

[Cite as *State v. Gex*, 2011-Ohio-631.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
 Plaintiff-Appellee : C.A. CASE NO. 23867
 vs. : T.C. CASE NO. 09CR3000/1
 CRAIG GEX : (Criminal Appeal from
 Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 11th day of February, 2011.

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GRADY, P.J.:

{¶ 1} Defendant, Craig Gex, was convicted following his jury trial of four felony offenses, including R.C. 2929.13(A)(3), having weapons while under disability (prior conviction of any offense involving possession of a drug of abuse), and R.C. 2929.13(A)(4), having weapons while under disability (if the person is drug

dependent). Defendant was sentenced pursuant to law and filed a timely notice of appeal.

{¶ 2} Defendant's conviction arose from events that occurred on the evening of September 8, 2009. Four Dayton Police officers were dispatched on a report of gunshots having been fired. When they were admitted to a house at 357 Delaware Avenue to investigate, the officers saw an AK-47 rifle inside a doorless closet at the base of a stairway. Defendant Gex was found in an upstairs bedroom. Also in the room were forty to forty-five marijuana plants and equipment for cultivating marijuana.

{¶ 3} Defendant was secured inside a police cruiser and the rifle was seized. Shell casings found outside the house, which were still warm, are of the type used in an AK-47 rifle. After waiving his *Miranda* rights, Defendant admitted the rifle was his, but denied shooting it that evening. Defendant also admitted to "growing the weed" found in his bedroom, and told officers he "smokes weed every day and that he's been doing it since he was a kid." Defendant also admitted he is drug addicted, and that the house at 357 Delaware Avenue is his residence.

FIRST ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S CRIM.R. 29 MOTION FOR ACQUITTAL."

{¶ 5} This assignment of error concerns Defendant's conviction

for having weapons while under the disability of a prior conviction of any offense involving possession of a drug of abuse, R.C. 2929.13(A)(3).

{¶6} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶7} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶8} "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. 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."

{¶ 9} R.C. 2923.13(A) states:

{¶ 10} "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:

{¶ 11} "* * *

{¶ 12} "(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."

{¶ 13} The State offered evidence showing that Defendant had previously been convicted in Dayton Municipal Court of possession of drugs in violation of R.C. 2925.11(A), (C)(3)(A) and (D), a minor misdemeanor. "Drug Abuse Offense" is defined in R.C.

2925.01(G), and includes a violation of R.C. 2925.11. See: R.C. 2925.01(G)(1); *State v. Moaning*, 76 Ohio St.3d 126, 128-129, 1996-Ohio-413.

{¶ 14} R.C. 2925.11(D) states:

{¶ 15} "Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness."

{¶ 16} Defendant argues that because his prior conviction for a violation of R.C. 2925.11(A), (C)(3)(A) and (D) does not constitute a criminal record, the State's evidence was insufficient to prove that he was under a disability for purposes of R.C. 2923.13(A)(3). Defendant also argues that even if the evidence the State presented was sufficient to prove a disability, it was nevertheless insufficient to prove the culpable mental state necessary for a violation of R.C. 2923.13(A)(3), which is that he acted "recklessly," when his prior conviction did not constitute a criminal record.

{¶ 17} Defendant's contention that the culpable mental state of recklessness applies to the element of being under indictment

for or having been convicted of any offense involving the possession of any drug of abuse was recently considered and rejected by the Ohio Supreme Court. In *State v. Johnson*, ___ Ohio St. 3d ___, 2010-Ohio-6301, at paragraph one of the syllabus, the Supreme Court held:

{¶ 18} "A conviction for violation of the offense of having weapons under disability as defined by R.C. 2923.13(A)(3) does not require proof of a culpable mental state for the element that a defendant 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."

See also: *State v. Smith* (1987), 39 Ohio App.3d 24.

{¶ 19} Defendant contends that, when read in *pari materia*, R.C. 2923.13(A)(3) and 2925.11(D) compel a conclusion that Defendant's minor misdemeanor conviction for possession of marijuana does not qualify as a prior conviction for any offense involving the illegal possession of any drug of abuse, because no criminal record resulted from his prior conviction. Defendant's claim that R.C. 2923.13(A)(3) and R.C. 2925.11(C)(3)(a) and (D) must be read in *pari materia* is misplaced. In *pari materia* is a canon of statutory construction that permits statutes on "the same subject" to be read together, so that inconsistencies in one may be resolved by looking at the other statute on the same subject. Black's Law

Dictionary (7th Ed. Revised, 1999) at 794. The short answer here is that the two statutes concerned, R.C. 2923.13 and 2925.11, involve different subjects, and neither is internally inconsistent. In pari materia does not apply here.

{¶ 20} Defendant additionally complains, relying upon *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, that because his indictment failed to include the culpable mental state for a violation of R.C. 2923.13(A)(3), and the jury was not instructed as to that element of the offense, the omission constitutes structural error that requires reversal of his conviction. An examination of this indictment discloses that it does include the culpable mental state, knowingly, that applies to possession of the firearm, which is the only mens rea element required to prove a violation of R.C. 2923.13(A)(3). *Johnson*. Furthermore, in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, at paragraph one of the Syllabus, the Ohio Supreme Court recently overruled its decisions in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, and held:

{¶ 21} “1. An indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.”

{¶ 22} A disability arises whenever a person is convicted of

any offense involving the illegal possession of any drug of abuse.

Moaning, 76 Ohio St.3d at 129; R.C. 2923.13(A)(3). The drug abuse offenses referred to in R.C. 2923.13(A)(3) are defined in R.C. 2925.01(G), *Moaning*, and expressly include possession offenses in violation of R.C. 2925.11. See: R.C. 2925.01(G)(1). The State presented ample evidence that Defendant was previously convicted in Dayton Municipal Court of a minor misdemeanor marijuana possession offense in violation of R.C. 2925.11(A), (C)(3)(a). That is sufficient to prove a disability prohibiting the possession of a firearm that R.C. 2923.13(A)(3) prohibits, even though that conviction does not constitute a criminal record for purposes of background checks for employment or licensing. *State v. Robinson*, 187 Ohio App.3d 253, 2010-Ohio-543. The purpose of R.C. 2923.13(A)(3) is to keep weapons out of the hands of persons involved with drugs. *Moaning*, 76 Ohio St.3d at 129.

{¶ 23} Viewing the evidence presented in this case in a light most favorable to the State, as we must, a rational trier of facts could find all of the essential elements of having a weapon while under a disability in violation of R.C. 2923.13(A)(3) to be proved beyond a reasonable doubt. Defendant's conviction for a violation of R.C. 2923.13(A)(3) is supported by legally sufficient evidence, and the trial court properly overruled Defendant's Crim.R. 29

motion for acquittal.

{¶ 24} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 25} "THE CONVICTION FOR HAVING WEAPONS UNDER DISABILITY FOR DRUG DEPENDENCE WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE."

{¶ 26} Defendant argues that his conviction for having weapons while under a disability based upon his being drug dependent or in danger of becoming drug dependent is against the manifest weight of the evidence because the State failed to prove that he is drug dependent. That is a sufficiency, not a weight, of the evidence argument.

{¶ 27} A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 28} "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. 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."

{¶ 29} Defendant was found guilty of having weapons while under a disability in violation of R.C. 2923.13(A)(4), which states:

{¶ 30} "(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:

{¶ 31} "* * *

{¶ 32} "(4) the person is drug dependent, in danger of drug dependence, or a chronic alcoholic."

{¶ 33} R.C. 3719.011(B) states:

{¶ 34} "'Drug dependent person' means any person who, by reason of the use of any drug of abuse, is physically, psychologically, or physically and psychologically dependent upon the use of such drug, to the detriment of the person's health or welfare."

{¶ 35} "Person in danger of becoming drug dependent" is also defined in R.C. 3719.011(C):

{¶ 36} "'Person in danger of becoming a drug dependent person' means any person who, by reason of the person's habitual or incontinent use of any drug of abuse, is in imminent danger of

becoming a drug dependent person.”

{¶ 37} Defendant admitted to Detective Chad Knight that he was growing the marijuana police found in his home. Defendant told Detective Knight “he smokes weed every day and that he’s been doing it since he was a kid.” T. 127. Defendant also admitted to Detective Knight that he is addicted. *Id.*

{¶ 38} Viewing the evidence presented in this case in a light most favorable to the State, as we must, a rational trier of facts could find all of the essential elements of having weapons under a disability in violation of R.C. 2923.13(A)(4), including that Defendant is a drug dependent person or in danger of becoming a drug dependent person, to be proved beyond a reasonable doubt. Defendant’s conviction is supported by legally sufficient evidence.

{¶ 39} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 40} “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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 41} 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* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (August 22, 1997), Montgomery App. No. 16288, we observed:

{¶ 42} "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 fact finder'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 fact finder, who has seen and heard the witness."

{¶ 43} 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 facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 44} Defendant argues that his conviction for having weapons

while under a disability based upon his being a drug dependent person is against the manifest weight of the evidence because the only evidence the State presented concerning Defendant's use of marijuana and his addiction to it was Detective Knight's testimony.

We have concluded that evidence was legally sufficient to sustain Defendant's conviction. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to decide. *DeHass*. The jury did not lose its way in this case simply because it chose to believe the State's witnesses, which it had a right to do. *Id.*

{¶ 45} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 46} Defendant's second assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, J. And FROELICH, J., concur.

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