[Cite as *State v. Mick*, 2012-Ohio-3296.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-11-1034

Appellee — Trial Court No. CR0201002246

v.

Lawrence Mick — **DECISION AND JUDGMENT**

Appellant — Decided: July 20, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Brenda J. Majdalani and Bruce J. Sorg, Assistant Prosecuting Attorneys, for appellee.

Ann M. Baronas, for appellant.

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YARBROUGH, J.

{¶ 1} Defendant-appellant, Lawrence Mick, appeals his conviction following a jury trial for having a weapon while under a disability, a third degree felony, in violation R.C. 2923.13(A)(3). The Lucas County Court of Common Pleas entered a judgment of sentence on Mick's conviction on January 21, 2011.

{¶ 2} A review of the trial testimony reveals the following scenario of events.

{¶ 3} July 9, 2010, was project day at Mick's residence in East Toledo. In the early evening he and a friend, Adam Collins, were attempting to relocate and then repair a large kennel for Mick's dog, a German Shepherd named Sarge. For this task, Collins brought his welder to reinforce the steel side-panels of the kennel. Before moving the kennel, Mick first put Sarge into a "little holding cage," described as approximately four feet high and five feet long. He did this explicitly for Collins' safety. Mick then placed the cage on or near a deck at the back of his house. Hardly the docile pooch, Mick described Sarge as having "very aggressive" tendencies and an "erratic state of mind." Thus, along with the welder—and with Mick's approval—Collins came armed with a .25-caliber semiautomatic pistol.[1]

[1] In his own testimony before the jury, Mick offered his candid "psychological" assessment of Sarge. The dog apparently harbored a penchant for hard chomping that was unpredictable and serial. At home alone with Mick, Sarge's "frame of mind was good," and he would behave normally. Around other people, however, his disposition could change without warning. A visitor had to step carefully, Mick stressed, without suddenness or appearing "threatening." Unexpected motion or changes in "body language" within Sarge's proximity could alter the dog's mood. He would lower his head and draw back his ears, his eyes narrowing on a nearby ankle or thigh, signaling an imminent attack. This resulted in "a history of biting people," as Mick put it, before and after he acquired the dog. Indeed, but a week earlier, Sarge had mauled Mick's girlfriend, biting her "ten times along the shoulder, arm and leg." The severity of her wounds had required emergency medical treatment. Yet, despite that incident, he declined to have Sarge examined by a veterinarian or his aggression treated with medication. Mick preferred the dog unsedated, apparently willing to risk the intermittent outbreaks of ferocity.

{¶ 4} Things began well enough. The men disassembled the six-foot panels of the kennel on the side of the house and were moving them into the backyard where Collins had set up the welder. They had just erected one of these panels when Mick's girlfriend appeared at the back door. Either because of her appearance or the commotion of moving the panels, or both, Sarge began "growling and snarling" and "bouncing back and forth" inside the cage. Mick himself described the dog as "going nuts" and "beating up the cage." Seeing Sarge pushing on the gate to get out, he hurried over. In the neighboring yards there were children running about. Mick bluntly told the jury: "the dog could not be permitted to get out of that yard under any circumstances in its frame of mind." Just as he reached the cage, Sarge pushed his muzzle through the gate, popped it open and started out. Crouching down Mick grabbed the dog, now snapping at his face, and struggled to push him back. Suddenly Collins appeared behind Mick, drew his pistol, and started firing through the top of the cage.

{¶ 5} On the second floor of their home next door, Mick's neighbors, John and Amanda Armstrong, were watching a movie. They heard a dog barking loudly, followed by "a couple of pops." Thinking fireworks were igniting, the Armstrongs looked out an open window. In the yard below they saw a man in a white t-shirt, standing over a cage, shooting a small-caliber handgun at the dog inside. Mick, wearing an orange t-shirt, stood next to him holding a screwdriver against the gate. The "popping" continued with spent cases bouncing across the deck. While Mrs. Armstrong called 9-1-1, her husband yelled out to the men that the police were coming. By the fourth or fifth shot, Armstrong

could hear bullets "pinging off the cage." Collins' aim did not discernibly improve during this extended exercise in point-blank abuse; apparently only two of the rounds actually struck the dog. Following this volley, the men went inside Mick's house "for a minute or two." Sarge lay motionless in a corner of the cage. When they came out, Mick had the gun, and Armstrong watched him "take his turn and shoot [the dog] twice."

{¶ 6} Another neighbor, Melissa Compau, also witnessed this sad confluence of dog, man and gunfire. She was working at her computer near a rear window of her home, which overlooks Mick's backyard and deck. An unfamiliar kippage drew her attention to the window. Compau looked out and saw two men below—one of them "putting the dog in the cage [and then] putting some kind of screwdriver or something into the door to hold it." She returned to her computer, then heard "two gunshots" and went back to the window. She saw "a young man in a white t-shirt" firing a black pistol down into the cage—and "with every shot you heard the dog yelp and whine." Compau was concerned that children playing nearby might be injured because "you could hear the ding as [the bullets] went ricocheting." Collins stopped firing and both men went into the house. When they re-emerged, Compau watched Mick, who she recognized as the "heavy-set older gentleman" in an orange t-shirt, walk over to the cage and "put two more gunshots into the dog." She too called Toledo police.

{¶ 7} Collins, aware that police were alerted, fled in his truck. Several officers soon arrived, among them Officer Lamberger. Mick met Lamberger at the front door and led the officer through the house and out onto the deck where he observed the dog lying

in a corner of the cage. No handgun was recovered at the scene; however, two .25-caliber cases were found near the deck. The dog warden eventually arrived and Sarge, bleeding from two head wounds, was taken away. Later, a different officer located Collins at his house and recovered the pistol. Collins was subsequently arrested.

{¶ 8} At trial Lamberger testified about his conversation with Mick on the deck. Mick said the dog had attacked him while trying to escape the cage. Referring to Collins, Mick said "his friend" shot the dog initially. Mick then told Lamberger that after they went inside the house, "the dog was still trying to escape and he [Mick] came back out and shot it." Mick denied making this last statement. He did not deny that a handgun was involved, but maintained that only Collins did any shooting. Mick's 1988 conviction for marijuana possession in Michigan was admitted by stipulation.

{¶ 9} Mick now assigns one error for our review:

> The verdict was against the manifest weight of the evidence and the evidence was insufficient to support the verdict.

{¶ 10} In pertinent part, R.C. 2923.13 states:

> (A) Unless relieved from disability * * *, no person shall knowingly *acquire, have, carry, or use* any firearm or dangerous ordnance, if any of the following apply:
>
> * * *

(3) The person * * * has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse[.] (Emphasis added.)

{¶ 11} Given Mick's prior drug conviction, that disability generally prohibited him from engaging in any of the four modes of possessing a firearm set forth in the statute.[2] The two modes relevant here are "have" and "use." "Have" may be shown by evidence of immediate physical possession or control over the firearm, while "use" would include indicia such as brandishing or discharging it. *State v. Jones*, 6th Dist. No. L-00-1231, 2003-Ohio-219, ¶ 97.

{¶ 12} Against this statutory context, Mick's assigned error, as presented, inappropriately mingles manifest weight and sufficiency challenges. Although he seeks to employ both to dispute the elements of "having" or "using" a weapon, each ground invokes a distinct conceptual and evidentiary doctrine. Consequently, a bifurcated

[2] While courts have recognized a so-called "self-defense exception" to R.C. 2923.13, it is very narrowly construed. *See State v. Fryer*, 90 Ohio App.3d 37, 44-46, 627 N.E.2d 1065 (8th Dist.1993), citing *State v. Hardy*, 60 Ohio App.2d 325, 397 N.E.2d 773 (8th Dist.1978). This defense, one of self-preservation premised on a rather temporary and unanticipated use of a firearm "against an immediate threat of deadly force," is personal to the actor. It does not extend to the use of the weapon by third parties or for other purposes. *Id*. In testifying that he was "worried about getting a [femoral] artery punctured" by a deep bite, Mick arguably implied his fear of a life-threatening injury—assuming the dog still posed an immediate threat of that kind at the instant he fired the weapon. Yet, by insisting that Collins did all the shooting, Mick himself negated the possible availability of this defense. This is true even if we accept the premise that Collins genuinely acted to save both men from a fanged onslaught.

analysis is required. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25; *State v. Thompkins*, 78 Ohio St.3d 380, 386-387 (1997).

{¶ 13} A sufficiency review entails an elements-based analysis of the evidence. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Thompkins* at 386. An appellate court must determine whether the state presented enough evidence on each element of the crime to allow the case to go to the jury. *Id.* No assessment of weight—persuasive force—is involved. In contrast, "manifest weight" contests the *believability* of the evidence before the jury. *Id*. at 387; *State v. Barnhart*, 6th Dist. H-10-005, 2011-Ohio-2693, ¶ 50.

{¶ 14} Taking his sufficiency challenge first, Mick suggests there were conflicting statements about whether anyone actually saw him shooting the pistol and about how many shots were ultimately fired at the dog. Noting that no gun was found at his home, Mick then argues for the inference that since Collins left with the gun before the police arrived, and since it was later recovered from him, only Collins fired the weapon that evening. The tenuousness of this inference aside, the argument confuses weight with sufficiency.

{¶ 15} Apart from Mick's admission to Officer Lamberger, Armstrong and Compau separately witnessed the sequential shooting here—first by Collins blasting away in his white t-shirt, their attention plainly riveted by ricocheting bullets and the dog "howling in pain" when struck. They saw both men enter the house, and after Mick came out they watched him fire the handgun into the cage. Their testimony as to that act, if

believed by a rational jury, sufficed to prove the elements of "having" and "using." *State v. Leonard,* 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77. And combined with the stipulated proof of disability, their testimony was sufficient to prove the offense. Thus, Mick's challenge to his conviction based on insufficient evidence plainly fails.

{¶ 16} In criminal appeals challenging the jury's verdict on manifest-weight grounds, the issue is whether the state met its burden of *persuasion*. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 78 N.E.2d 541. "Weight is not a question of mathematics, but depends on its *effect in inducing belief.*" (Emphasis sic.) *Id.* at 387. Sitting as the putative "thirteenth juror," the appeals court must "examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.'" (Internal citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶ 81.

{¶ 17} Mick complains that he should not have been convicted because he never touched the weapon. The witnesses' possible mistakes or inconsistencies in relaying information in their 9-1-1 calls, he contends, and their possible misperceptions as to whether he or Collins fired into the cage the second time, demonstrate that the jury erred in not accepting his account.[3] The state counters that Armstrong and Compau were able

[3] As a further indication of "confusion," Mick points to a written question the court received from the jury, during deliberations, asking whether they had to decide "if Mr. Mick shot the gun" or "whether just having the gun, knowingly, at his house" completed the offense. The trial court did not answer this question, but simply told jurors to rely on

to identify the differences in each man's age, physical appearance and shirt colors and cogently relate each man's role in the incident. The accuracy of their observations, the state maintains, indicates there were no misperceptions as to who fired the gun and at what point. The state also notes that the neighbors' 9-1-1 reports were made independently of each other, and afterward no collusion occurred between the witnesses.

{¶ 18} Where the jury is presented with conflicting testimony, the standard for overturning a guilty verdict based on manifest weight is necessarily a high one. Recently, in *State v. Fell*, 6th Dist. L-10-1162, 2012-Ohio-616, we explicated the rationale for this:

> The jury is free to accept or reject evidence, to note ambiguities and inconsistencies in testimony—whether between several witnesses or in the conflicting statements of a single witness—and to resolve or discount them accordingly. * * * Jurors may accept as true all, some or none of what a witness tells them. On that score, unlike the "thirteenth juror," the original twelve had the benefit of actually seeing the witnesses testify. They observed their facial expressions and body language. They heard their voice inflections in responding to questions. In all of this the jurors could

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the previous instructions defining the elements of the offense. In his brief, Mick merely speculates how the jury's question might relate to the various testimonial conflicts, but does not specify how it demonstrates that in finding him guilty the jury "clearly lost its way"—whether in terms of how jurors resolved those conflicts or in how they applied the elements to their factual determinations. In any event, such speculation is simply not enough to overcome the presumption that "[a] jury [will] follow the instructions given to it by the trial judge." *State v. Stallings*, 89 Ohio St.3d 280, 286, 731 N.E.2d 159 (2000). Nor has Mick argued that the trial court's response to the question was itself a separate error.

> instinctively discern qualities such as hesitancy, equivocation, or candor (or the lack of it). The intimate and evanescent nature of observed testimony simply cannot be replicated after the fact. For that reason, we are required to extend "special deference" to the jury's determinations of credibility. *Thompkins* at 390 (Cook, J. concurring). (Some citations omitted). *Id.* at ¶ 14.

{¶ 19} Having reviewed the entirety of the trial transcript, we have little difficulty concluding that the jury did not "clearly [lose] its way" in finding Mick guilty of having a weapon while under a disability. Nor are we persuaded that "the evidence weighs heavily against the conviction." *Thompkins.*

{¶ 20} Accordingly, the sole assigned error is not well-taken.

{¶ 21} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App. R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE