outlined below, we affirm.

{¶2} Appellant was indicted on charges of attempted aggravated burglary

with a firearm specification in violation of R.C. 2923.02(A) and R.C. 2941.141, a second-degree felony, tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony, and possessing criminal tools in violation of R.C. 2923.24, a fifth-degree felony. Following a two-day jury trial, appellant was found guilty on all counts and sentenced to serve a total of seven years in prison.

{¶3} Appellant now appeals from his conviction, raising five assignments of error. For ease of discussion, appellant's second and third assignments of error will be addressed together.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT COMMITTED STRUCTURAL ERROR OR PLAIN ERROR WHERE THE DEFENDANT-APPELLANT WAS TRIED WITH A DEFECTIVE INDICTMENT WHICH FAILS TO CHARGE OFFENSE(S), FOR THE REASON THAT IT LACKS THE ESSENTIAL ELEMENTS OF ATTEMPTED AGGRAVATED BURGLARY WITH A GUN SPECIFICATION, TAMPERING WITH EVIDENCE, AND POSSESSING CRIMINAL TOOLS, AND THE UNDERLYING OFFENSES RELATED THERETO."

{¶6} In his first assignment of error, appellant argues that the trial court erred by failing to dismiss the "fatally defective indictment" because it "omitted *all* of the elements" for each of the three crimes charged, thereby creating a "structural error" that requires his convictions be reversed. (Emphasis sic.) We disagree.

{¶7} At the outset, we note appellant failed to timely object to the indictment, and therefore, has waived all but plain error on appeal. *State v. Horner*, Slip Opinion No. 2010-Ohio-3830, paragraph two of the syllabus; *State v. Wagers*, Preble App. No. CA2009-06-018, 2010-Ohio-2311, ¶7. 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. 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.

{¶8} It is well-established that the purpose of an indictment is to give the accused adequate notice of the crime charged. *Horner* at ¶10; *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707, ¶6; *State v. Smith*, Butler App. No. CA2009-02-038, 2010-Ohio-1721, ¶62. An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge, and enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *State v. Curtis*, Butler App. No. CA2008-01-008, 2009-Ohio-192, ¶30, citing *Hamling v. United States* (1974), 418 U.S. 87, 117, 94 S.Ct. 2887; see, also, Crim.R. 7(B).

{¶9} Initially, appellant argues that count one of the indictment, which charged him with attempt in violation of R.C. 2923.02(A), was defective for failing to list "all of the elements of R.C. 2911.11(A)(2) Aggravated Burglary," the underlying offense for which the attempt charge was predicated. However, contrary to appellant's claim, an indictment that tracks the language of the charged offense, that identifies an underlying offense by reference to the statute number, such as the case here, is not defective for it provides the defendant with adequate notice of the charges pending against him. See *Horner* at ¶45; *Buehner* at syllabus; see, also, *State v. Reyna* (1985), 24 Ohio App.3d 79, 80-81; *State v. Burch* (Nov. 15, 1988), Wyandot App. No. 16-86-11, 1988 WL 122479, *2; *State v. Lyons* (Sept. 22, 1994), Ross App. No. 94CA1997, 1994 WL 534937, *2. Therefore, because count one of

the indictment was not defective, appellant's first argument is overruled.

{¶10} Next, appellant argues that counts two and three of the indictment, which charged him with tampering with evidence in violation of R.C. 2921.12(A)(1) and possessing criminal tools in violation of R.C. 2923.24, were fatally defective for failing "to identify so as to be defined" what evidence he allegedly tampered with, as well as what criminal tools he allegedly possessed. However, it is clear that counts two and three of the indictment tracked the exact statutory language of both offenses, and, as a result, were properly charged. *State v. Ramirez*, Clermont App. No. CA2004-06-046, 2005-Ohio-2662, ¶50; *State v. Morris*, Clark App. No. 06-CA-65, 2007-Ohio-3591, ¶20. Furthermore, we find that any confusion appellant may have had regarding the charges pending against him was eliminated by the bill of particulars.[1] See *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶27. Therefore, because counts two and three of the indictment were not defective, appellant's second argument is overruled.

{¶11} In light of the foregoing, we find the trial court did not err, let alone commit plain error, by failing to dismiss the indictment. Accordingly, appellant's first assignment of error is overruled.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT VIOLATED THE DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS BY OVERRULING HIS MOTION(S) FOR CRIM.R. 29 ACQUITTAL."

1. The bill of particulars stated, in pertinent part, that appellant was charged with tampering with evidence after he allegedly threw a "Colt .25 Calibur, Serial Number 77530CC out of the window of the car he was a passenger in," and that he was charged with possessing criminal tools for allegedly possessing two pairs of gloves, a prybar, a lug wrench, cleaning wipes, a "spotting scope," pliers, a screwdriver, a "wood club," two flashlights, a cell phone, a gun, and a "Winchester Knife."

{¶14} Assignment of Error No. 3:

{¶15} "THE DEFENDANT-APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶16} In his second and third assignments of error, appellant argues that the trial court erred by denying his Crim.R. 29 motion for acquittal, that his conviction was not supported by sufficient evidence, and that his conviction was against the manifest weight of the evidence. Specifically, appellant argues that the state "did not present *facts* of an Attempted Aggravated Burglary sufficient to sustain their burden of proof," and therefore, "since said Count underlines the other two Counts, there was insufficient evidence going to all three Counts in the Indictment."[2] (Emphasis sic.) We disagree.

{¶17} Our review of a trial court's denial of a Crim.R. 29 motion for acquittal is governed by the same standard used for determining whether a verdict is supported by sufficient evidence. *State v. Moshos*, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶26; *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14.

{¶18} As this court has previously stated, "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; *State v. Urbin,* 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that

2. Appellant does not provide any further argument regarding his tampering with evidence and possessing criminal tools charges. Therefore, we will focus our opinion solely on appellant's attempted aggravated burglary charge.

appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon,* Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez,* Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶19} A manifest weight challenge 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. *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *Thompkins* at 387, 1997-Ohio-52. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester,* Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James,* Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. The credibility of witnesses and weight given to the evidence are primarily matters for the trier of fact to decide. *State v. Gesell,* Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Upon review, the question is 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. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton,* Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶20} Appellant was charged with attempted aggravated burglary in violation

of R.C. 2923.02(A), a second-degree felony.[3] Pursuant to R.C. 2923.02(A), which defines criminal attempt, "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense." In other words, a criminal attempt is complete when a defendant's acts constitute a substantial step in a sequence of events designed to result in the perpetration of a crime. *State v. Green* (1997), 122 Ohio App.3d 566, 569-570. A "substantial step," as defined by the Ohio Supreme Court, involves conduct which is "strongly corroborative of the actor's criminal purpose." *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, ¶95, quoting *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of the syllabus; *State v. Gann*, 154 Ohio App.3d 170, 2003-Ohio-4000, ¶18.

{¶21} At trial, Terry Bridge, the owner of a house located at 3595 Layhigh Road, Ross Township, Butler County, Ohio, testified that at approximately 10:00 a.m. on October 30, 2008 he heard a car that "sounded like it had a muffler off" coming up his driveway. Not expecting any visitors, Bridge testified that he looked out the window when he saw "three individuals," later identified as Jonathan Kleinbreg, Curtis Wooten, and appellant, "pull up in that particular car, and it just didn't look good." After the car parked, Bridge testified that appellant, who was wearing "jersey gloves," approached the house and "beat the door * * * 20, 30, 40 times" to the point that it "rattled that house." In response, Bridge testified that he went into his bedroom to retrieve "two weapons" and call 911, whereas appellant went to another door and

3. Aggravated burglary in violation of R.C. 2911.11(A)(2), the underlying offense for which appellant's attempt charge was predicated, prohibits any person "by force, stealth, or deception" from "trespass[ing] in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense" while the "offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

"[b]eat [it] as hard and as loud as he could possibly do it." Bridge, after seeing appellant "peeking through the window of the door," testified that he told appellant to "just get off of [his] porch" or "[he] was going to take care of him." Appellant, apparently hearing Bridge's warning, retreated from the porch, got into the back seat of the vehicle, and made a "speedy exit."

{¶22} Officer Gary Vaughn of the Ross Township Police Department testified that he was dispatched to Bridge's home at approximately 10:15 a.m. to investigate a "burglary in progress call." Thereafter, while en route to Bridge's home, Officer Vaughn testified that he passed the suspects vehicle, "immediately did a U-turn, turned around in the middle of the street, and pursued the vehicle." Once stopped, Officer Vaughn testified that he found a plastic grocery bag in the back seat of the vehicle containing many items generally used in burglaries; namely, a "pry bar," lug wrench, two flashlights, a "spotting scope," cleaning wipes, a "wooden club with black tape," a screwdriver, "wire cutter pliers," and two pairs of gloves. Officer Vaughn also testified that Wooten, the driver of the vehicle, informed him that appellant "threw a firearm out of the car." A gun belonging to appellant was later discovered after police conducted a roadside search.

{¶23} Also at trial, Kleinberg, one of the other individuals in the car with appellant that morning, testified that he went to Bridge's house with Wooten and appellant because he "heard there was some cash in there." When asked who told him there was cash in Bridge's house, Kleinberg, who lived with appellant in Richmond, Indiana at that time, testified that appellant told him the house contained "$50,000 in a brick of gold." Kleinberg later testified that it was "all our idea" to break into Bridge's house, that they went there to "get the money," and that they left

because appellant "thought [Bridge] was on the phone with the cops."

{¶24} In his defense, appellant, who admitted to having a gun with him that day, testified that he was not planning on burglarizing Bridge's house, but instead, claimed that he was in the area to pick up a friend when they "turned into the wrong driveway."[4] Appellant then testified that although he was "knocking fairly loudly," he did so to make sure that "anybody there could hear [him]." Appellant continued by testifying after he heard Bridge "calling the cops for whatever reason," he knew that he "had the wrong house." Thereafter, once they left Bridge's house and "passed two cops," appellant testified that he "threw the gun out" of the car in an effort to hide it from police because he "was scared." When asked if he had any intention of burglarizing Bridge's home that morning, appellant testified "[n]o, none," and that none of the items found in the car belonged to him.

{¶25} After a thorough review of the record, and while appellant may claim that he merely turned into the wrong driveway, it is well-established that "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony." *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶11; *State v. Bromagen,* Clermont App. No. CA2005-09-087, 2006-Ohio-4429, ¶38. As a result, because the state presented an abundance of evidence that clearly indicates appellant took a substantial step in his efforts to burglarize Bridge's home while he had a firearm under his control, we find the jury did not lose its way so as to create such a manifest miscarriage of justice requiring his attempted aggravated burglary

4. Tony Hoebbel, who appellant referred to as "Tony Hopple," the "friend" appellant claimed he was trying to visit, testified that he was unaware of any plans for appellant to pick him up that morning.

charge to be reversed. See *State v. McFadden* (Sept. 23, 1991), Butler App. No. CA90-09-193, 6; see, also, *State v. Dias* (Dec. 10, 1997), Medina App. No. 2647-M, 1997 WL 778849, *4; *State v. Corpening* (Dec. 28, 1995), Franklin App. No. 95APA05-523, 1995 WL 765204, *3; *State v. Goston* (Aug. 21, 1995), Allen App. Nos. 94 11 0085, CR 94 10 0432, 1995 WL 506013, *2. Therefore, as appellant's attempted aggravated burglary conviction was not against the manifest weight of the evidence, we necessarily conclude that the state presented sufficient evidence to support the jury's finding of guilt. See, e.g., *Rodriguez,* 2009-Ohio-4460 at ¶62. Accordingly, appellant's second and third assignments of error are overruled.

{¶26} Assignment of Error No. 4:

{¶27} "THE TRIAL COURT COMMITTED STRUCTURAL ERROR OR PLAIN ERROR BY ERRONEOUSLY INSTRUCTING THE JURY ON THE ELEMENTS OF ATTEMPTED AGGRAVATED BURGLARY WITH A FIREARM SPECIFICATION, TAMPERING WITH EVIDENCE, AND POSSESSING CRIMINAL TOOLS."

{¶28} In his fourth assignment of error, appellant challenges the jury instructions provided by the trial court because, according to him, the instructions did not contain "each essential element" and contained "some elements * * * that were 'pulled out of thin air' and defined for the jury." However, after a thorough review of the record, we find the jury instructions provided by the trial court contained "all matters of law necessary for the information of the jury in giving its verdict," virtually mirrored the proposed instructions found in the Ohio Jury Instructions manual, were an accurate statement of the law, and did not prejudice appellant's right to a fair trial in any way. See R.C. 2945.11; *State v. Thompson* (Aug. 5, 1996), Madison App. No. CA95-12-040, 7; *State v. Haithcock* (Sept. 21, 1992), Clinton App. No. CA91-08-021,

5. Therefore, appellant's fourth assignment of error is overruled.

{¶29} Assignment of Error No. 5:

{¶30} "THE DEFENDANT-APPELLANT IS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BY HIS COUNSEL'S FAILURE TO CHALLENGE THE DEFECTIVE INDICTMENT, AND BY HIS FAILURE TO OBJECT TO DEFECTIVE JURY INSTRUCTIONS AT TRIAL."

{¶31} In his fifth assignment of error, appellant argues that his trial counsel was ineffective for failing to "challenge the severely defective Indictment" and the "defective jury instructions." However, having found no error in our review of these issues under appellant's first and fourth assignments of error, we necessarily conclude that appellant was not subjected to ineffective assistance of trial counsel. *State v. Behanan*, Butler App. No. CA2009-10-266, 2010-Ohio-4403, ¶41; *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052. Accordingly, appellant's fifth assignment of error is overruled.

{¶32} Judgment affirmed.

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