[Cite as *State v. Sebastian*, 2009-Ohio-3117.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	Case No. 08CA19
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
MENDELL SEBASTIAN,	:	
	:	**Released 6/11/09**
Defendant-Appellant.	:	

APPEARANCES:

Jeffrey Jon Lyle, Hillsboro, Ohio, for appellant.

James B. Grandey, HIGHLAND COUNTY PROSECUTOR, and Anneka P. Collins, HIGHLAND COUNTY ASSISTANT PROSECUTOR, Hillsboro, Ohio, for appellee.

Harsha, J.

{¶1} Upon executing a search warrant, deputies of the Highland County Sheriff's Office discovered loaded firearms in a bedroom where deputies also found Mendell Sebastian ("Sebastian") and his fiancée Brandie Boone ("Boone"). Based upon this incident, and his prior conviction for drug trafficking, a jury found Sebastian guilty of one count of having weapons while under disability.

{¶2} In his first assignment of error, Sebastian contends that the trial court erred in denying his motion to suppress the evidence seized under the search warrant. First, he argues that the deputy's affidavit in support of the warrant did not provide probable cause because it was based on hearsay from an informant, and the issuing judge could not determine that the informant was credible. However, the deputy's affidavit identified the informant as Mendell Sebastian II ("Jr."), Sebastian's son.

Because he was an identified citizen informant, courts ordinarily presume that Jr. gave truthful and reliable information. We acknowledge that the issuing judge may have inferred from the affidavit that Jr. had a motive to falsify information, i.e. anger or dissatisfaction toward his father. Furthermore, the deputy's affidavit could have provided a more explicit account of Sebastian's criminal activity. However, the affidavit contained some detail regarding this activity and related timely information that Jr. observed first-hand. Because even doubtful or marginal cases should be resolved in favor of upholding the warrant, we find that the issuing judge had a substantial basis to conclude that probable cause existed.

{¶3} Sebastian next contends that Christopher M. Lengefeld ("Lengefeld"), the deputy who supplied the affidavit in support of the warrant, omitted critical information from his affidavit. First, he argues that Lengefeld omitted information about Jr.'s motive to make a statement, i.e. anger or dissatisfaction toward his father. However, Sebastian failed to show that Lengefeld intentionally or recklessly misled the issuing judge by omitting this information. At the suppression hearing, Lengefeld testified that he did not believe Jr. was trying to get even with Sebastian, and Lengefeld made Jr. swear out an affidavit before Lengefeld applied for the search warrant. Furthermore, as we note above, the magistrate could have inferred Jr.'s motivation from the information included in the affidavit. A more explicit statement in this regard would not alter our finding that the issuing judge had a substantial basis to conclude that probable cause existed. Therefore, we conclude Sebastian failed to establish that Lengefeld's affidavit intentionally or recklessly omitted information about Jr.'s motive.

{¶4} Second, Sebastian argues that the affidavit withheld information about

Lengefeld's opinion on Jr.'s veracity. Specifically, Sebastian points to Lengefeld's testimony at trial that he believes Jr. "can be" a liar. Assuming Sebastian properly preserved this argument, the record is devoid of any information concerning when Lengefeld formed this opinion or whether Lengefeld had reason to believe Jr. lied on this occasion. Therefore, we cannot conclude that Lengefeld intentionally or recklessly omitted this information from his affidavit.

{¶5} In his second assignment of error, Sebastian contends that the trial court improperly denied the Crim.R. 29(A) motion for acquittal he made at the close of the State's case because the State failed to produce sufficient evidence to show that he knowingly possessed any firearm. However, the State presented evidence from which the jury could reasonably infer that Sebastian knew of and had access to (1) a loaded firearm behind the bedroom door he opened for deputies, and (2) at least one loaded firearm underneath a pillow on Sebastian's side of the bed. Such evidence, if believed, would convince the average mind beyond a reasonable doubt that Sebastian knowingly had constructive possession of these firearms. Thus, sufficient evidence supports his conviction for having weapons while under disability.

{¶6} In his third assignment of error, Sebastian contends that his conviction was against the manifest weight of the evidence because he established that he was unaware the weapons were in the home. In particular, he argues that the jury lost its way in not crediting testimony that Boone owned the firearms and placed them in her bedroom without his knowledge on the day deputies executed the search warrant. However, we leave credibility determinations to the finder of fact. Because the jury could reasonably return a guilty verdict based on the State's version of the events, we

cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that we must reverse the conviction. Accordingly, we affirm the trial court's judgment.

I. Facts

{¶7} On July 14, 2006, Jr. contacted the Sheriff's Office to report a "domestic situation" between him and Sebastian. When Lengefeld responded to the call that day, Jr. told Lengefeld about a verbal argument he had with Sebastian. Lengefeld decided not to charge Sebastian for this incident. However, Jr. revealed additional information about his father that led Lengefeld to believe Sebastian had firearms while under disability and was trafficking in prescription drugs. Jr. swore out an affidavit stating that his father lived at 2210 Sicily Road, Highland County, Ohio, and detailing the contraband Jr. had last seen in the home that day. Lengefeld then swore out his own affidavit which he used to obtain a search warrant; Lengefeld did not attach Jr.'s affidavit to his application. Based on evidence seized when deputies executed the warrant, a Highland County grand jury indicted Sebastian for one count of having weapons while under disability, in violation of R.C. 2923.13(A)(3).

{¶8} Although several witnesses testified during the trial, only an abbreviated summary of the events is necessary at this point. However, we have also included a more detailed summary of the evidence as an appendix to the opinion so that a full comprehension of the manifest weight of the evidence analysis is possible.

{¶9} At trial, the State offered the testimony of Lengefeld and Ronald Hughes ("Hughes"), a deputy who assisted Lengefeld in executing the search at 2210 Sicily Road. Both testified that after they entered the home, Sebastian opened the dead-

bolted master bedroom door for them. The deputies saw Boone lying on the side of the bed furthest from the door. The deputies seized five or six firearms from the residence. Hughes located two firearms underneath the pillow on the side of the bed closest to the door. At least one of these firearms was loaded. He located another loaded firearm behind the door. Lengefeld recalled the deputies finding another firearm under the bed and one in the master bathroom. Lengefeld also testified without objection that Sebastian did not seem surprised that the deputies found firearms in the home. After the State rested its case, Sebastian made a Crim.R. 29 motion for judgment of acquittal, which the court denied.

{¶10} Sebastian presented testimony that he did not live at 2210 Sicily Road or know that Boone had firearms in the home. According to the defense, Boone owned the weapons and ordinarily stored them in a gun safe at the home of Douglas and Elizabeth Haney. She knew that Sebastian could not be around firearms. On July 14, 2006, a Friday, she removed all of her weapons from the Haneys' gun safe because she planned to use them for target shooting with the Haneys and another friend, Henry Shrader ("Shrader"), later that weekend. Boone placed the guns around her master bedroom in the locations deputies ultimately found them. According to Sebastian, he saw Boone that afternoon, but she never had an opportunity to tell him that she had done this. Sebastian came to Boone's home that evening after she was asleep in the master bedroom on her side of the bed, i.e. the side closest to the door. Sebastian entered the room in the dark, so he could not see the firearms, and went to sleep on the side of the bed furthest from the door. He awoke when he heard the deputies enter the home. While he went to open the master bedroom door for them, Boone switched sides

of the bed.

{¶11} The jury found Sebastian guilty of one count of having weapons while under disability, in violation of R.C. 2923.13(A)(3). After the trial court sentenced him to two years in prison, Sebastian filed this appeal.

II. Assignments of Error

{¶12} Sebastian assigns the following errors for our review:

> THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION TO SUPPRESS AS THE SEARCH WARRANT HEREIN WAS ISSUED WITHOUT PROBABLE CAUSE.
>
> THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S RULE 29 MOTION AT THE CONCLUSION OF THE STATE'S CASE IN CHIEF WHERE THE STATE FAILED TO ESTABLISH ALL OF THE ELEMENTS OF THE ALLEGED DEFENSE BEYOND A REASONABLE DOUBT, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.
>
> THE JURY VERDICT FINDING DEFENDANT-APPELLANT GUILTY OF HAVING WEAPONS UNDER DISABILITY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. Motion to Suppress

A. Standard of Review

{¶13} Our review of a trial court's decision on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332, 713 N.E.2d 1. When considering a motion to suppress, the trial court acts as the trier of fact and is in the best position to resolve factual questions and evaluate witness credibility. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100, citing *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. Accordingly, we defer to the trial court's findings of fact if they are supported by competent, credible evidence.

State v. Landrum (2000), 137 Ohio App.3d 718, 722, 739 N.E.2d 1159. Accepting those facts as true, we must independently determine whether the trial court reached the correct legal conclusion in analyzing the facts of the case. *Roberts* at ¶100, citing *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8.

B. Probable Cause

{¶14} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 14 of the Ohio Constitution contains a nearly identical provision.

{¶15} "A neutral and detached magistrate may issue a search warrant only upon the finding of probable cause." *State v. Gilbert*, Scioto App. No. 06CA3055, 2007-Ohio-2717, at ¶13, citing *United States v. Leon* (1984), 468 U.S. 897, 914-915, 104 S.Ct. 3405, 82 L.Ed.2d 677 and Crim.R. 41(C). A warrant shall issue "only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant." Crim.R. 41(C). An affidavit in support of a search warrant must "particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located." Id.

{¶16} When evaluating an affidavit for the sufficiency of probable cause, the issuing magistrate must apply a "totality-of-the-circumstances" test. *State v. George*

(1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph one of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527. The magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id., quoting *Gates* at 238.

{¶17} Neither the trial court nor an appellate court should substitute its judgment for that of the magistrate. Id. at paragraph two of the syllabus, following *Gates*. Rather, the reviewing court should simply "ensure that the magistrate had a substantial basis for concluding that probable cause existed." Id. The reviewing court "should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." Id.

{¶18} Here, Sebastian contends that Lengefeld's affidavit did not support a finding of probable cause because it was based on hearsay from an informant, Jr., and did not supply enough facts for the issuing judge to assess Jr.'s credibility. The State contends that the issuing judge had a substantial basis for concluding that probable cause existed, specifically pointing to Jr.'s first-hand observation of Sebastian's criminal activity on the day the warrant issued and to an affidavit Jr. provided, which included a detailed diagram of 2210 Sicily Road that identified the location of illegal contraband.

{¶19} While the parties do not directly address it, the State's partial reliance on Jr.'s affidavit raises an issue regarding the information we may rely on in reviewing a determination of probable cause. In evaluating whether probable cause exists to

support the issuance of a search warrant, a reviewing court "is confined to the four corners of the affidavit and any recorded testimony made part of the affidavit pursuant to Crim.R. 41(C)." *State v. Oprandi*, Perry App. No. 07CA5, 2008-Ohio-168, at ¶45. The record does not indicate that the issuing judge reviewed Jr.'s affidavit or heard any testimony prior to issuing the search warrant. Accordingly, our review of the probable cause determination is limited to the "four corners" of Lengefeld's affidavit.

{¶20} Lengefeld's affidavit in support of the search warrant states:

* * *

> On July 14, 2006 at approx[imately] 3:08 PM, [Jr.] called the Highland County Sheriff's Office to report a domestic situation between his father and himself. At that time, I was dispatched to investigate. At approx[imately] 4:38 PM, I arrived to the Buford area, and met with the complainant, [Jr.]. [Jr.] advised that he and his father, [Sebastian] were at their residence located at 2210 Sicily Road, in Clay Township, Highland County, Ohio, and got into a verbal argument. During the investigation it was discovered that [Sebastian] was convicited [sic] of drug trafficking which places him under disability, and in possession of numerous firearms. [Jr.] advised that his father keeps several guns in the home, and at all times carries a small 25 cal. gun in his left pants pocket. Further information obtained was that his father is dealing in a large amount of prescription pills. [Jr.] advised that the pills are kept in several safes located in the home. [Jr.] advised that he last seen the guns and pills at his father[']s residence located at 2210 Sicily Road today, July 14, 2006.

* * *

{¶21} In applying the *Gates* "totality-of-the-circumstances" test, the official issuing a warrant must still consider the veracity and basis of knowledge of informants who supply the underlying information for the affidavit. *State v. Goddard* (Oct. 2, 1998), Washington App. No. 97CA23, 1998 WL 716662, at *4, citing *Gates* and *George*. "However, an affidavit lacking in these areas is not automatically insufficient to procure the issuance of a search warrant." Id., citing *Gates* at 230. These areas should instead

be viewed as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." Id., quoting *Gates* at 230. Therefore, a deficiency in one area may be overcome by "other indicia of reliability." Id., citing *Gates* at 233. Here, the deputy's affidavit indicates Jr. had personally observed the guns and contraband that very day. In other words, Jr.'s basis of knowledge was his own very recent observation, which bolsters its reliability.

{¶22} Furthermore, identified citizen informants are considered "highly reliable and, therefore, a strong showing as to the other indicia of reliability may be unnecessary[.]" *State v. Wagner* (Feb. 29, 2000), Pickaway App. No. 99CA23, 2000 WL 245499, at *3, quoting *Maumee v. Weisner* (1999), 87 Ohio St.3d 295, 300, 1999-Ohio-68, 720 N.E.2d 507, citing *Gates* at 233-234. "[U]nless special circumstances exist which would indicate that an ordinary citizen has a motive to falsify his report of criminal activity, such information is presumed to be truthful and reliable." *State v. Willis* (Aug. 11, 1989), Wood App. No. WD-88-38, 1989 WL 90636, at *3. "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case." *State v. Farndon* (1984), 22 Ohio App.3d 31, 35-36, 488 N.E.2d 894, quoting *Gates* at 234.

{¶23} As an identified citizen informant, Jr.'s information would ordinarily be presumed truthful and reliable. Because Lengefeld's affidavit indicates that Jr. initially contacted the Sheriff's Office to report a "domestic situation" involving a "verbal argument" between him and Sebastian, the issuing judge could have easily inferred that

Jr. harbored feelings of anger or dissatisfaction toward his father. Thus, the body of the affidavit contains information that casts some doubt as to Jr.'s reliability. But, the affidavit also indicates that Jr. observed first-hand Sebastian's possession of firearms while under disability and possession of prescription pills for the purpose of drug trafficking. Furthermore, Jr.'s information was timely in that he last observed Sebastian's possession of contraband the same day law enforcement obtained the search warrant. We do not believe an express reference to Jr.'s possible motive for informing on his father was necessary for the court to evaluate Jr.'s reliability.

{¶24} We acknowledge that Lengefeld's affidavit could have provided a more explicit and detailed description of Sebastian's wrongdoing, particularly if it had included a copy of Jr.'s own affidavit. However, Lengefeld's affidavit does provide some detail of Sebastian's criminal activity, i.e. he "keeps several guns in the home"; "at all times carries a small 25 cal. gun in his left pants pocket"; deals in "a large amount of prescription pills"; and keeps pills "in several safes located in his home." Because the affidavit provides some detail of Sebastian's wrongdoing from the timely, first-hand observations of an identified citizen informant, and given the Supreme Court of Ohio's instruction that "doubtful or marginal" cases should be resolved in favor of upholding the warrant, we conclude that the issuing judge had a substantial basis to find that probable cause existed.

{¶25} Sebastian points out that in making its ruling at the suppression hearing, the trial court stated that: "So in any case what the son projected was found out to be true, so that's a pretty good test of credibility, so I'll deny the Motion [to Suppress]." However, we review the issuing court's probable cause determination based upon the

information presented to it, i.e. the four corners of Lengefeld's affidavit. Thus, our analysis focuses upon the information available to the issuing judge, not the analysis of the reviewing trial court. Moreover, "when a trial court has stated an erroneous basis for its judgment, an appellate court must affirm the judgment if it is legally correct on other grounds, that is, it achieves the right result for the wrong reason, because such an error is not prejudicial." *Reynolds v. Budzik* (1999), 134 Ohio App.3d 844, 732 N.E.2d 485, fn. 3. Thus, we disregard the trial court's comment as it has no bearing on our analysis.

{¶26} Next, Sebastian contends that Lengefeld withheld critical information regarding Jr.'s credibility. "To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.'" *State v. Waddy* (1992), 63 Ohio St.3d 424, 441, 588 N.E.2d 819 (superseded by state constitutional amendment on other grounds), quoting *Franks v. Delaware* (1978), 438 U.S. 154, 155, 98 S.Ct. 2674, 57 L.Ed.2d 667. Omissions are false statements if "designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate." Id., quoting *United States v. Colkley* (C.A.4, 1990), 899 F.2d 297, 301. Even if an affiant intentionally or recklessly omits information from an affidavit, a warrant based on that affidavit is still valid unless, with the omissions included, the affidavit's remaining content is insufficient to establish probable cause. *State v. Sells*, Miami App. No. 2005-CA-8, 2006-Ohio-1859, at ¶11, citing *Waddy* at 441.

{¶27} Sebastian argues that Lengefeld's affidavit failed to reveal his suspicions about the motive behind Jr.'s statement. Specifically, Sebastian contends that

Lengefeld "believed that Jr.'s information was fueled by his anger and dissatisfaction with * * * Sebastian." At the hearing on the motion to suppress,[1] Lengefeld testified that he investigated Jr. on a prior occasion when Sebastian contacted the Sheriff's Office to report that Jr. had used his vehicle without permission. Lengefeld also testified that he felt Jr.'s statement was "fueled by the disagreement" Jr. had with his father. However, Lengefeld did not believe that Jr. gave him information to get even with Sebastian and made Jr. swear out an affidavit detailing Sebastian's criminal activity before Lengefeld applied for the search warrant. In addition, while Lengefeld's affidavit does not explicitly state his belief as to the motivation behind Jr.'s statement, the affidavit does state that Jr. (1) called the Sheriff's Office "to report a domestic situation between his father and himself" and (2) revealed that he had a "verbal argument" with Sebastian. As we note above, the issuing judge could certainly infer from these statements that Jr. had a motive to falsify his report, i.e. anger toward or dissatisfaction with Sebastian.

{¶28} Lengefeld's testimony, behavior, and affidavit do not show that he intentionally or recklessly misled the issuing judge about Jr.'s motivation. Furthermore, as we determined above, even though Lengefeld's affidavit indicates that Jr. had a motive to falsify his report, the affidavit's remaining content is sufficient to establish probable cause. Therefore, we reject Sebastian's contention that Lengefeld purposely or recklessly omitted information from his affidavit regarding Jr.'s motive.

{¶29} Sebastian also argues that Lengefeld's affidavit was silent concerning Jr.'s reliability. Specifically, Sebastian points to Lengefeld's testimony at trial that he believes Jr. "can be" a liar to conclude Lengefeld purposely withheld his opinion that Jr.

[1] Because we are dealing with the deputy's subjective intent, we are not limited here to the four corners of the affidavit.

was unreliable from the issuing judge. However, Sebastian failed to question Lengefeld as to his opinion on Jr.'s veracity at the suppression hearing. Thus, the record provides no information about whether Lengefeld (1) formulated this opinion before or after he submitted his affidavit, or (2) had reason to believe Jr. lied on this occasion. To the contrary, Lengefeld indicated he made Jr. sign an affidavit and draw a diagram to ensure that the information was reliable. Thus, we cannot conclude that Lengefeld intentionally or recklessly omitted this information from his affidavit.

{¶30} Accordingly, we overrule Sebastian's first assignment of error.

IV. Sufficiency of the Evidence

{¶31} Sebastian contends that the trial court erred in denying his Crim.R. 29(A) motion for judgment of acquittal at the close of the State's case. Crim.R. 29(A) motions for acquittal test the sufficiency of the evidence presented at trial. *State v. Umphries*, Ross App. No. 02CA2662, 2003-Ohio-599, at ¶6, citing *State v. Williams,* 74 Ohio St.3d 569, 576, 1996-Ohio-91, 660 N.E.2d 724 and *State v. Miley* (1996), 114 Ohio App.3d 738, 742, 684 N.E.2d 102. The trial court must enter a judgment of acquittal when the state's evidence is insufficient as a matter of law to sustain a conviction. Crim.R. 29(A).

{¶32} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function "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* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (superseded by state constitutional amendment on other grounds). "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., following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Our evaluation of the sufficiency of the evidence raises a question of law and does not permit us to weigh the evidence. *State v. Simms*, 165 Ohio App.3d 83, 2005-Ohio-5681, 844 N.E.2d 1212, at ¶9, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

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

{¶34} Sebastian contends the State failed to produce sufficient evidence during its case that he knowingly acquired, had, carried, or used any firearm. According to Sebastian, the State only proved that deputies found him in a room that contained firearms, and mere presence in an area where contraband is located does not conclusively establish constructive possession. See *State v. Riggs* (Sept. 13, 1999), Washington App. No. 98CA39, 1999 WL 727952, at *5.

{¶35} The State contends that it produced sufficient evidence that Sebastian knowingly had constructive possession of firearms. "Constructive possession can be sufficient to support a charge of having weapons while under a disability." *State v. Whitaker*, Scioto App. No. 07CA3168, 2008-Ohio-4149, at ¶24, citing *State v. Cherry*, 171 Ohio App.3d 375, 2007-Ohio-2133, 870 N.E.2d 808, at ¶10 and *State v. Pitts*, Scioto App. No. 99CA2675, 2000-Ohio-1986, 2000 WL 1678020, at *9 ("In order to

'have' a firearm within the meaning of R.C. 2923.13(A), a person must have actual or constructive possession of it."). Constructive possession exists "when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Wolery* (1976), 46 Ohio St.2d 316, 329, 348 N.E.2d 351. "Thus, possession of a firearm in violation of R.C. 2923.13 may be inferred when the defendant has exercised dominion and control over the *area* where the firearm was found." *Pitts* at *9.

{¶36} "Dominion and control, as well as whether a person was conscious of the presence of an item of contraband, may be established by circumstantial evidence." *State v. Matteson*, Vinton App. No. 06CA642, 2006-Ohio-6827, at ¶23, citing *Jenks* at 272-273. While a defendant's mere presence in an area where contraband is located does not conclusively establish constructive possession, a defendant's proximity to contraband may constitute some evidence of constructive possession. Id. at ¶24. Mere presence in the vicinity of contraband, coupled with one other factor probative of dominion or control over the contraband, may establish constructive possession. Id.

{¶37} Here, the State presented evidence that Sebastian was inside the master bedroom at 2210 Sicily Road on the night deputies executed the search warrant. When Sebastian opened the bedroom door, Lengefeld and Hughes saw Boone lying on the side of the bed furthest from the door. The deputies found (1) at least one loaded firearm behind the door Sebastian opened for them, and (2) two firearms underneath a pillow on the side of the bed closest to the door, at least one of which was loaded. Furthermore, Lengefeld testified that Sebastian did not seem surprised that the deputies found firearms in the home.

{¶38} Based on this evidence, any rational trier of fact could have found that Sebastian knew the master bedroom contained firearms and that he exercised dominion and control over them. The jury could reasonably infer that Sebastian knew of and had access to the loaded firearm behind the door he personally opened for the deputies. Likewise, the jury could reasonably infer that Sebastian slept on the side of the bed closest to the door, despite his testimony that Boone rolled over there when he got up. Therefore, the jury could conclude he knew of and had access to the firearms beneath the pillow. We conclude that the State produced sufficient circumstantial evidence that, if believed, would convince the average mind beyond a reasonable doubt that Sebastian knowingly had constructive possession of firearms. We overrule Sebastian's second assignment of error.

V. Manifest Weight of the Evidence

{¶39} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and 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. Id., citing *Martin*, supra, at 175. A reviewing court "may not reverse a conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a

reasonable doubt." *State v. Johnson* (1991), 58 Ohio St.3d 40, 42, 567 N.E.2d 266, citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus.

{¶40} Even in acting as a thirteenth juror we must still remember that the weight to be given evidence and the credibility to be afforded testimony are issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000, citing *State v. Grant*, 67 Ohio St.3d 465, 477, 1993-Ohio-171, 620 N.E.2d 50. The fact finder "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice.

{¶41} Sebastian contends that his conviction is against the manifest weight of the evidence because (1) the State presented no evidence that he knowingly had any firearm, and (2) the defense witnesses offered "uncontroverted testimony" that Sebastian did not know of the firearms at 2210 Sicily Road. As we explain above, the State did present circumstantial evidence that Sebastian knew of and exercised dominion and control over at least two loaded firearms in the master bedroom at 2210 Sicily Road. Therefore, Sebastian essentially argues that the jury lost its way in discrediting his testimony and the testimony of his other witnesses.

{¶42} According to Sebastian's version of events, Boone owned the firearms deputies found at 2210 Sicily Road. Sebastian did not even live there. Boone knew Sebastian could not be around firearms, and she ordinarily stored her weapons in the

Haneys' gun safe. Because she had plans to go target shooting with the Haneys, she decided to remove all five of her firearms from their safe and place them in various locations throughout her bedroom to prepare for the trip. She put two of the firearms underneath her pillow on the side of the bed closest to the door. Although Boone saw Sebastian the afternoon before deputies executed the search warrant, and in spite of the fact that she knew Sebastian had keys to the house and master bedroom, she never told him this. According to Sebastian, he entered the master bedroom in the dark that evening, after Boone was asleep. Sebastian slept on the side of the bed furthest from the door. Boone moved to his side of the bed while he opened the bedroom door for the deputies. Sebastian never saw the firearms before deputies found them. Had he known of their presence, he "never would have went in there."

{¶43} As we explained in *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, at ¶31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

For the jury to conclude that Sebastian did not have weapons under disability, it had to assess the credibility of Sebastian and his other witnesses and reject their testimony that he had no knowledge of the firearms at 2210 Sicily Road. Having heard this testimony and having observed the demeanor of Sebastian and his other witnesses, the jury could choose to believe all, part, or none of the testimony presented by any of these witnesses. *State v. Parish*, Washington App. Nos. 05CA14 & 05CA15, 2005-Ohio-7109, at ¶15, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

{¶44} The jury chose to disbelieve Sebastian's version of events, and we will not substitute our judgment for that of the jury under these circumstances. The evidence reasonably supports the conclusion that Sebastian knew about the firearms behind the door and under the pillow and exercised dominion and control over them. Lengefeld and Hughes saw Sebastian open the door that had a loaded firearm behind it. They further observed Boone lying on the side of the bed opposite from the side where they located additional firearms – the side of the bed the jury could infer Sebastian used. Thus, after reviewing the entire record, we cannot say that the jury lost its way or created a manifest miscarriage of justice when it found Sebastian guilty of having weapons while under disability. Accordingly, we overrule Sebastian's third assignment of error.

{¶45} Having overruled each of the assignments of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

APPENDIX

{¶46} At trial, the State presented the testimony of Alice Frick ("Frick"), Lengefeld, and Hughes. Frick, the Chief Deputy Clerk for the Clermont County Court of Common Pleas, authenticated the judgment entry indicating that Sebastian had a prior conviction for drug trafficking.

{¶47} Lengefeld testified that he became acquainted with Jr. in 2005 when he investigated a report from Sebastian that Jr. had used his vehicle without permission. On July 14, 2006, Lengefeld responded to a call Jr. made to the Sheriff's Office to report a domestic situation between him and Sebastian. Lengefeld decided not to charge Sebastian for this incident. However, Jr. revealed additional information about his father that led Lengefeld to take Jr. to the Sheriff's Office to file a written affidavit. Lengefeld then obtained a warrant to search the residence at 2210 Sicily Road in Highland County for firearms.

{¶48} In addition, Lengefeld testified that he executed the warrant that night along with six or seven other deputies, including Hughes. They forcibly entered the home but could not open the dead-bolted door to the master bedroom. Sebastian, who was inside the room, opened the door for them. When Sebastian did this, Lengefeld saw Boone on the side of the bed furthest from the door. Lengefeld recalled deputies locating six firearms in the home and testified as to the location of five of those weapons. He testified that deputies found one firearm behind the door to the master bedroom, two firearms underneath the pillow on the side of the bed closest to the door to the master bedroom, one firearm under the bed, and one firearm in the master bathroom. Lengefeld acknowledged that he could not be certain of the original location of the firearms because he only saw them after another deputy had picked them up, removed the ammunition, and presumably put them back in their original location. The Sheriff's Office found no direct evidence to show that Sebastian owned the firearms, and Lengefeld never saw Sebastian acquire or possess them. However, Lengefeld testified that Sebastian did not appear to be surprised that the deputies found firearms in the home.

{¶49} Lengefeld further testified that deputies found a photograph of Sebastian and Jr. on the entertainment center in the living room. In the master bedroom, they found a checkbook with checks for "Brandie E. Boone and Mendell Sebastian, POA, 2210 Sicily Road, Mt. Orab, Ohio." They also located prescription medication for Sebastian in the home. The deputies also found a safe in the family room, which Lengefeld determined belonged to Sebastian.

{¶50} Hughes testified that he assisted in executing the search warrant for 2210 Sicily Road on July 14, 2006. After the deputies entered the home, they tried to force their way into the master bedroom but could not. Sebastian opened the door for them, and Hughes saw a female lying on the side of the bed furthest from the door. Hughes recalled the deputies finding six firearms in the room. He personally located two handguns underneath the pillow on the side of the bed closest to the door, at least one

of which was loaded. He cleared the weapons of ammunition and put them back by the pillow. Hughes also located a loaded Uzi behind the door. While he did not actually see Sebastian have, carry, or use any firearm, Hughes believed that Sebastian could have easily gained access to them. Hughes further testified that he had been to 2210 Sicily Road two days earlier, on July 12, 2006, to respond to a report of an assault on Jr. At that time, Sebastian told Hughes that his current address was 2210 Sicily Road. Hughes did not see any firearms in the home on this occasion, but he did not enter the master bedroom.

{¶51} In addition to testifying on his own behalf, Sebastian introduced the testimony of Mr. Haney, Shrader, Mrs. Haney, and Boone. Mr. Haney testified that he lived at 1239 Sicily Road, approximately 1.5 miles from 2210 Sicily Road. Mr. Haney had known Sebastian for 17 or 18 years. According to Mr. Haney, Boone lived at 2210 Sicily Road, and Jr. moved in with her for a few years for school-related reasons. While Sebastian would spend extended times at Boone's home, his primary residence was in Georgetown, Ohio. Mr. Haney admitted that living 1.5 miles from 2210 Sicily Road, he could not track the movements of people coming to and from the residence. He also admitted that Sebastian had put the Georgetown home up for sale. However, Mr. Haney frequently drove Sebastian to the Georgetown home and believed that Sebastian spent more than half his time there. When Sebastian was at 2210 Sicily Road, he and Mr. Haney used walkie-talkies to contact each other. If Sebastian wanted a ride to the Georgetown residence, he would tell Mr. Haney that he was "ready to go home" or "I wanna go home."

{¶52} Mr. Haney further testified that he and Mrs. Haney helped Boone become interested in firearms. Boone purchased five firearms through Mr. Haney. She bought a black .9 millimeter Taurus from him. Later, he purchased four weapons on her behalf at gun shows: a .44 Anaconda, a .357 Taurus, a .9 millimeter Cobra, and a .12 gauge shotgun. He stored the weapons for Boone in a gun safe in the Haneys' home. Boone had the safe combination. On direct, Mr. Haney testified that on July 14, 2006, Boone picked her up weapons on her way home from work. However, Mr. Haney was not at home when Boone did this. On cross, Mr. Haney testified that Boone picked up the weapons the day before law enforcement executed the search warrant, i.e. on July 13, 2006. According to Mr. Haney, Boone was supposed to go shooting with the Haneys that weekend. Mr. Haney also testified that he knew Sebastian did not like guns. Sebastian never accepted Mr. Haney's offers to let him use Mr. Haney's firearms. Mr. Haney admitted that he never came forward to reveal any of this information to law enforcement before testifying at trial.

{¶53} Shrader testified that he had a close relationship with Sebastian for five or six years. According to Shrader, Sebastian lived in Georgetown. During the course of their friendship, Shrader never saw Sebastian acquire, use, carry, or possess a firearm. Shrader never saw any firearms in the Georgetown home or in Boone's home at Sicily Road. He last went to the Sicily Road residence two or three weeks before law enforcement executed the search warrant. However, he admitted that he had not been in the master bedroom since 2003 or 2004.

{¶54} Mrs. Haney testified that she lived with her husband at 1239 Sicily Road, roughly 1.5 miles from 2210 Sicily Road. Like her husband, Mrs. Haney testified that only Boone and Jr. lived at 2210 Sicily Road. According to Mrs. Haney, Sebastian lived in Georgetown though he stayed with Boone a few days each week. Mrs. Haney admitted that from her location on Sicily Road, she could not track the movements of people coming to and from the residence at 2210 Sicily Road. Mrs. Haney had known Sebastian and Boone for roughly 17 years.

{¶55} In addition, Mrs. Haney testified that Boone developed an interest in firearms and shooting after the Haneys took her target shooting. Sebastian never joined the Haneys for target shooting or hunting activities. Mrs. Haney believed that Boone purchased five firearms through Mr. Haney. Boone purchased a .9 millimeter Taurus Mr. Haney owned. Mr. Haney later purchased other guns for Boone at various gun shows. Mrs. Haney could not recall all of the weapons Mr. Haney purchased for Boone, but she did recall a .44 Anaconda, a shotgun, and another .9 millimeter. Boone kept her guns on the right-hand side of the second shelf in a gun safe in the Haneys' basement. However, Mrs. Haney admitted that Boone bought a gun safe from the Haneys' in 2004. Mrs. Haney recalled that on a Friday, i.e. July 14, 2006, Boone's weapons were still in the safe. However, Boone knew where to find an extra key to the Haneys' home and had the combination to their gun safe. After learning of the search at 2210 Sicily Road, Mrs. Haney discovered Boone's firearms had been removed from the Haneys' gun safe. Mrs. Haney admitted that she never came forward to reveal this information to law enforcement before testifying at trial.

{¶56} Boone testified that she and Sebastian had been in a relationship for eight years, and she considered him to be her fiancé. Boone lived with Sebastian and Jr. in Georgetown for four years before purchasing her own home at 2210 Sicily Road in 2004. Jr. moved in with her at that time for school-related reasons, but Sebastian never lived in her home. Boone explained that she kept pictures of Sebastian, Jr., and her family around her home. Furthermore, the check the State introduced into evidence merely showed that Sebastian served as a power of attorney on her checking account, not that he lived with her. Boone admitted that Sebastian occasionally stayed overnight at her home and kept prescription medication in her safe. In addition, she acknowledged that in August 2004 she reported a crime to the Sheriff's Office, and the deputy wrote in his report that "Ms. Boone stated she resided at [2210 Sicily Road] with Mendell Sebastian, her fiancee [sic]."

{¶57} According to Boone, Sebastian introduced her to the Haneys roughly eight years ago. In 2003 or 2004, Boone took an interest in firearms after the Haneys took her shooting. She purchased a .9 millimeter Taurus from Mr. Haney. After that, Mr. Haney purchased four additional firearms for Boone at various gun shows. Although Boone had a gun safe she purchased from the Haneys in 2000 or 2001, she only used it for legal documents and medications. She stored her weapons in a gun safe at the Haneys' home. They gave her the safe combination and told her where to find the spare key to their home. Boone further testified that she knew Sebastian could not be around firearms and never saw him use, purchase, carry, or otherwise have a firearm.

{¶58} Boone further testified that on July 14, 2006, a Friday, she went alone to the Haneys' home, when they were not there, and retrieved all five of her loaded firearms from the gun safe. She planned to go target shooting with the Haneys and Shrader that weekend. Because she had little experience shooting, she intended to practice using all of her weapons during the outing. According to Boone, she placed a .9 millimeter Taurus and a .44 Anaconda Colt under her pillow in the master bedroom, i.e. the pillow closest to the bedroom door. She placed a Remington rifle behind the bedroom door, a .12 gauge Mossberg pistol grip next to her side of the bed, and a .357 Taurus revolver on top of a desk in her master bathroom. Boone testified that she never had an Uzi in her home. Around 8:00pm or 8:30pm, Boone went to bed alone and dead-bolted the door to the master bedroom. Later that night when deputies began to bang on her bedroom door, she awoke to find Sebastian on the other side of the bed, i.e. the side furthest from the door. Prior to that time, she had no idea where Sebastian was. However, she testified that Sebastian had keys to get inside her house. Boone explained that the lock on the master bedroom door, which she referred to as a "dead-bolt," could be opened and closed with a key. Sebastian also had a key for this lock. When Sebastian went to open the bedroom door for the deputies, she jumped over to his side of the bed.

{¶59} In addition, Sebastian testified on his own behalf. He acknowledged staying occasionally at Boone's home at 2210 Sicily Road but maintained that he resided at the Georgetown address and spent at least 75% of his time there. Sebastian admitted that he kept prescription medication in a safe at 2210 Sicily Road. He further admitted that his will contained the combination to the safe and that he kept a copy of the will at 2210 Sicily Road. However, he offered into evidence exhibits, such as his recognizance form and various bills, indicating that he lived in Georgetown. Sebastian explained that on prior occasions when deputies responded to calls from Boone's home and filled out incident reports, the deputies misunderstood his living situation when they reported that Sebastian lived in her home.

{¶60} Sebastian further testified that on July 14, 2006, he and Boone had an altercation with Jr. at Boone's home around 1:30pm or 2:00pm. According to Sebastian, Boone did not have time to inform him that she had picked up her weapons from the Haneys' residence and placed them in the master bedroom. After this altercation, Sebastian left Boone's home. When he returned in the early evening, Boone had the master bedroom door shut. Sebastian could hear her snoring, so he slept on the couch to avoid disturbing her. He woke up during the night and decided to enter the master bedroom and sleep next to Boone, on the side of the bed furthest from the door. According to Sebastian, he always slept on that side of the bed when he stayed overnight at Boone's. Boone did not wake up when Sebastian entered the room, and there were no lights on in bedroom at this time. Sebastian next awoke when he heard the deputies enter Boone's home. In the dark, he opened the master bedroom door for them.

{¶61} In addition, Sebastian testified that he knew he could not acquire, have,

carry, or use firearms because of his prior conviction for drug trafficking. Since Boone never told him that she had retrieved her weapons from the Haneys' residence and placed them in the master bedroom, and because the room was dark when Sebastian entered it the night of July 14, 2006, he did not know the room contained firearms until the Sheriff's Office executed the search warrant. Had he known, he "never would have went in there."

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.