

[Cite as *State v. West*, 2009-Ohio-6217.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92508

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DECHARLES WEST

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508353

BEFORE: Cooney, A.J., McMonagle, J., and Blackmon, J.

RELEASED: November 25, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, DeCharles West, appeals his conviction for having a weapon while under disability. Finding no merit to the appeal, we affirm.

{¶ 2} In March 2008, West was indicted for having a weapon while under disability, domestic violence, and felonious assault. A jury found him guilty of having a weapon under disability and domestic violence. The trial court sentenced him to three years in prison.

{¶ 3} West appeals, raising three assignments of error. He challenges only his conviction for having a weapon under disability, conceding the conviction for domestic violence.

Manifest Weight and Sufficiency of the Evidence

{¶ 4} In the first assignment of error, West claims that there was insufficient evidence to convict him of having a weapon under disability and, in the second, that his conviction was against the manifest weight of the evidence. We address these two assignments of error together because, although the standards of review differ, they involve the same evidence.

{¶ 5} In *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶113, the Ohio Supreme Court explained the standard for sufficiency:

{¶ 6} “Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. In reviewing such a challenge, ‘[t]he 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.’ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.”

{¶ 7} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25, the Ohio Supreme Court restated the criminal manifest weight standard and explained how it differs from the sufficiency standard:

{¶ 8} “The criminal manifest-weight-of-the-evidence standard was explained in * * * *Thompkins* * * *, [in which] the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a

reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 9} West was convicted of having a weapon under disability under R.C. 2923.13(A)(3), which provides:

"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 * * * [t]he 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 * * *."

{¶ 10} The jury heard the following evidence at trial. Patricia Bailey ("Bailey") and her seven children lived in a three-story house in Cleveland. West was the father of two of the children and had been staying with Bailey. During the early morning hours of March 13, 2008, Bailey and her two oldest daughters, 14-year-old S.B. and 13-year-old P.B., heard a knock at the door. West entered the residence, and S.B. and P.B. went upstairs.

{¶ 11} West became angry with Bailey due to suspected infidelity. He punched her multiple times. S.B. came downstairs and asked West to get off Bailey. In response, he punched her and Bailey.

{¶ 12} P.B. came downstairs and jumped on West's back. He then struck her, and she fell on the couch. Bailey grabbed several of her children and ran to the third floor of the house. S.B. followed her, carrying Bailey's 9-month-old son, B.B. West followed Bailey upstairs and kicked in the bedroom door. He waved a black gun and pointed it at her. Bailey's 11-year-old daughter, M.W., asked West to stop hitting Bailey. West then struck the wall with the gun. He pointed the gun at B.B., and Bailey threw herself in front of the baby. West turned the gun toward S.B. and told her, "Don't say nothing to me because you are next."

{¶ 13} West left the room and closed the door. Bailey and the children heard four to five shots fired. S.B. managed to call 9-1-1, and police arrived at the home.

{¶ 14} Detective Curtis Orr ("Orr") testified that during the early morning hours of March 13, he and police officer Greg Hunter ("Hunter") responded to a call regarding a domestic dispute at Bailey's house. Several hysterical children ran up to the officers and told them that their mother was in the house and that their father had a gun and was hitting her.

{¶ 15} Officers Kevin Stanard (“Stanard”) and Teresa Mandzak (“Mandzak”) arrived at the residence. Police arrested West and discovered a live bullet in his pocket and spent shell casings on the floor. The officers searched the house for the gun that the children had reported. Stanard found a gun in a bedroom closet on the second floor, and Mandzak found some bullets in one of the bedrooms. Orr observed white chalk marks on the barrel of the gun that, to him, suggested that it had been pounded into drywall. The officers also found shell casings on the back porch and outside, near the landing of the house.

{¶ 16} At trial, Bailey testified that West had previously brought the same gun to her house, and she identified the gun from a photo introduced into evidence. She also identified photos of holes in the third floor bedroom that West made when he pounded the barrel of the gun into the wall. A police firearms examiner testified that that the shell casings that were found on the floor had not been fired from the gun found in Bailey’s house.

{¶ 17} On appeal, West argues that there was no evidence of gunshot residue on his clothing, the shell casings found in the house did not match the gun found in the house, and there was no evidence of his fingerprints on the gun. He also asserts that Bailey had once pled guilty to failing to secure a

firearm, apparently implying that the gun was hers. We do not find West's arguments convincing.

{¶ 18} The evidence supports the jury's verdict finding West guilty of having a weapon under disability. First, the jury examined a certified copy of West's 2004 criminal conviction for drug possession and drug trafficking, which demonstrated that West was under disability. Next, Bailey and several of the children testified that they observed West waving a gun. Bailey and M.W. testified that West brandished it, pointed it at B.B., and waved it around. Police found a live bullet in West's pocket and a gun with drywall residue on it. There was testimony and photographic evidence that West had made holes in the bedroom wall with a gun.

{¶ 19} It is not relevant that the shell casings recovered at the scene were not fired from the gun that was found in the house. The witnesses observed West carrying or brandishing a gun. Discharging the gun is not an essential element of the crime of having a weapon under disability.

{¶ 20} The evidence supports the conviction for having a weapon under disability. Therefore, we overrule the first two assignments of error.

{¶ 21} In the third assignment of error, West argues that the State did not disclose the name of witness S.B. during discovery, in violation of Crim.R. 16. The State argues that it disclosed S.B.'s name throughout pretrial

discussions, including in the police report of the attack, the 9-1-1 audiotape recording, and during discussions regarding the trial date and witness travel arrangements. The State also demonstrates that the trial court gave West the opportunity to confer with S.B. before she testified.

{¶ 22} Crim.R. 16(B)(1)(e) provides that upon the defendant’s request, the prosecuting attorney must disclose the names of all witnesses. When the State violates this rule, the trial court may shape a remedy at its discretion. Crim.R. 16(E)(3); *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 453 N.E.2d 689. But “a trial court must inquire into the circumstances surrounding a discovery rule violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the rules of discovery.” *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, 511 N.E.2d 1138.

{¶ 23} In the instant case, the prosecuting attorney informed the trial court that, although S.B.’s name was accidentally omitted from the written witness list, he had identified S.B. numerous times during oral discussions. We cannot conclude that the trial court abused its discretion in deciding that the appropriate remedy was to allow West to confer with S.B. before she testified.

{¶ 24} The third assignment of error is overruled.

{¶ 25} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

CHRISTINE T. McMONAGLE, J., and
PATRICIA ANN BLACKMON, J., CONCUR