

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

State of Ohio

Court of Appeals Nos. L-11-1248
L-11-1249

Appellee

Trial Court Nos. CR0201102285
CR0201101809

v.

Christopher G. Smith

DECISION AND JUDGMENT

Appellant

Decided: January 25, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Matthew D. Simko, Assistant Prosecuting Attorney, for appellee.

Ann M. Baronas, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This consolidated appeal is from two October 7, 2011 judgments of the Lucas County Court of Common Pleas, which sentenced appellant, Christopher G. Smith, after he was convicted in a consolidated trial by a jury of violating R.C. 2923.13(A)(3), having a weapon while under a disability and R.C. 2923.12(A)(2)(F), carrying a

concealed weapon. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignment of error on appeal:

THE TRIAL COURT ERRED IN DENYING APPELLANT'S
MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO CRIM.R.
29(A) AND WHEN IT PERMITTED THE JURY TO RETURN A
VERDICT OF "GUILTY" AGAINST THE MANIFEST WEIGHT OF
THE EVIDENCE.

{¶ 2} Appellant was indicted in two separate indictments for having a weapon while under a disability (Lucas County case No. CR0201102285) and for carrying a concealed weapon (Lucas County case No. CR0201101809). Both offenses arose out of the same circumstances occurring on May 20, 2011. The two cases were consolidated at the time of trial on August 29, 2011. Following a two-day jury trial, appellant was convicted of both offenses. Appellant bought this appeal.

{¶ 3} The following evidence was admitted at trial. Appellant stipulated to the fact that he was convicted in January 2009 of attempted drug abuse, which placed him under a disability that prohibits him from ever carrying a firearm. At 1:50 a.m. on May 20, 2011, a 28-year veteran police officer was dispatched to the area of Pinewood Street, Toledo, Ohio, by reports of a person with a gun on Pinewood Street, which was near an area the officer was patrolling. The persons described included one wearing a short-sleeved white t-shirt and black pants carrying a gun and a second person dressed all in

black. They were reportedly walking westbound on Pinewood and were approaching Hoyt Street.

{¶ 4} The officer testified that he arrived in the area within ten minutes after receiving the dispatch and turned the corner quickly from Ewing Street onto Pinewood, cutting off two individuals approaching the corner. These two men matched the descriptions of the persons identified in the dispatch. The officer testified there was limited street lighting in the area, some house lighting, and the officer's spotlight. The two men were startled for a moment and paused when the officer exited his vehicle, put the spotlight on them, and told them to stop. The man dressed in black was holding a puppy with two hands and walking near the inside of the sidewalk. The second man, appellant, who had been walking along the curb side of the sidewalk, stepped behind the man with the puppy. Appellant was holding a bottle of wine in his left hand and his right hand was not visible. As the officer called for backup, he saw appellant dip and then something fly into a nearby yard. The officer did not hear anything hit the ground.

{¶ 5} After backup arrived, the officer inspected the area where he had seen appellant throw something and found a gun. It was lying on top of the dew-covered grass of the well-kept yard, but the gun was dry. Appellant was intoxicated and very uncooperative. The other man was also intoxicated, but was "happy go lucky." After the officer found the gun, the second man indicated that it was not his and pointed to appellant, who rolled his eyes and laughed. While the officer examined the gun and determined that it was partially loaded, he did not determine whether it had been fired

recently. A forensics expert from the Toledo Police Forensic laboratory testified he tested the gun and determined that it was operable. The gun was never checked for fingerprints.

{¶ 6} The officer also testified that the area involved in this crime is a high crime area and there are many gangs. Therefore, he did not believe a gun lying in the grass would remain there for long, but it was not impossible for the gun to have been there before appellant approached the area.

{¶ 7} Appellant's companion, Ray Conley, testified that he had been with appellant all night and that they had been drinking. Conley heard a noise that night that could have been a gun or fireworks, but because he often hears that kind of noise, he ignored it. He recalled that he and appellant were walking along Pinewood Street after visiting the store, intending to turn onto Miller Street when an officer drove around the corner at Miller Street onto Pinewood Street. Conley recalled that shortly before this moment, he had placed a dog he had been carrying on the ground so the dog was walking alongside him when the officer came around the corner. Appellant was carrying a bottle of alcohol and, although he had been walking a few paces in front of Conley, was walking slightly behind Conley at that moment. Conley recalled that it was very bright in the area where they were stopped because there was a street light nearby. Conley never saw appellant throw anything. Conley had never seen appellant with a gun that night nor any other time they had been together. The officer kept asking who owned the gun and Conley recalling denying that it was his.

{¶ 8} In his sole assignment of error, appellant argues that the trial court erred by denying his motion for acquittal and that his convictions were contrary to the manifest weight of the evidence.

{¶ 9} An appellate court reviews a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under the sufficiency standard, we must determine whether the evidence admitted at trial, “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.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). *See also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, “[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact.” *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 10} In determining whether the evidence is sufficient to support the conviction, the appellate court does not weigh the evidence nor assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978), and *State v. Willard*, 144 Ohio App.3d 767, 777-778, 761 N.E.2d 688 (2001). If the state “relies on

circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction[.]” so long as the jury is properly instructed as to the burden of proof, i.e., beyond a reasonable doubt. *Jenks* at paragraph one of the syllabus.

{¶ 11} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *Thompkins* at paragraph two of the syllabus. When weighing the evidence, the court of appeals must consider whether the evidence in a case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if 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, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983), and *State v. Smith*, 80 Ohio St.3d 89, 114, 684 N.E.2d 668 (1997).

{¶ 12} To obtain a conviction of carrying a weapon while under a disability, the prosecution needed to establish appellant was carrying a gun on May 20, 2011, and he had a prior felony conviction involving attempted drug abuse. R.C. 2923.13(A)(3).¹ To

¹ R.C. 2923.13(A)(3) provides:

obtain a conviction of carrying a concealed weapon, the prosecution needed to establish that appellant was carrying a loaded gun on May 20, 2011, which he hid behind his companion so that the officer could not see it. R.C. 2923.12(A)(2) and (F).²

Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

* * *

(3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

² R.C. 2923.12(A)(2) and (F) provide in pertinent part:

(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

* * *

(2) A handgun other than a dangerous ordnance;

* * *

(F)(1) Whoever violates this section is guilty of carrying concealed weapons. Except as otherwise provided in this division or division (F)(2) of this section, carrying concealed weapons in violation of division (A) of this section is a misdemeanor of the first degree. Except as otherwise provided in this division or division (F)(2) of this section, if the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, carrying concealed weapons in violation of division (A) of this section is a felony of the fourth degree.

{¶ 13} Appellant challenges that the prosecution did not present sufficient evidence to establish that he possessed a gun that evening. He argues that his conviction was based solely on the circumstantial evidence that he was walking in a high crime area at a time when shots had been fired and the officer found a gun in the lawn near where appellant was stopped. Furthermore, he argues the prosecution presented no evidence that appellant's fingerprints were on the gun or that the gun had been recently fired.

{¶ 14} We reject appellant's argument that the evidence in this case was entirely circumstantial. There was both direct and circumstantial evidence presented in this case. Furthermore, circumstantial and direct evidence carry equal evidentiary value. *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d 492. Appellant really challenges the jury's evaluation of the evidence rather than the type of evidence involved.

{¶ 15} The officer observed appellant move to conceal his right hand and make a movement that, along with seeing something fly into the nearby yard, indicated to the officer that appellant had thrown something, and the officer found a dry gun in the dew-covered grass. Conley testified that he never saw appellant carrying a gun or attempt to hide a gun. The officer and Conley testified to conflicting versions of the events of that evening. Furthermore, the jury could consider that appellant was in a high crime area at the time a report was made of a man with a gun, he was near the area where the incident happened, and he and his companion matched the description of the men involved in the reported disturbance. The officer's observations, along with the stipulation of the prior felony offense, the circumstantial evidence, and the testimony of the forensic expert that

the gun was operable, were sufficient evidence, if believed, to support a jury finding that each element of the two offenses had been proven beyond a reasonable doubt. Therefore, we find that the trial court did not err by denying appellant's motion for acquittal.

{¶ 16} Furthermore, we find that the jury's determination of guilt in this case turned on the credibility of the witnesses and an assessment of the weight of the evidence. There is nothing in the transcript to support a finding that the jury lost its way in evaluating the evidence. Therefore, we find that the convictions were not contrary to the manifest weight of the evidence. Appellant's sole assignment of error is not well-taken.

{¶ 17} Having found that the trial court did not commit error prejudicial to appellant, the judgments of the Lucas County Court of Common Pleas are affirmed. Appellant is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgments affirmed.

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

Peter M. Handwork, J. _____

JUDGE

Arlene Singer, P.J. _____

JUDGE

Thomas J. Osowik, J. _____
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
