

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Julie A. Edwards, J.
vs.	:	
	:	
THOMAS WIMBUSH	:	Case No. 2005CA0024
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2004CR830D
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	December 6, 2005
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APPEARANCES:

For Plaintiff-Appellee

KIRSTEN L. PSCHOLKA-GARTNER
38 South Park Street
Mansfield, OH 44902

For Defendant-Appellant

WILLIAM C. FITHIAN, III
111 North Main Street
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Farmer, J.

{¶1} On September 18, 2003, appellant, Thomas Wimbush, was called as a witness in a preliminary hearing involving his stepfather who had been charged with armed robbery and other crimes. Appellant testified about owning the shotgun which had been entered into evidence. Appellant claimed the shotgun had been in his mother's home for some two to four years before it was discovered by the police investigating the armed robbery. Later, it was learned that during the same time period of appellant's claimed ownership, the shotgun had been owned by other individuals. As a result, appellant was charged with perjury in violation of R.C. 2921.11.

{¶2} A jury trial commenced on March 17, 2005. The jury found appellant guilty. By sentencing entry filed March 21, 2005, the trial court sentenced appellant to four years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF PERJURY, AS THERE EXISTED NO PROOF THAT APPELLANT'S STATEMENT WAS 'MATERIAL'."

II

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ADMITTING TESTIMONY THAT THE SHOTGUN WAS USED IN A ROBBERY."

I

{¶6} Appellant claims there was insufficient evidence to convict him of perjury. We disagree.

{¶7} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881.

{¶8} Appellant was convicted of perjury in violation of R.C. 2921.11 which states the following:

{¶9} "(A) No person, in any official proceeding, shall knowingly make a false statement under oath or affirmation, or knowingly swear or affirm the truth of a false statement previously made, when either statement is material.

{¶10} "(B) A falsification is material, regardless of its admissibility in evidence, if it can affect the course or outcome of the proceeding. It is no defense to a charge under this section that the offender mistakenly believed a falsification to be immaterial."

{¶11} Upon investigating appellant's stepfather for an armed robbery, police searched his home and found the shotgun in question. T. at 49-50. Testimony established the shotgun in evidence at the preliminary hearing was the same shotgun

recovered in the stepfather's residence. T. at 40-42, 50, 53-54. As a result of the shotgun, the stepfather was charged with possessing a weapon while under disability, armed robbery and other crimes.

{¶12} Appellant was called as a witness at the September 18, 2003 preliminary hearing. Under oath, appellant testified he owned the shotgun for "two and a half, three years." T. at 86. Then appellant stated he left the shotgun at his mother's house "[a]bout four years, three years ago." T. at 87-88. Appellant stated he had never told his stepfather about the shotgun being left in the house. T. at 89. Based upon appellant's testimony, appellant would have owned the shotgun as early as 1999 or as late as 2001.

{¶13} Testimony established the same shotgun was sold by the Sportsman's Den to a Matt Lehnhart on January 20, 2000. T. at 57-58. Mr. Lehnhart testified he owned the shotgun for about a year to a year and a half before he sold it to Don Lucas in late 2001. T. at 62. Mr. Lucas testified he owned the shotgun until he discovered it missing in July of 2003. T. at 64. Mr. Lucas later learned his son had taken the shotgun and sold it. T. at 67-69.

{¶14} The testimony established appellant could not have owned the shotgun from late 1999 to July of 2003.

{¶15} Appellant's testimony about owning the shotgun was material. If the trial court believed appellant's testimony, the trial court could have found the state lacked probable cause on the disability charge and the firearm specifications attached to the other charges.

{¶16} Upon review, we find sufficient testimony, if believed, to find appellant guilty of perjury.

{¶17} Assignment of Error I is denied.

II

{¶18} Appellant claims the trial court erred in permitting testimony that the shotgun was used in a robbery. We disagree.

{¶19} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶20} The first question is whether the evidence was relevant. Under Evid.R. 104(A), questions of relevancy are preliminary matters to be determined by the trial court. Evid.R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403(A).

{¶21} Testimony regarding the robbery and the subsequent discovery of the shotgun was clearly relevant as background information as to why appellant was called to testify at the preliminary hearing. In addition, upon objection by defense counsel, the trial court instructed the jury as follows:

{¶22} "Folks, I might just make a statement here so you understand. This Rembert who is being investigated for this robbery and so forth, there is no evidence at all that Mr. Wimbush was involved in that robbery in any way. So don't get these things confused. What he is accused of is lying under oath in that preliminary hearing. He is not accused of this robbery in any way." T. at 30-31.

{¶23} Upon review, we find the trial court did not err in permitting testimony that the shotgun was used in a robbery.

{¶24} Assignment of Error II is denied.

{¶25} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Hoffman, P.J. and

Edwards, J. concur.

JUDGES

SGF/db 1123

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

vs.

THOMAS WIMBUSH

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 2005CA0024

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed.

JUDGES