

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-792
Willis Spencer,	:	(C.P.C. No. 08CR-09-7072)
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on August 4, 2011

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

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Willis Spencer ("Spencer") is appealing from his conviction on a charge of unlawful possession of a dangerous ordnance, in violation of R.C. 2923.17. He assigns two errors for our consideration:

[I.] Appellant was deprived of the fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution by the prosecution's use of irrelevant and inflammatory evidence.

[II.] Appellant's conviction is not supported by sufficient evidence.

{¶2} Police from Whitehall executed a search warrant on Spencer's residence on May 4, 2007. As a result of the search, Spencer was indicted on three drug-related charges and the unlawful possession of a dangerous ordnance charge. The dangerous ordnance charge was based upon a theory that Spencer possessed a sawed-off shotgun. One of the drug-related charges was dismissed by the trial judge and a jury found Spencer not guilty of the other two.

{¶3} The sawed-off shotgun found by Whitehall police had a barrel of 16 and one-fourth inches in length.¹ Thus, the shotgun was clearly a dangerous ordnance as defined in R.C. 2923.11(K)(1). The only issue to be contested at trial was whether or not Spencer possessed it and/or knowingly possessed it.

{¶4} In the first assignment of error, appellate counsel for Spencer asserts that the State of Ohio tried to influence the jury's verdict on the possession issue by presenting testimony about the fact that police found a large number of pill bottles, some containing pills, in Spencer's residence. The State also presented evidence that Spencer had a total of 39 firearms in his residence.

¹ This testimony by David Hall of the Ohio Bureau of Criminal Investigation differed from that of Columbus Police Department Sgt. Dennis Allen who testified the barrel was 15 inches in length. See ¶19.

{¶5} Spencer, representing himself at trial, did not object to the testimony about the firearms and the pill bottles, so we can sustain this assignment of error only if the trial court committed plain error under Crim.R. 52(B).

{¶6} To constitute plain error, the error must be obvious on the record, palpable, and fundamental such that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166. Notice of plain error is to be taken with utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171; *State v. Ospina* (1992), 81 Ohio App.3d 644, 647.

{¶7} We cannot find the existence of plain error here, especially since the jury who heard the case acquitted Spencer of two of the three charges they considered, including the charges related to drug possession.

{¶8} The first assignment of error is overruled.

{¶9} Turning to the second assignment of error, unlawful possession of a dangerous ordnance is defined by R.C. 2923.17(A), which reads:

No person shall knowingly acquire, have, carry, or use any dangerous ordnance.

{¶10} "Dangerous ordnance" is defined in R.C. 2923.11(K)(1) and (L). R.C. 2923.11(K)(1) reads:

"Dangerous ordnance" means any of the following, except as provided in division (L) of this section:

(1) Any automatic or sawed-off firearm, zip-gun, or ballistic knife[.]

{¶11} None of the exclusions contained in R.C. 2923.11(L) apply to the facts of this case.

{¶12} Sufficiency of the evidence is the legal standard applied to determine whether the case should have gone to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In other words, sufficiency tests the adequacy of the evidence and asks whether the evidence introduced at trial is legally sufficient as a matter of law to support a verdict. *Id.* "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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273. If the court determines that the evidence is insufficient as a matter of law, a judgment of acquittal must be entered for the defendant. See *Thompkins* at 387.

{¶13} Even though supported by sufficient evidence, a conviction may still be reversed as being against the manifest weight of the evidence. *Thompkins* at 387. In so doing, the court of appeals, sits as a "thirteenth juror" and, after "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.* (quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175); see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-48. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387.

{¶14} As this court has previously stated, "[w]hile the jury may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* [(1967), 10 Ohio St.2d 230], such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. It was within the province of the jury to make the credibility decisions in this case. See *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("It is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.")

{¶15} See *State v. Harris* (1991), 73 Ohio App.3d 57, 63 (even though there was reason to doubt the credibility of the prosecution's chief witness, he was not so unbelievable as to render verdict against the manifest weight).

{¶16} To address the second assignment of error, we must set forth more detail about the actual testimony presented at trial.

{¶17} Chad Wilder, a detective with the Whitehall Police Department, was the first person to testify at the trial. Wilder testified that Spencer was present when he and other

Whitehall Police Officers executed the search warrant at Spencer's residence at 4411 Duchine Lane in Whitehall.

{¶18} In a bedroom at the Duchine Lane address were safes, each close to the size of a refrigerator. Spencer provided police the combinations for the safes so the safes could be searched. By doing so, he acknowledged a familiarity with the safes and the ability to exercise control over them and their contents. However, the shotgun was not in the safes, but in a nearby bedroom closet.

{¶19} The second witness to testify was Dennis Allen, a sergeant with the Whitehall Police Department. Sgt. Allen participated in the search and found the sawed-off shotgun in the bedroom closet of what appeared to be Spencer's bedroom. A photograph of the shotgun was taken and admitted into evidence as State's exhibit No. 144. Sgt. Allen described the weapon as a sawed-off shotgun, 15-inch barrel, 29 and one-half inches overall found in the bedroom closet.

{¶20} A second photograph of the shotgun was taken at the Whitehall Police station and entered into evidence as State's exhibit No. 139 LL.

{¶21} David Hall, a firearm examiner testified third and testified that the shotgun was operable.

{¶22} The first witness in the defense case was Jeffery Spencer, Spencer's brother. Among other testimony, Jeffery Spencer testified that Spencer is always careful with firearms and that Spencer had been buying and collecting firearms for many years.

{¶23} Reviewing the testimony, Spencer was a man who owned, collected and worked on firearms at his home in Whitehall, Ohio. He was careful and diligent with his

firearms. A sawed-off shotgun was found in his bedroom closet. He was present at the time. He owned safes which were in the bedroom and contained numerous other firearms.

{¶24} The evidence was sufficient to show that Spencer knowingly possessed the sawed-off shotgun.

{¶25} The second assignment of error is overruled.

{¶26} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT, P.J., and FRENCH, J., concur.
