

[Cite as *State v. Lipkins*, 2009-Ohio-2561.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

LIONEL I. LIPKINS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. W. Scott Gwin, J.

Hon. William B. Hoffman, J.

Case No. 2008CA00248

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Stark County Court of
Common Pleas, Case No. 2008CR0649

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

June 1, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Lionel I. Lipkins appeals his conviction entered by the Stark County Court of Common Pleas, on one count of having weapons while under disability, in violation of R.C. 2923.13(A)(3), following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On May 12, 2008, the Stark County Grand Jury indicted Appellant on one count of having weapons while under disability, in violation of R.C. 2923.139A)(3), a felony of the third degree; and one count of aggravated possession of drugs, in violation of R.C. 2925.11(A)(C)(1)(a), a felony of the fifth degree.¹ Appellant appeared before the trial court for arraignment on June 6, 2008, and entered a plea of not guilty to the charges. Appellant filed a Motion to Suppress on July 8, 2008. The State filed a timely response thereto. The trial court conducted a hearing on the motion on September 29, 2008. Via Judgment Entry filed October 1, 2008, the trial court overruled Appellant's motion to suppress.

{¶3} Over the course of the proceedings, Appellant dismissed two attorneys, one which he had privately retained and the other which the trial court had appointed. Appellant advised the trial court he wished to represent himself. The trial court conducted several inquiries of Appellant and concluded Appellant was knowingly and voluntarily waiving his right to counsel. Appellant signed a waiver of counsel form. The

¹ Appellant's disability was the result of a 2004 conviction for possession of cocaine.

matter proceeded to jury trial on October 1, 2008. Prior to the commencement of voir dire, the State dismissed Count 2 of the Indictment, aggravated possession of drugs.

{¶14} Detective Craig Riley of the Canton Police Department Vice Unit testified, in March, 2008, the Unit started receiving complaints about criminal drug activity at 1460 9th Street, N.E., Canton, Stark County, Ohio, Appellant's residence. The Unit also received tips from confidential informants regarding Appellant's involvement in that drug activity. After conducting a background check on Appellant, Detective Riley employed a confidential informant to make a controlled purchase. Based upon the information obtained from the confidential informant, Detective Riley requested and received from Judge Stephen Belden of the Canton Municipal Court a search warrant for the residence at 1460 9th Street, N.E., Canton, Ohio.

{¶15} At approximately 9:00 pm on April 1, 2008, Detective Riley and a SWAT team executed the warrant. Appellant was not present when the SWAT team entered the residence, but arrived approximately five minutes later. Appellant as well as two other individuals who were at the residence at the time the SWAT team entered were confined to the family room while the residence was searched.

{¶16} During the search, the vice unit found a patient information sheet from Aultman Hospital dated March 18, 2008, which included Appellant's name and the 1460 9th Street, N.E. address. The detectives also found music lyrics and various pieces of recording equipment which Appellant subsequently admitted belonged to him. In a closet in the kitchen, the unit discovered a .38 revolver hidden in a large bag of dog food. Detective Riley found six cartridges in the chamber of the revolver. Subsequent

testing of the gun and the casing conducted by the Stark County Crime Lab revealed the six cartridges were live and the gun was operable.

{¶7} Upon completion of the search, Detective Riley arrested Appellant and transported him to the Canton Police Department. The detective read Appellant his Miranda rights. After waiving his rights, Appellant made a statement to Detective Riley indicating he required the gun for protection after he was beaten up when leaving a local bar. Appellant claimed he found the gun near a sewer.

{¶8} After hearing all the evidence and deliberations, the jury found Appellant guilty of having one count of having weapons under disability. At the sentencing hearing on October 6, 2008, the trial court imposed a three year term of incarceration on Appellant.

{¶9} It is from this conviction Appellant appeals, raising as his sole assignment of error:

{¶10} "I. THERE WAS INSUFFICIENT EVIDENCE TO FIND THE APPELLANT GUILTY OF HAVING WEAPONS UNDER DISABILITY AND HIS CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I

{¶11} In his first assignment of error, Appellant challenges the manifest weight and sufficiency of the evidence of his conviction of having weapons while under disability.

{¶12} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, superseded by

constitutional amendment on other grounds as stated by *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. “While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenges questions whether the State has met its burden of persuasion.” *State v. Thompkins*, supra at 78 Ohio St.3d 390.

{¶13} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492 superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668.

{¶14} Specifically, an appellate court's function, when reviewing the sufficiency of the evidence to support a criminal conviction, is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, supra. This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. 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. Thompkins*, 78 Ohio St.3d at 386, 678 N.E.2d 541.

{¶15} In *State v. Thompkins* supra, the Ohio Supreme Court held “[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary.” *Id.* at paragraph three of the syllabus. However, to “reverse a

judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required.” Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶ 38, 775 N.E.2d 498.

{¶16} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “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 .” *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. See, also, *State v. Thompkins*, supra. The granting of a new trial “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175, 485 N.E.2d 717.

{¶17} Appellant was convicted of having weapons while under disability, in violation of R.C. 2923.13(A)(3), which provides:

{¶18} “(A) 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:

{¶19} “(3) The person is under indictment for or has been convicted of any 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 an offense

involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.”

{¶20} Appellant argues the State failed to establish he knowingly acquired, had, carried, or used a firearm while under disability. Appellant further asserts the jury clearly lost its way in resolving the conflicts and evidence and; therefore, created a manifest miscarriage of justice. Appellant explains he was not the only person residing in the residence or the only person who had access to the bag of dog food in which the gun was found; his alleged confession was not credible due to interference on the tape; and there was a lack of fingerprint evidence to show Appellant handled the weapon. We disagree.

{¶21} Upon review of the entire record, we find there was sufficient evidence to establish Appellant knowingly acquired or had a firearm while under a disability. Appellant admitted to Detective Riley he acquired the gun for protection after he was beaten up when leaving a local bar. The jury also heard Appellant’s taped statement in which he acknowledges his possession of the gun. Accordingly, we find there was sufficient evidence to find Appellant guilty of having weapons under disability. We further find the conviction was not against the manifest weight of the evidence. The testimony reveals, during his post-arrest statement, Appellant informed Detective Riley he acquired the gun for protection. Appellant did not dispute he lived in the residence in which the gun was found. Further, when Detective Riley remarked the bag of dog food was a “pretty good spot” for hiding the gun, Appellant laughed.

{¶22} Based upon the foregoing, we find Appellant’s conviction was neither against the manifest weight nor the sufficiency of the evidence.

{¶23} Appellant's sole assignment of error is overruled.

{¶24} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

s/ William B. Hoffman _____
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer _____
HON. SHEILA G. FARMER

s/ W. Scott Gwin _____
HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
LIONEL I. LIPKINS	:	
	:	
Defendant-Appellant	:	Case No. 2008CA00248

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ W. Scott Gwin
HON. W. SCOTT GWIN