[Cite as *State v. Nelson*, 2010-Ohio-383.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 97
v.	:	T.C. NO. 08 CR 0399
DEREK NELSON	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 5th day of February, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notice of Appeal of Derek Nelson, filed October 17, 2008. On May 12, 2008, Nelson was indicted on one count of burglary, in violation of R.C. 2911.12(A)(2), with two firearm specifications; one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A), with two firearm specifications; one count of

discharging a firearm on or near prohibited premises, in violation of R.C. 2923.162, with two firearm specifications; one count of tampering with evidence, in violation of R.C. 2921.12(A)(1), with one firearm specification; one count of carrying a concealed weapon, in violation of R.C. 2923.12(A)(2); and one count of having weapons while under disability, in violation of R.C. 2923.13(A)(2).

{¶ 2} Nelson pled not guilty, and he filed a motion to suppress on September 18, 2008. Following a hearing on the motion, the trial court sustained the motion as to Nelson's "pre-Miranda statements" and overruled the motion with respect to all "post-Miranda statements."

{¶ 3} The State proceeded to a jury trial on the charges of tampering with evidence with a gun specification, carrying a concealed weapon, and having weapons while under disability, and the other charges were dismissed. Nelson was convicted of tampering with evidence, a felony of the third degree, with a firearm specification, and having weapons while under disability, also a felony of the third degree. He was found not guilty of carrying a concealed weapon. Nelson was sentenced to a mandatory one year term on the gun specification to be served prior and consecutive to the consecutive five year terms on the other counts, for a total sentence of 11 years.

{¶ 4} Nelson asserts two assignments of error. His first assignment of error is as follows:

{¶ 5} "THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF WEAPONS UNDER DISABILITY AND TAMPERING WITH EVIDENCE."

{¶ 6} Nelson argues that his convictions for the above offenses are against the manifest weight of the evidence and not supported by sufficient evidence.

{¶ 7} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 8} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 9} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 10} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing 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, 61 L.Ed.2d 560; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, * * * ." *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 70.

{¶ 11} R.C.2921.12 provides: "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

{¶ 12} "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation."

{¶ 13} R.C. 2923.13 provides "(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: * * * (2) The person * * * has been convicted of any felony offense of violence * * *."

{¶ 14} By way of background, at the suppression hearing, Officer Jason Via of the Springfield Police Department testified that Nelson initially volunteered at the scene of the shooting that Matt Markley had been shooting at him. The following exchange then occurred:

{¶ 15} "Q. So there at the house at Mound Street was that the only thing [Nelson] says?

{¶ 16} "A. I'm sure Sergeant [James] Hall told Mr. Nelson that we found his gun also in the basement crawl space area there behind Mound Street, and [Nelson] stated that he did not fire the gun but it was his.

{¶ 17} "Q. Had he been Mirandized at that time?

{¶ 18} "A. No.

{¶ 19} "Q. From there did he make any other statements to you there at that juncture?

{¶ 20} "A. I don't think that he made any statements, not directly to me, but after he was identified by witnesses and was placed under arrest, I Mirandized him at that time."

{¶ 21} Officer Hall also testified that he told Nelson, before he had been Mirandized, that the officers "recovered a firearm in the location where we found him." Hall testified that Nelson told him that "he did have a firearm, but he didn't shoot it at anyone."

{¶ 22} At the hearing, the State conceded that Nelson's pre-Miranda statements to Hall regarding the gun were subject to suppression. The trial court determined that Hall's statement to Nelson, although not in the form of a question, was made "with the intent of eliciting some kind of a response from the defendant." According to the trial court, Nelson's response was voluntarily made, such that the statement "should be suppressed not because of a constitutional voluntariness violation, but because of a procedural Miranda violation."

{¶ 23} At trial, Via testified that he and Officers Wendy Kibler and Greg Ivory responded to the scene and apprehended Nelson "hiding in grass, some high grass in the backyard" at 1115 Mound Street. Nelson was initially placed in Officer Brian Taylor's cruiser and then moved to Via's and Kibler's cruiser. After he was identified by witnesses, Nelson was taken to headquarters. Via testified that Nelson made statements to him and Kibler in the cruiser, after he was Mirandized, and that part of what he said was recorded by the cruiser's recording system. The partial recording was played in open court for the jury, during which Nelson asserted, " * * * I always got a gun on me, we always keep guns on us * * * for protection. I guess his house got broken into and he come around the corner and started shooting

at me * * * I didn't even shoot. I didn't even shoot my fucking gun. * * * If I get charged it should be for carrying a concealed weapon that's about it."

{¶ 24} Officer Wendy Kibler testified that whenever the lights on the police cruiser are activated, the on board camera automatically records both audio and video. Kibler believed that the system was working when Nelson was placed in the cruiser, and when she realized that nothing was being recorded, the system was activated. Kibler acknowledged that the CDR recording is incomplete. According to Kibler, Nelson "mentioned that yes, he did have a gun, but he just kept stating that he didn't fire it." At headquarters, Kibler testified that she asked Nelson "where he had his firearm, and he stated that he kept it in his waistband."

{¶ 25} Officer James Hall testified that he arrived at the scene after the other officers, and Nelson was already in the cruiser. For gunshot residue testing, he collected a sample from Nelson's hands at police headquarters.

{¶ 26} Officer Joseph Lewis testified that he gathered evidence at the scene and took photographs. He recovered a "Colt pistol, chrome with a wood handle. * * * a jacket, * * * two .45 casings and a live .9 millimeter round, and a casing for the .9 millimeter round."

{¶ 27} The Colt pistol and the jacket were recovered from a crawl space at 1115 Mound Street. Lewis stated that the jacket appeared to be stained with blood. The .9 millimeter round was recovered at 1086 Mound Street, and the spent casings were found at the rear of 1101 Mound Street.

{¶ 28} Officer Brian Taylor testified that he was involved taking Nelson into custody. Taylor stated that the Colt pistol "was in a crawl space underneath the vacant house where [Nelson] was taken into custody." The crawl space is on the southwest corner of the house.

{¶ 29} Laura Hagler testified that she was in her living room with her boyfriend at the corner of East and High Streets, on the date of the incident, when she heard glass breaking. Hagler looked out the window and observed Nelson "kicking out the bottom part of the glass window and then jump through it" in the apartment building next to hers. According to Hagler, "he kind of ran towards where we were inside our apartment. There is a little corner that he hid behind and I went to call 911, and my boyfriend * * * just said that he had a gun." Hagler also observed the gun, and she testified it "was a handgun and an automatic and it was silver." Hagler identified Nelson after his arrest, and she testified, "when I was watching all of this take place, I believe he had a jacket on and later on when they brought him back to ID him, he did not."

{¶ 30} Seth Fenstermaker, Hagler's boyfriend, also testified. He observed Nelson "run and hide into the courtyard area. * * * After he hid beside the building he pulled out like a silver or chrome semiautomatic pistol and held it in his hand for a minute." Fenstermaker also identified Nelson after his arrest and in court.

{¶ 31} Ted Manasiam, a forensic scientist in the trace evidence unit of the Ohio Bureau of Criminal Identification and Investigation, testified. Manasiam conducted gunshot residue testing on the sample obtained by Hall and found "particles highly indicative of gunshot residue," a positive result.

{¶ 32} Timothy Shepherd, a forensic criminalist in the City of Springfield and the Springfield City Police Division Crime Laboratory, testified that he determined that the Colt pistol was operable, and he also determined that the two casings retrieved at the scene had been fired from the Colt pistol.

{¶ 33} Officer Greg Ivory testified that upon arriving at the scene, he observed Nelson walking away from the southwest corner of the vacant house at 1115 Mound Street. Ivory later discovered the firearm in the crawl space at that corner of the residence.

{¶ 34} Nelson testified on his own behalf. He admitted that he had previously been convicted of burglary, in case number 2005 CR 819. According to Nelson, he owed Sean and Matt Markley $500 for a half pound of marijuana. Nelson went to see them on May 3rd, calling the men to tell them that he was outside when he arrived. Sean asked Nelson if he had the money, and when Nelson indicated that he did not, "that's when Matt Markley came around the corner with a [Ruger] and said, 'You better give me my money.' [Nelson] turned around and took off running. [Markley] took several shots at [Nelson]." Nelson testified, "I just kept running. We got to the middle of Mound Street.

{¶ 35} "I stopped and turned around and said, 'What are you doing? Don't shoot me. Please don't shoot me.' He put the gun to my head, and I got my hands up, turned around and I hit the gun like this and I took off running. He shoots several more shots at me, and I go in between the houses and he comes back around.

{¶ 36} "I thought he was gone so I stopped, and I turned around and I looked, and he came around the corner with a gun. I fell and hit my hands - - my head on the ground. He shot another shot, and I took off running, and when I turned around to see if he picked up the * * * magazine because the clip fell out of the gun. He picked it up and ran home. That's when the police came. I never hid."

{¶ 37} Nelson testified that he did not have a gun, but he "had a cell phone in my hand, and Seth and Laura is Matt and Sean's friends. They stay right there and they always come over

and talk. This is all just a big set-up really for some money for some weed."

{¶ 38} Nelson asserted that while he was in Taylor's cruiser, "Sergeant Hall, he was basically threatening me, calling me names and saying, 'This is your gun. This is your gun, right?' They said they found the gun. I'm like, 'They're shooting at me. Of course you're going to find guns.'

{¶ 39} "He just kept saying, 'This is your gun.' And then he said, 'Do you have a gun?' I said, 'Yes, I have a gun but that's not my gun.' But he just kept saying, 'This is your gun. This is your gun. You're going to get charged with a gun.' I said, 'That's a CCW. What are you going to get them with?' I never had a gun on me at that time." Nelson explained that the gun residue on his hands came from pushing Matt's gun away. He denied wearing the jacket that was recovered and he identified it as Matt's jacket. Nelson denied Ivory's testimony that he observed Nelson near the crawlspace, and he testified that he was instead "in the backyard farther from where they got [the gun and jacket] out." Nelson acknowledged that he received a small cut on his hand when he fell, but he denied that the blood Lewis observed on the jacket was his. Nelson stated that he did not tamper with evidence.

{¶ 40} Having thoroughly reviewed the entire record, weighed all of the evidence and all reasonable inferences, and considered the credibility of the witnesses, we cannot determine that the jury lost its way in resolving conflicts in the evidence such that Nelson's convictions are against the manifest weight of the evidence, and that a new trial must be ordered. Further, after reviewing the evidence in a light most favorable to the prosecution, we conclude that any rational juror could have found the essential elements of having weapons while under disability and tampering with evidence proven beyond a reasonable doubt.

{¶ 41} Regarding the conviction for having weapons while under disability, Nelson admitted that he had previously been convicted of a felony offense of violence. Kibler's testimony about Nelson's post-Miranda statements was consistent with Nelson's admissions in the cruiser, namely that Nelson had or carried a gun but did not fire it in the course of the incident. Hagler and Fenstermaker each observed a gun in Nelson's hand, and the jury was free to discredit Nelson's testimony that he only carried a cell phone. Nelson's comment while in the cruiser that he should be charged only with carrying a concealed weapon discredits his trial testimony that he did not have a gun at the scene. Ivory testified that he observed Nelson walking away from the southwest corner of the house at 1115 Mound Street where the firearm was recovered. Gunshot residue was found on Nelson's hand, and given Shepherd's testimony that the two casings recovered from the scene came from the Colt pistol, the jury was free to disregard Nelson's testimony that the residue detected on his hand came from Matt's weapon.

{¶ 42} Regarding the conviction for tampering with the evidence, Hagler and Fenstermaker observed a weapon in Nelson's hand, and Hagler testified that Nelson was wearing a jacket when she initially observed him, and that he was not when she later identified him. Nelson's hand was bleeding, and there was what appeared to Lewis to be blood on the jacket. Ivory observed Nelson in an area close to where the weapon and jacket were found. The gunshot residue on Nelson's hand suggests that he had carried a weapon, and he admitted to having a weapon on the day of the shooting. From the above evidence a rational juror could reasonably conclude that Nelson, knowing that the shoot out would result in a police investigation, concealed the jacket he wore and the weapon he carried so that the items would not be available as evidence against him.

{¶ 43} Since Nelson's convictions for having weapons while under disability and tampering with evidence are not against the manifest weight of the evidence and are supported by sufficient evidence, Nelson's first assignment of error is overruled.

{¶ 44} Nelson's second assignment of error is as follows:

{¶ 45} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶ 46} According to Nelson, the trial court erred in overruling his motion to suppress "as the statements he made were the result of a custodial interrogation that was initiated without his Miranda rights being read and thus all subsequent statements were the fruit of the poisonous tree and should have been suppressed."

{¶ 47} "Appellate courts give great deference to the factual findings of the trier of facts. (Internal citations omitted). At a suppression hearing, the trial court serves as the trier of fact, and must judge the credibility of witnesses and the weight of the evidence. (Internal citations omitted). The trial court is in the best position to resolve questions of fact and evaluate witness credibility. (Internal citations omitted). In reviewing a trial court's decision on a motion to suppress, an appellate court accepts the trial court's factual findings, relies on the trial court's ability to assess the credibility of witnesses, and independently determines whether the trial court applied the proper legal standard to the facts as found. (Internal citations omitted). An appellate court is bound to accept the trial court's factual findings as long as they are supported by competent, credible evidence. (Internal citations omitted)." *State v. Purser*, Greene App. No. 2006 CA 14, 2007-Ohio-192, ¶ 11.

{¶ 48} The State correctly directs our attention to *State v. Dixon,* 101 Ohio St.3d 328,

2004-Ohio-1585, which noted, "The United States Supreme Court's decision in *Oregon v. Elstad* (1985), 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, is the leading case on this issue. *Elstad* held that if a suspect's statement obtained in violation of *Miranda* is nevertheless voluntary, the Fifth Amendment does not require the suppression of a subsequent confession made after a suspect has been fully advised of and had properly waived *Miranda* rights. (Citation omitted). The *Elstad* court rejected the contention that the suspect's confession must be excluded as 'fruit of the poisonous tree' because it had been tainted by the earlier failure of the police to provide *Miranda* warnings. (Citations omitted). The court reasoned that there was no need to presume a coercive effect on a later confession when the suspect's first statement, though technically obtained in violation of *Miranda*, had been voluntary. (Citation omitted).

{¶ 49} "*Elstad* requires courts to make a threshold inquiry into the effect of the violation on the voluntariness of the suspect's unwarned statement. (Citation omitted). 'Whether a statement was made voluntarily and whether an accused voluntarily, knowingly, and intelligently waived his right to counsel and right against self-incrimination are distinct issues. However, both are measured by the "totality of the circumstances" standard' (e.g., the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement). (Citations omitted). While the state carries the burden of proving voluntariness by a preponderance of the evidence, 'evidence of police coercion or overreaching is necessary for a finding of involuntariness.' (Citations omitted)." *Dixon*, ¶ 24-25.

{¶ 50} During the hearing on the Motion to Suppress, there was no evidence of the police coercion or overreaching that is necessary for a finding of involuntariness. Via testified

that he Mirandized Nelson after he was identified by witnesses to the shooting, and before Nelson's statements were recorded in the cruiser. Kibler's testimony was consistent with Via's. Hall testified that he told Nelson, pre-Miranda warnings, "that we had found or recovered a firearm in the location where we found him."

{¶ 51} We defer to the trial court, who was in the best position to assess the credibility of the witnesses. The trial court held that there was no police or state coercion as follows: "There was no evidence that there was any kind of duress or anything that would make that statement [that Nelson carried the gun but did not fire it] involuntary."

{¶ 52} Since Nelson's initial statement regarding the pistol was voluntary, the Fifth Amendment does not require the suppression of subsequent confessions made after Nelson was fully advised of and had properly waived his *Miranda* rights. *Elstad*. In other words, measuring the effect of any violation upon the voluntariness of Nelson's unwarned statement regarding the pistol, under the totality of the circumstances standard, there is nothing in the record regarding Nelson's age, mentality, and prior criminal experience that suggests that Nelson's statement was involuntary. Further, the record does not suggest that Nelson made the statement involuntarily in response to a lengthy and intense interrogation characterized by frequent questions. Finally, nothing in the transcript of the hearing on the motion to suppress suggests the existence of physical deprivation or mistreatment, or the existence of threat or inducement. Pursuant to *Elstad*, we conclude that the trial court properly suppressed Nelson's pre-Miranda statements and admitted his post-Miranda remarks.

{¶ 53} Nelson's second assignment of error is overruled, and the judgment of the trial court is affirmed.

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BROGAN, J. and FAIN, J., concur.

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