[Cite as *State v. Pride*, 2011-Ohio-6055.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-55
v.	:	(C.P.C. No. 10CR-07-4114)
Alexander D. Pride,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 22, 2011

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

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Alexander D. Pride, appeals from the judgment of the Franklin County Court of Common Pleas convicting him of one count of having a weapon while under a disability ("WUD"), a third-degree felony, in violation of R.C. 2923.13.

Because the record contains sufficient evidence to support the conviction, we affirm the judgment of the trial court.

{¶2} The conviction herein arises out of an incident that occurred on July 5, 2010. As adduced at trial, on this date, Raymond Brown, Jr., was working the afternoon shift at the radiology department at Mount Carmel West Hospital. At the end of Raymond's shift at approximately 11:30 p.m., Raymond's wife, Taqisha Brown, picked him up at the hospital. The couple's youngest child was in the backseat of the car. and because it was warm outside, the car's windows were down. On the way to their home, approximately three to four miles from the hospital, Raymond stopped at a red light at the intersection of West Broad Street and Eureka Avenue.

{¶3} Raymond noticed a man wearing blue jean shorts and a gray tank top run across the street with, what appeared to be, a white shirt over his head. According to Raymond, the man approached the car and hit him twice in the face with a gun while telling him to, "Get out of the car." (Tr. 53.) Raymond's description of the gun was very specific in that he testified the gun was a chrome revolver that "was a 357 or something because it was kind of big." (Tr. 56.) Instead of exiting the car, however, Raymond sped away and Taqisha called 9-1-1. Seeing a Columbus Police cruiser in a parking lot, the couple stopped and reported to police what had just transpired. After speaking with the officer, Raymond was transported to the hospital for treatment where he subsequently underwent medical testing and received eight stitches.

{¶4} At approximately 2:00 a.m. that morning, Raymond was asked to identify a man, later identified as appellant, who had been apprehended by the police. Raymond

identified appellant as the man that hit him in the face with the gun and expressed that he was 100 percent certain in his identification.

{¶5} According to Taqisha, while at the red light, she noticed a large group of people at the corner. Taqisha saw a man wearing a gray tank top and jean shorts approach the car, and Taqisha testified that the man was trying to cover his face with a white shirt as he ran across the street. Once at the car, Taqisha testified the man proceeded to hit Raymond "a couple times in the face and said, 'Get out of the car.' " (Tr. 95.) As Raymond sped away, Taqisha explained to the jury that she looked back and it appeared as if the man was trying to point the gun at the car. When Taqisha returned with Raymond for the identification of the men apprehended by police, she was not able to identify the man's face, but did identify the suspect's clothes as those worn by the perpetrator.

{¶6} Detectives Kenneth Kirby and Gary Bowman testified that, while in the area near the crime scene, they observed two men, one of whom matched the description of the perpetrator. The detectives testified that the man reached behind his back and pulled out something silver or chrome in color. Each detective testified that he believed the object was a handgun. The two men began running away, and, as the men fled, the detectives lost sight of them. Within ten minutes, with the assistance of additional cruisers and a police helicopter, one of the men, identified as Anthony Wadsworth, was apprehended by police. Twenty minutes later, police apprehended appellant. No weapons or other silver objects were found on appellant's person though they did find a worn wooden brush. After Raymond identified appellant as the perpetrator, appellant was taken to Columbus Police Headquarters.

{¶7} During interviews with police, appellant claimed Wadsworth gave him a black gun and told him to "stick up" the next car that came to the stoplight. According to appellant, he was to give Wadsworth the money and the car after the carjacking. Appellant admitted to police that he hit the driver of the car but denied trying to shoot him. Appellant also told police that after the incident, Wadsworth "dumped" the gun somewhere.

{¶8} On July 15, 2010, a Franklin County Grand Jury rendered an 11-count indictment against appellant for three counts of aggravated robbery with firearm specifications, three counts of second-degree felony robbery with firearm specification, three counts of third-degree felony robbery with firearm specifications, one count of felonious assault, and one count of WUD. A jury trial commenced on September 27, 2010, and the three counts of the indictment pertaining to the child were dismissed. On October 1, 2010, the jury rendered a verdict of guilty on the WUD, but was unable to reach a verdict on the remaining counts of the indictment. Therefore, a mistrial was declared as to those counts. On November 4, 2010, appellant was sentenced to a five-year term of incarceration. Prior to the re-trial on the remaining counts, appellant entered a plea of guilty to one count of robbery as a second-degree felony without a firearm specification. Appellant was sentenced to five years concurrent to the sentence imposed on the WUD conviction.

{¶9} This appeal followed, and appellant challenges only the WUD conviction as set forth in the following two assignments of error:

> [1.] The evidence was insufficient as a matter of law to support appellant's conviction for having a weapon while under a disability as there was no evidence from which the

> jury might reasonably infer appellant was in possession of an instrument meeting the statutory definition of a "firearm."
>
> [2.] With respect to count eleven the trial court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.

{¶10} Because both assignments of error challenge the sufficiency of the evidence they will be addressed as one. Appellant contends the evidence failed to establish that he was in possession of an instrument meeting the statutory definition of a "firearm." Therefore, it is appellant's position that the evidence is insufficient to support his WUD conviction and the trial court should have granted his Crim.R. 29 motion. We note that the defense made Crim.R. 29 motions at the close of the state's case and at the close of the evidence and that the trial court overruled both motions.

{¶11} Crim.R. 29(A) provides that, "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." When reviewing a trial court's denial of a Crim.R. 29 motion for judgment of acquittal, appellate courts apply the same standard as that applied to claims regarding sufficiency of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. "A conviction based on insufficient evidence constitutes a denial of due process." *State v. Rawls*, 10th Dist. No. 03AP-41, 2004-Ohio-836, ¶25, citing *Thompkins* at 386. As set forth in *State v. Jenks* (1991), 61 Ohio St.3d 259, when reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court must examine the evidence submitted at trial to determine whether such evidence, if believed, would convince an

average person 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. Id. at paragraph two of the syllabus. See also *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789.

{¶12} 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. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. Accordingly, the weight given to the evidence and the credibility of witnesses are issues primarily for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The reviewing court does not substitute its judgment for that of the factfinder. *Jenks* at 279.

{¶13} Appellant was convicted of WUD, in violation of R.C. 2923.13(A), which provides, in pertinent part, "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: * * * [t]he person * * * has been convicted of any felony offense of violence 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 of violence."

{¶14} R.C. 2923.11(B)(1) provides: " 'Firearm' means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable."

{¶15} According to R.C. 2923.11(B)(2), "[w]hen determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶16} Appellant does not dispute that he was under a disability at the time of the offense, nor does he challenge any aspect other than operability of the gun. Specifically, it is appellant's position that the record lacks evidence from which the jury could infer that he was in possession of a "firearm" because there is no evidence from which the jury could infer that the gun was operable.

{¶17} When attempting to prove that a deadly weapon constitutes a firearm, the state is not required to produce the gun or offer direct evidence that the gun is operable. *State v. Glover*, 10th Dist. No. 07AP-832, 2008-Ohio-4255, ¶45, citing *State v. Murphy* (1990), 49 Ohio St.3d 206. As held in *Thompkins*, "[i]n determining whether an individual was in possession of a firearm and whether the firearm was operable or capable of being readily rendered operable at the time of the offense, the trier of fact may consider all relevant facts and circumstances surrounding the crime, which include any implicit threat made by the individual in control of the firearm." Id. at 385. See also, e.g., *State v. Poulson*, 10th Dist. No. 09AP-778, 2010-Ohio-3574 (sufficient evidence to find operability of a gun where the defendant ordered store employees to a back room at gunpoint while announcing "this is a robbery, no joking").

{¶18} In *State v. Henderson*, 8th Dist. No. 88833, 2007-Ohio-5076, the court was presented with a scenario similar to that before us. In that case, an argument began

within a group of people and escalated into a physical altercation. Five witnesses testified that the defendant had a gun with which he hit two persons in the head. Though recognizing the record lacked any "overt threats" by the defendant, the court concluded that the totality of the circumstances, i.e., witnesses placing a gun in the defendant's hand and testifying that he hit two persons with the gun that was produced during the altercation, implied that the defendant had an operable firearm.

{¶19} In the case sub judice, both Raymond and Taqisha testified that while stopped at a red light at the intersection of West Broad Street and Eureka Avenue a man not known to either of them ran over to their car. Both witnesses testified that the man had a gun and that the man proceeded to hit Raymond in the face with the gun while demanding that he "[g]et out of the car." (Tr. 53.) Additionally, Taqisha testified that as Raymond sped away, she looked back and saw the man "like juggling the shirt and looking like he was going to point and shoot at us." (Tr. 97.) For clarification, Taqisha was asked, "[b]ut it looked like to you he was going to point at you?" to which she responded, "[y]es." (Tr. 97.)

{¶20} Upon review of the record, we conclude the evidence herein is akin to that presented in *Henderson*. While not presented with an explicit threat that the victim would be shot if he failed to comply with appellant's demands, the totality of the circumstances demonstrates that the gun was handled in a manner that implied it could be used to shoot the victim if he failed to comply. *Henderson*. See also *Thompkins* (operability may be proven if an individual brandishes a gun and implicitly but not expressly threatens to discharge the firearm); *State v. Dutton*, 10th Dist. No. 09AP-365, 2009-Ohio-6120 (firearm operability inferred where the record contained evidence that the defendant barged into a

house, pointed a gun at the victim, and then began to beat him with it); *State v. Craig*, 8th Dist. No 94455, 2011-Ohio-206 (sufficient evidence of operability where the defendant demanded money and hit victim with the gun). Cf. *State v. Johnson*, 8th Dist. No. 90449, 2008-Ohio-4451 (insufficient evidence to establish firearm specification where the defendant hit his wife in the head with the handle of a gun and record void of any express or implied threats). When viewed in a light most favorable to the state, as is required when reviewing the sufficiency of the evidence, we conclude the record contains sufficient evidence to support appellant's WUD conviction.

{¶21} Accordingly, we overrule appellant's two assignments of error.

{¶22} Having overruled both of appellant's assigned errors, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

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

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