

[Cite as *State v. Harris*, 2009-Ohio-6786.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-666
v.	:	(C.P.C. No. 08CR-11-8463)
	:	
Charles E. Harris, Jr.,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Ron O'Brien, Prosecuting Attorney, and *Barbara A. Farnbacher*, for appellee.

Brian J. Rigg, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, P.J.

{¶1} Defendant-appellant, Charles E. Harris, Jr. ("Harris"), appeals the judgment of the Franklin County Court of Common Pleas, which convicted Harris of tampering with evidence, carrying a concealed weapon, improperly handling a firearm in a motor vehicle, and having a weapon while under disability.

{¶2} On November 26, 2008, the Franklin County Grand Jury issued an indictment charging Harris with (1) felonious assault, a violation of R.C. 2903.11, with a

firearm specification, (2) tampering with evidence, a violation of R.C. 2921.12, (3) carrying a concealed weapon, a violation of R.C. 2923.12, (4) improperly handling a firearm in a motor vehicle, a violation of R.C. 2923.16, and (5) having a weapon while under disability, a violation of R.C. 2923.13. Harris waived his right to a jury trial.

{¶3} A bench trial commenced on June 4, 2009. At the outset, the parties discussed discovery issues, and the prosecution argued that it had insufficient notice of the defense witnesses. The defense asserted that Harris' mother would testify that the gun at issue was a paintball gun; the prosecution objected. The court reserved its ruling.

{¶4} The state's first witness was Columbus Police Officer Robert Vass. Officer Vass testified that he and two other officers were driving through the Woodcrest Apartments complex in response to complaints about criminal activity in the area. The officers observed a vehicle backed into a parking spot in an area they considered a "hot spot" for criminal activity. (Tr. 17.)

{¶5} Officer Vass and Officer Chris Smith-Hughes got out of their vehicle and approached the parked vehicle from the passenger side. Detective Anthony Johnson approached the driver side and observed suspected marijuana on the driver's lap. The driver got out of the vehicle. After engaging in a conversation Vass could not hear, the driver shoved Johnson and attempted to flee. Johnson tackled the driver and yelled, "'gun.'" (Tr. 19.) Vass "looked down and saw a black firearm, which I believe was a Hi-Point * * * either a CF 9 millimeter or a 380 laying on the sidewalk; and I saw the driver reaching for this firearm." (Tr. 20.)

{¶6} Officer Vass stated that he got a good look at the gun and believed it to be a real firearm. When asked whether it could have been a paintball gun, Vass explained that this gun could not have been a paintball gun because it had a magazine on it.

{¶7} Officer Vass also said that, at this point, the driver was "reaching frantically" for the gun. (Tr. 21.) Vass punched the driver once or twice, and Officer Smith-Hughes delivered knee strikes. The driver got control of the gun and brought it toward Vass' head. The driver then threw the gun 40 to 50 feet, into the middle of the parking lot. When the gun hit the ground, the driver said something like: " 'Get my gun, dude. Get my gun.' " (Tr. 23.) One of the passengers in the car ran over to where the gun landed, picked it up, and ran off. No firearm was ever recovered. When the car was searched later, officers found a shoulder handgun holster, marijuana, a scale, and a laptop computer.

{¶8} Officer Vass identified Harris as the driver. Vass did not interview Harris.

{¶9} On cross-examination, Officer Vass conceded that he did not know who owned the holster found in the car. He confirmed that the driver got control of the gun, despite being tackled and held in a bear-hug by Detective Johnson, punched and held by Vass, and kned in the back by Officer Smith-Hughes. Vass also confirmed that the officers were not in uniform. Instead, they wore tactical gear with police markings on the front and back. They wore black vests with big lettering identifying them as police officers, although non-police individuals could dress similarly. Vass agreed that the individuals in the parked vehicle were not engaged in any illegal activity when the officers approached.

{¶10} As to paintball guns, Officer Vass testified that he had "purchased probably four or five." (Tr. 50.) He was not familiar with a "Tiberius T8." (Tr. 50.) Defense counsel showed Vass pictures of paintball guns sold at a local store, "including the T8, which has the magazines that load in from the bottom and come out." (Tr. 52.) Vass said that he had never seen a paintball gun like that before, but said: "But I have seen hundreds of Hi-Point 9 millimeters, and I know exactly what they look like." (Tr. 52.)

{¶11} The state also called Columbus Police Detective Anthony Johnson. Detective Johnson gave testimony similar to Officer Vass' testimony. Johnson said that, when he approached the parked vehicle, he saw the driver, who had marijuana in his lap, rolling a marijuana cigarette. It was in plain view. Johnson recognized one of the five individuals in the car as a gang member and someone he had arrested previously.

{¶12} Detective Johnson asked the driver to exit the vehicle, and the driver did so reluctantly. When Johnson looked in the back seat of the car, the driver "pushed past [him] and tried to run towards the rear of the vehicle." (Tr. 69.) Johnson tackled him. As the driver grabbed at his waist area, a gun appeared. Johnson yelled: "'Gun.'" (Tr. 70.) During the struggle with the three officers, the gun fell to the ground. Johnson testified that it was a black automatic handgun. The driver regained control of it and threw it across the parking lot. Johnson stated that it could not have been a paintball gun. He also said that, after the driver threw it, the driver said: "'Yo, man. Get my gun, get my gun. Yo, get it.'" (Tr. 75.) When questioned, the driver said that the gun was not real, that he bought it from a friend, and that it was a paintball gun.

{¶13} On cross-examination, Detective Johnson confirmed that the officers did not observe anything illegal about the parked car before they approached it, and he did not block the parked car from pulling out. As the officers approached the car on foot, Johnson indicated to the other officers that he could see marijuana in the car. Johnson did not identify himself as a police officer because Alex Ferguson, the individual whom Johnson had once arrested, said: " 'Officer Johnson, what's up?' " (Tr. 103.) When questioned, the driver said that he tried to run from the officers because his cousin had been shot, and he thought he was going to be shot, too.

{¶14} Detective Johnson could not identify the type of gun the driver had. He said that the driver had the gun in his hand at one point during the struggle. He could have fired it, but did not.

{¶15} After Detective Johnson's testimony, the prosecution again raised the issue of undisclosed defense witnesses. One of those witnesses was a representative of Paintball Ohio. The prosecution argued that the defense had not responded to its demand for discovery; defense counsel argued that he had orally informed the prosecution of his intended witnesses and had left a handwritten copy of the defense witness list with the receptionist at the county prosecutor's office.

{¶16} The court asked defense counsel why testimony about paintball guns would be relevant. Defense counsel referred to the officers' limited knowledge of paintball guns. The following dialogue took place:

THE COURT: There's just no testimony that it could have been a paintball gun. So I don't know why you would bring somebody in to tell me what a paintball gun looks like any

more than you would bring somebody in to tell me what a bazooka looks like.

[DEFENSE COUNSEL]: In this case, Your Honor, what we would be doing is the employee from the paintball house * * * would testify that there are paintball guns that look identical and sound identical to real guns, that you cannot tell them apart from the situation unless you take them apart to examine them and see what's inside the magazine.

(Tr. 155.)

{¶17} The prosecution argued that, because the witness was not present at the scene, his testimony was not relevant. The prosecution also argued that, without prior disclosure of a defense expert witness on paintball guns, there was no opportunity for the state to prepare evidence that a paintball gun could be a deadly weapon if it is fired fast enough.

{¶18} Ultimately, the court denied defense counsel's request to present an expert witness on paintball guns. The court noted that the defense had not provided the prosecution with any formal discovery, so the witness was not allowed.

{¶19} The prosecution also presented Columbus Police Officer Christopher Smith-Hughes as a witness. Officer Smith-Hughes' testimony was similar to that of the other officers. Although Detective Johnson was the first to observe the marijuana, Smith-Hughes also saw it.

{¶20} Officer Smith-Hughes confirmed that he and Officer Vass went to assist Detective Johnson, who had tackled Harris. Johnson yelled, "'gun.'" (Tr. 172.) Vass punched Harris; Smith-Hughes struck him in the midsection with his knee. Smith-Hughes could see the weapon for about ten seconds. He said: "[I]t looked real. It was black. It looked metal." (Tr. 174.)

{¶21} Once Harris threw the gun, Officer Smith-Hughes gained control of Harris' arm and began to handcuff him. Harris then "yelled, 'I swear, if one of y'all don't get that gun, someone will have a problem.' " (Tr. 175.)

{¶22} The state rested. The defense moved to suppress all of the evidence against Harris because the officers had no probable cause for an arrest or a search. The court denied the motion.

{¶23} The defense called Aliver Alexander as a witness. The incident between Harris and the officers took place in front of Alexander's home. Alexander testified that the officers' vehicle was parked so as to block Harris' car. He never heard anyone say "gun." Harris did not aim the gun at the officers, and he tried to get rid of it. Harris did not have a chance to harm the officers.

{¶24} Harris also testified on his own behalf. On November 13, 2008, he was parked in front of his friend's apartment. Four men from the neighborhood approached the car and tried to sell him a laptop. He did not see the officers until they were parked and getting out of their vehicle, which was blocking Harris' vehicle.

{¶25} Harris admitted that he had marijuana on his lap, but said that Detective Johnson would not have been able to see it from outside the car. Johnson told him to get out of the car; he asked why he was being harassed. Once he got out of the car, he tried to run because he had a warrant for driving under suspension. Then Johnson tackled him.

[HARRIS]: As I'm getting tackled, he's starting at my waist, and he's sliding down. As he slides down, he gets to my legs, he pulls my legs together. As I was falling, the BB gun

fall – I mean, the paintball gun falls out. I don't reach and grab it. I don't try to point it at nobody like that. It falls out.

(Tr. 249.)

{¶26} With his pants at his ankles, Harris grabbed the gun and tossed it. He also said: " 'I am not resisting. I'm not resisting.' " (Tr. 250.) The officers read him his rights, questioned him, and said that they would let him go if he told them who ran off with the gun. Harris told them it was a paintball gun. Harris denied pushing Detective Johnson and said there would not have been room to do so.

{¶27} Harris said that he had gotten the paintball gun from a friend, but had not been able to contact the friend because the police confiscated his phone. He said he had no intent to harm anyone and had never physically abused anyone. He also said he had not carried a real gun since his release from prison six years ago. On cross-examination, Harris admitted to throwing the gun, but said he only threw it so he would not get shot.

{¶28} At the conclusion of the trial, the court found Harris guilty of carrying a concealed weapon (a real gun), tampering with evidence (by throwing the gun), improper handling of a weapon in a vehicle, and having a weapon under disability. The court found him not guilty of felonious assault, which would have required a finding that Harris knowingly attempted to cause serious harm with a firearm. The court imposed a total sentence of three years in prison.

{¶29} Harris filed a timely appeal, and he raises the following assignments of error:

[I.] [APPELLANT] WAS DENIED A FAIR TRIAL WHEN THE COURT PROHIBITED THE DEFENSE WITNESSES TO TESTIFY.

[II.] THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY. THIS DENIED APPELLANT A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

[III.] THERE WAS INSUFFICIENT EVIDENCE TO CONVICT APPELLANT. THIS DENIED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

{¶30} In his first assignment of error, Harris argues that the court erred by not allowing defense witnesses to testify. Although he refers to "witnesses" in his assignment of error, his argument relates only to the court's denial of counsel's request to call a representative from Paintball Ohio. We reject Harris' arguments.

{¶31} Ohio Crim.R. 16(C)(1)(c) requires a defendant to disclose to the prosecution, upon the court's order pursuant to a prosecution motion, a list of the names and addresses of all witnesses the defendant intends to call at trial. If a party fails to comply with Crim.R. 16, "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances." Crim.R. 16(E)(3).

{¶32} The purpose behind the criminal rules is to remove the element of gamesmanship from the trial. *State v. Parker* (1990), 53 Ohio St.3d 82, 86, citing *State v. Howard* (1978), 56 Ohio St.2d 328, 333. The purpose behind the discovery rules is to prevent surprise and the secreting of evidence in favor of one party. *Parker*, citing

Lakewood v. Papadelis (1987), 32 Ohio St.3d 1, 3. A trial court must inquire into the circumstances producing the alleged discovery violation. After doing so, the court must impose the least severe sanction that is consistent with the purpose of the rules of discovery. *Lakewood* at 5.

{¶33} A trial court has discretion in responding to a discovery issue. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78. We will reverse a court's decision to exclude evidence only where the court abuses its discretion. *Id.*

{¶34} Here, after inquiring into the circumstances regarding defense counsel's alleged failure to provide the prosecution with a list of defense witnesses, the court prohibited the defense from presenting a witness from Paintball Ohio. Although Harris contends that the defense informed the prosecution of its witnesses more than a week before trial, the discussion at trial indicated that the exchange of information had been very informal, and the prosecution may or may not have written down all of the relevant information. At best, defense counsel informed the prosecution in their pre-trial discussion that he would be calling a paintball-related witness and specifically identified the Paintball Ohio representative as a witness in a handwritten note left with the receptionist at the prosecutor's office the evening before the witness was to be called. At no time, however, did the defense present to the prosecution, or file with the court, a formal, written witness list. The lack of notice precluded the state from calling its own expert to testify regarding the use of a paintball gun as a deadly weapon. Under these circumstances, we cannot conclude that the trial court abused its discretion by refusing to allow the witness to testify.

{¶35} Moreover, we do not agree with Harris that the court's ruling changed the outcome of the trial. Harris himself testified that the gun was a paintball gun and had the opportunity to offer evidence in support, for example, the identity of the friend to whom the gun belonged. The three officers, all of whom saw the gun at close range, testified that it was a real gun and not a paintball gun. Defense counsel cross-examined each of the officers extensively about their knowledge of paintball guns and whether the gun that fell from Harris' clothing could have been a paintball gun. Therefore, the issue of whether the gun was, or could have been, a paintball gun was squarely before the court. For all these reasons, we conclude the court did not abuse its discretion in denying defense counsel the opportunity to call a Paintball Ohio representative as a witness. Accordingly, we overrule Harris' first assignment of error.

{¶36} In his second assignment of error, Harris argues that the court's verdict was against the manifest weight of the evidence. In his third assignment of error, Harris argues that there was insufficient evidence to convict him of all the charges. We address these assignments together.

{¶37} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved beyond a reasonable doubt the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78. We will not disturb the verdict

unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *Jenks* at 273. In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶38} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *Thompkins* at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Id.* Additionally, we determine "whether in resolving conflicts in the evidence, the [trier of fact] 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. We reverse a conviction on manifest weight grounds for only the most "exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387, quoting *Martin* at 175. Moreover, "it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible." *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶39} In making these arguments, Harris cites to the "very limited evidence" that he possessed an actual firearm. We disagree with Harris' characterization of the

evidence. As we noted, each of the three officers testified that he saw the gun at close range and that it was a real gun. Officer Vass specifically identified it as "a Hi-Point * * * either a CF 9 millimeter or a 380." (Tr. 20.) He also said that he had "seen hundreds of Hi-Point 9 millimeters," and he knew "exactly what they look like." (Tr. 52.) Detective Johnson identified it as a black automatic handgun. Officer Smith-Hughes said that he saw the gun for about ten seconds and that it looked real.

{¶40} Harris' own actions also suggest that the gun was real. He was carrying it inside his clothing. After it dropped to the ground, he threw it across the parking lot. He did so, he said, because he did not want to get shot.

{¶41} Together, this evidence was sufficient to show that Harris possessed an actual firearm. The convictions for carrying a concealed weapon, improper handling of a firearm in a vehicle, and having a weapon under disability, were not against the weight of the evidence. Furthermore, his admission that he threw the weapon across the parking lot supports his conviction for tampering with evidence. Therefore, we overrule his second and third assignments of error.

{¶42} In conclusion, we overrule Harris' first, second, and third assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.
