[Cite as *State v. Humphrey*, 2009-Ohio-5981.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
WILLARD C . HUMPHREY	:	Case No. 09CAA010001
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 08CRI070369
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 10. 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KYLE E. ROHRER 140 North Sandusky Street Delaware, OH 43015	JOHN R. CORNELY 941 Chatham Lane Suite 201 Columbus, OH 43221

Farmer, P.J.

{¶1} On July 11, 2008, the Delaware County Grand Jury indicted appellant, Willard Humphrey, on two counts of having a weapon while under disability in violation of R.C. 2923.12, one under subsection (A)(2) and the other under (A)(3). Said charge arose from an incident wherein appellant was observed with a shotgun during a neighborhood dispute.

{¶2} A jury trial commenced on August 19, 2008. The jury found appellant guilty as charged. By nunc pro tunc judgment entry of sentence filed December 31, 2008, the trial court sentenced appellant to three years of community control.

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

I

{¶4} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL AS THE EVIDENCE OF THE FIREARM'S OPERABILITY WAS INSUFFICIENT TO SUPPORT CONVICTIONS FOR HAVING WEAPONS UNDER DISABILITY."

II

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PROHIBITED APPELLANT FROM INTRODUCING EXTRINSIC EVIDENCE OF JONATHAN SCOTT'S PRIOR INCONSISTENT STATEMENT TO OFFICERS, AS SUCH EVIDENCE WAS ADMISSIBLE UNDER EVIDENCE RULE 613(B)."

III

{¶6} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PREVENTED OFFICE (SIC) ADAM MOORE FROM TESTIFYING ABOUT THE REASONS FOR ACTION HE TOOK IN INVESTIGATING THE CRIME, AS SUCH REASONS ARE NOT HEARSAY."

IV

{¶7} "THE PROSECUTORS COMMITTED MULTIPLE ACTS OF MISCONDUCT DURING CLOSING ARGUMENTS THAT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL UNDER ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

V

{¶8} "THE CUMULATIVE ERRORS SET FORTH ABOVE COMBINED TO DEPRIVE THE APPELLANT OF A FAIR TRIAL."

I

{¶9} Appellant claims the trial court erred in denying his Crim.R. 29 motion for acquittal as the evidence failed to establish that the firearm was operable. We disagree.

{¶10} Crim.R. 29 governs motion for acquittal. Subsection (A) states the following:

{¶11} "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not

reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶12} The standard to be employed by a trial court in determining a Crim.R. 29 motion is set out in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus:

{¶13} "Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."

{¶14} Appellant was charged with having a weapon while under disability in violation of R.C. 2923.13(A)(2) and (3) which state the following:

{¶15} "(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:

{¶16} "(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

{¶17} "(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."

{¶18} Appellant argues there was insufficient evidence to support a conviction for having weapons while under disability because there was no direct evidence of the firearm's operability or that the firearm could "readily be rendered operable." See, R.C. 2923.11(B)(1). Pursuant to R.C. 2923.11(B)(2), circumstantial evidence of operability is permissible:

{¶19} "When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶20} It is uncontested that the state did not produce any firearm, nor was one found immediately after the incident. T. at 93, 102, 112, 138. The trier of fact was left with the testimony of those who witnessed the event.

{¶21} The evidence established that a disturbance arose between appellant and his neighbor, Jonathan Scott. T. at 164-165. Appellant was yelling obscenities in the presence of Mr. Scott's children. T. at 164. Mr. Scott went into his residence to obtain a telephone and when he came back out, appellant "was walking down his driveway with a shotgun." T. at 166. The shotgun was in appellant's right hand, "kind of draped over his forearm." T. at 167. Mr. Scott, an ex-Marine, was an "expert weapons handler." T. at 166. He testified the shotgun's breech was closed. T. at 167. Although appellant told police officers the "gun" was a broomstick or stick, Mr. Scott positively affirmed it was a shotgun. T. at 114, 168-169, 192. Delaware Detective Sergeant John Radabaugh explained the operation of a shotgun as follows:

{¶22} "This is a break action or breech loading shotgun. Obviously, in the closed state it looks like what everybody would expect a shotgun to look like. Stock, barrel, trigger, external hammer. This particular shotgun is loaded by opening the action this way. A single shell would be placed into the breech here and then once the action is closed, pulling the trigger would, obviously, work the action, bring the hammer back, release it. That round would be fired. You would, then, have to reopen the action, pull the expended cartridge out and reload another one in. It's one shot at a time." T. at 140.

{¶23} During the execution of a search warrant the day following the incident, a shotgun or weapon was not found. T. at 138. However, ammunition was found in various places throughout appellant's house i.e., various bedroom drawers, a spare bedroom being used for storage, and the bathroom. T. at 136-137, 187. All of the found shells appeared to be "live and fully loaded." T. at 188.

{¶24} In reviewing evidence, an inference may not be made upon another inference to reach a conclusion of fact. However in this case, there are two fact issues established by direct evidence. Mr. Scott testified to seeing appellant brandishing, but not pointing or threatening, a shotgun with the breech closed. Upon searching appellant's residence the next day, police officers found loaded shotgun shells throughout the house. This direct evidence could lead a trier of fact to infer that appellant possessed an operable firearm as defined by the statute.

{¶25} Upon review, we cannot find that the evidence was insufficient to establish the operability of the firearm.

{¶26} Assignment of Error I is denied.

II

{¶27} Appellant claims the trial court erred in not permitting defense counsel the opportunity to cross-examine Mr. Scott on his prior inconsistent statement given in a police report. We disagree.

{¶28} 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.

{¶29} Evid.R. 613(B) governs extrinsic evidence of prior inconsistent statement of witness and states the following:

{¶30} "(B) Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

{¶31} "(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

{¶32} "(2) The subject matter of the statement is one of the following:

{¶33} "(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

{¶34} "(b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(B) or 706;

{¶35} "(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence."

{¶36} Mr. Scott repeatedly denied telling the police that the breech of the shotgun was open. T. at 174-176. In fact, Mr. Scott specifically questioned whether this fact was of any importance. T. at 175.

{¶37} Delaware Police Officer John Snead testified a witness told him appellant came outside with a single-barrel shotgun with the breech open. T. at 95. Mr. Scott specifically stated the breech was closed. T. at 167. The matter was essentially fully disclosed to the jury.

{¶38} We find further cross-examination of Mr. Scott about his statements in the police report would not have aided the trier of fact or added to the lack of credibility of Mr. Scott.

{¶39} Assignment of Error II is denied.

III

{¶40} Appellant claims the trial court erred in denying the cross-examination of Delaware Police Officer Adam Moore on his reasons for actions he took in investigating the incident. We disagree.

{¶41} During the execution of the search warrant, Officer Moore testified to looking for loose gunpowder in varmint holes:

{¶42} "Q. Officer Moore, you said you found some holes over by the shed; is that correct?

{¶43} "A. Yes.

{¶44} "Q. Looked like varmint holes?

{¶45} "A. Yes, sir.

{¶46} "Q. From your testimony.

{¶47} "A. Yes.

{¶48} "Q. And why were you looking for those?

{¶49} "A. Earlier, while we were in the house - -" T. at 193-194.

{¶50} The state objected, arguing the statement would be hearsay. We have no proffer of what the statement might have been or who made the statement.

{¶51} Given the nature of the record and the possibility of a *Crawford* violation, we cannot find error. See, *Crawford v. Washington* (2004), 541 U.S. 36.

{¶52} Assignment of Error III is denied.

IV

{¶53} Appellant claims he was denied a fair trial because of prosecutorial misconduct. We disagree.

{¶54} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused. *State v. Lott* (1990), 51 Ohio St.3d 160, certiorari denied (1990), 112 L.Ed.2d 596. In reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the contest of the entire trial. *Darden v. Wainwright* (1986), 477 U.S. 168. We note the prosecutor may "strike hard blows, but [the prosecutor] is not at liberty to strike foul ones." *Berger v. United States* (1935), 295 U.S. 78, 88.

{¶55} Appellant claims the prosecutor purposely emphasized that he was a bad person. The complained of statement occurred during rebuttal:

{¶56} "Let's talk about the guts of this. Mr. Banks want you to think that this defendant shouldn't be held liable because he's been clean for 15 years. No felonies for 15 years, though that's some kind of major accomplishment. I dare say that most of you have spent the last 15 years without a felony. The question is, has he been convicted of a felony? He had over and over. And did he have a firearm? So there we are." T. at 229.

{¶57} Appellant also argues that the prosecutor repeatedly called appellant a "liar":

{¶58} "Mr. Humphrey was not truthful when he told the police it was a broomstick on October 9th and on October 10th, when he told them it was that stick in that photograph.

{¶59} "***

{¶60} "Why do liars lie? We talked about credibility at the beginning. Why do liars lie? They lie to get an advantage. Either they're in trouble and they can't get out of it, or they're trying to get some kind of advantage. What happened here is really clear. Two different kinds of sticks that don't look anything alike. This man was lying to get out of a jam and that he knew he was in." T. at 225, 232, respectively.

{¶61} No objections were made to any of these statements. An error not raised in the trial court must be plain error for an appellate court to reverse. *State v. Long* (1978), 53 Ohio St.2d 91; Crim.R. 52(B). In order to prevail under a plain error analysis, appellant bears the burden of demonstrating that the outcome of the trial clearly would have been different but for the error. *Long*. Notice of plain error "is to be taken with the

utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

{¶62} Defense counsel freely admitted appellant's "terrible past," but argued for mercy. T. at 226, 228.

{¶63} We find the prosecutor's statements made on rebuttal as to appellant's criminal record were in direct response to defense counsel's statement. The issue was whether the jury believed the direct evidence by Mr. Scott that appellant brandished a shotgun in order to make the inference of operability. It was clear from the testimony that two views were given as to what happened i.e., Mr. Scott's and appellant's statements to the police officers. "Whom do you trust?" was the issue of this case.

{¶64} Upon review, we cannot find the complained of statements rose to the level of plain error.

{¶65} Assignment of Error IV is denied.

V

{¶66} Appellant claims the cumulative errors (Assignments of Error I through IV) denied him a fair trial. We disagree.

{¶67} Having found no error in the assignments of error above, this assignment of error is denied.

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

By Farmer, P.J.

Wise, J. concurs.

Hoffman, J. concurs separately.

_s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_____

JUDGES

SGF/sg 1002

Hoffman, J., concurring

{¶69} I concur in the majority's analysis and disposition of Appellant's Assignments of Error I, IV and V.

{¶70} I concur in the majority's disposition of Appellant's Assignment of Error II. However, I find the trial court did err in prohibiting impeachment of Mr. Scott with his prior inconsistent statement contained in the police report. Nonetheless, because a shotgun with an open breech can be readily rendered operable, I find the error harmless.

{¶71} As to Appellant's Assignment of Error III, I also disagree with the majority's conclusion the trial court did not err in denying cross-examination of Officer Moore concerning his reasons for looking for loose gunpowder in varmint holes. I do not find it was hearsay. Nothing indicates the answer would have been offered to prove anything other than why the officer took some investigative action.[1] Nevertheless, I find this error was harmless also.

_s/ William B. Hoffman_____
HON. WILLIAM B. HOFFMAN

[1] I do not believe a proffer is required during cross-examination.

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WILLARD C . HUMPHREY	:	
Defendant-Appellant	:	CASE NO. 09CAA010001

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ John W. Wise

JUDGES