

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	
CITY OF AKRON		C. A. No. 23482
Appellee		
v.		APPEAL FROM JUDGMENT
KENNETH E. SMITH		ENTERED IN THE
		AKRON MUNICIPAL COURT
Appellant		COUNTY OF SUMMIT, OHIO
		CASE No. 06 CRB 11332

DECISION AND JOURNAL ENTRY

Dated: June 6, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

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SLABY, Presiding Judge.

{¶1} Defendant, Kenneth E. Smith, appeals from the decision of the Akron Municipal Court finding him guilty of one count of carrying a weapon. We affirm.

{¶2} On October 17, 2006, Defendant was tried before a jury on the following charges: carrying a weapon, a third degree misdemeanor in violation of Akron Municipal Code Section 137.02A; obstructing official business, a second degree misdemeanor in violation of Akron Municipal Code Section 136.11; and littering, a third degree misdemeanor in violation of Akron Municipal Code Section 95.03. One additional charge, possession of drugs in violation of Akron

Municipal Code Section 138.10C1, was dropped by the prosecution prior to trial. The jury found Defendant guilty of carrying a weapon, and not guilty of littering and obstructing official business.

{¶3} Each of the above charges arose from an incident on September 10, 2006, in which Defendant called the police to investigate a man who was unresponsive and lying in Defendant's front yard. Defendant proceeded outside after having called the police, taking with him a baseball bat. When the police arrived on his street, Defendant went into the street and began gesturing with the baseball bat and pointing both to the police cruiser and to his house. The police, after an extended discussion with Defendant, finally succeeded in having him put the baseball bat down so that they could approach the house. However, Defendant moved to pick up the bat again after flicking his cigarette onto the arm of one of the officers, burning that officer. The police restrained him with handcuffs and placed him under arrest so that they could safely examine the individual on Defendant's property. Defendant now appeals, raising one assignment of error.

#### FIRST ASSIGNMENT OF ERROR

"The City of Akron failed to introduce sufficient evidence to prove beyond a reasonable doubt that [Defendant] carried a deadly weapon without proper justification thereby violating [Defendant's] due process rights under the Fourteenth Amendment of the Constitution of the United States."

{¶4} Defendant argues that the evidence presented by the prosecution was insufficient to support the charge of carrying a weapon.

{¶5} “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.” *State v. Smith*, 9th Dist. No. 23288, 2007-Ohio-1680, at ¶3, quoting *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752. “We must determine, as a matter of law, whether the evidence was legally sufficient to support a conviction.” *State v. Moneypenny*, 9th Dist. No. 03CA0061, 2004-Ohio-4060, at ¶10, citing *State v. Leggett* (Oct. 29, 1997), 9th Dist. No. 18303. “In essence, sufficiency is a test of adequacy.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶6} The charge of carrying a weapon was brought against Defendant under Akron Municipal Code Section 137.02A, which reads as follows:

“A. Weapons Generally. Except as otherwise permitted by law, no person shall carry on or about his person a pistol, a knife having a blade two and one-half inches in length or longer, knuckles, a billy or other dangerous ordnance or deadly weapon without proper justification. ‘Proper justification’ includes, but is not limited to, the right of law enforcement officers and other persons specifically authorized by law to be armed within the scope of his or her duties. This section does not apply to a person who is engaged in a lawful business or pursuit justifying possession of such an item and the person did not use or intend to use the item as a weapon. It shall be an affirmative defense to a violation of this section that the defendant was at the time engaged in a lawful business, calling,

employment or occupation and the circumstances in which he was placed justified a prudent man in possessing such a weapon for the defense of his person, property or family.”

{¶7} The prosecution offered the testimony of Officer Sinsley, one of the two officers who responded to Defendant’s call on September 10. Officer Sinsley testified that he and his partner, Officer Metzger, received the call that there was a “man down” in the front yard at 95 East Tallmadge Avenue. “Man down” calls indicate to officers that there is an unresponsive person in a yard or on a street or sidewalk. The officers did not know who had placed the call or who the resident of the home was, but Officer Sinsley testified that the neighborhood was a known gang and drug area. They were approximately three miles from 95 East Tallmadge Avenue when they received the call, and they proceeded to that location.

{¶8} When the officers were about seven houses from 95 East Tallmadge Avenue, Defendant entered the street “with a baseball bat in his hands jumping up and down, pointing at [the] cruiser.” The officers could not tell whether Defendant was pointing out the house or threatening the cruiser, and they did not know whether the “man down” call was a result of an incident with the baseball bat. They stopped about four houses away, and proceeded cautiously toward Defendant, explaining that they needed him to put the bat down for their safety. Defendant was uncooperative. After the officers asked three or four times for Defendant to put the bat down, and after threatening Defendant with jail if he did

not comply, Defendant put the bat down at his feet. Officer Metzger threw the bat farther into the front yard and away from Defendant.

{¶9} The officers entered the front yard toward the “man down,” but Defendant, who was between the officers, exclaimed “Fuck this, I’m getting my bat, it’s my house.” He then flicked his cigarette at Officer Sinsley, burning the officer’s arm. He took a step toward the bat, at which time Officer Sinsley handcuffed him and placed him on the steps in the front yard.

{¶10} Based upon the evidence presented, a reasonable jury could have found that Defendant had carried the bat as a weapon and without proper justification. As Officer Sinsley indicated, the bat could have been used as a weapon against the “man down.” They perceived Defendant’s continued possession of the bat as a threatening gesture because he waved it about as they were approaching him and he refused to acknowledge their repeated requests, warnings and explanations about why he needed to drop the bat. Even when the officers had moved the bat out of Defendant’s reach, Defendant attempted to regain possession of the bat, using combative language and flicking his cigarette at Officer Sinsley.

{¶11} The police were already on the scene to investigate the “man down,” and, even if Defendant had originally been justified in carrying the bat to confront the perceived danger of an unresponsive man in his front yard, he no longer had a

justification for carrying the bat. Any danger that Defendant perceived would have been confronted by the officers.

{¶12} The evidence presented by the prosecution was sufficient to support a finding by a rational jury that the elements of carrying a weapon had been proven beyond a reasonable doubt. Defendant's first assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

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The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Akron Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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LYNN C. SLABY  
FOR THE COURT

WHITMORE, J.  
CONCURS

MOORE, J.  
CONCURS IN PART, SAYING:

{¶13} I concur in the result reached by the majority, but write separately to address an analysis of the provision under which Appellant was charged. At the outset, this case appears to have resulted from failed communication. Appellant, noticing a man lying in the front yard of his home is understandably concerned and calls the police. While waiting for the police to respond, he goes out to investigate and, not knowing what danger might be lurking, takes a bat with him for protection. When the police arrive, responding to a “man down” call, they find a man waving a bat. They understandably are alarmed and order him to put down the bat. They have no way of knowing who placed the call or what role this man might have played in the condition of the “man down”.

{¶14} Had this case come before this Court on review of a motion to suppress, the thoughts and perceptions of the *officers* at the time they made the arrest would be paramount in our consideration. See *Beck v. Ohio* (1964), 379 U.S. 89, 91 (“Whether [an] arrest was constitutionally valid depends \*\*\* upon whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their

knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense”). This case, however, presents itself in the context of a sufficiency determination following a jury verdict of guilty. We must then determine, as a matter of law, whether the evidence before the *jury* was legally sufficient to support a conviction. *State v. Moneypenny*, 9th Dist. No 03CA0061, 2004-Ohio-4060, at ¶¶9-10. We undertake this review by viewing the evidence in a light most favorable to the prosecution, and determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. *Id.* at ¶9.

{¶15} The ordinance under which Appellant was charged, Akron City Code Section 137.02(A) provides as follows:

“Except as otherwise permitted by law, no person shall carry on or about his person a pistol, a knife having a blade two and one-half inches in length or longer, knuckles, a billy or other dangerous ordnance or deadly weapon without proper justification. ‘Proper justification’ includes, but is not limited to, the right of law enforcement officers and other persons specifically authorized by law to be armed within the scope of his or her duties. This section does not apply to a person who is engaged in a lawful business or pursuit justifying possession of such an item and the person did not use or intend to use the item as a weapon. It shall be an affirmative defense to a violation of this section that the defendant was at the time engaged in a lawful business, calling, employment or occupation and the circumstances in which he was placed justified a prudent man in possessing such a weapon for the defense of his person, property or family.”



{¶16} The term “proper justification” is not defined, but examples are provided which include, but do not limit the class to law enforcement officers “and other persons specifically authorized by law to be armed within the scope of his or her duties.” While it is clear that the list is not exhaustive, it is also apparent that the classification was not intended to extend to homeowners protecting their property. It is also clear that Appellant is neither a member of law enforcement nor one who is specifically authorized by law to be armed within the scope of his duties. Neither does Appellant fall within the exception of persons “engaged in a lawful business”, as there was no evidence in the record to suggest that he was acting in any business or professional capacity at the time of his arrest. The ordinance also excepts from criminal liability one who is engaged in a “pursuit justifying possession of such an item[.]” I read the clause “engaged in a lawful business or pursuit” to suggest a professional pursuit rather than to include a pursuit, for example of an individual on someone’s property. As stated above, Appellant is not embraced in this exception. Even if we were to read “pursuit” more broadly to encompass his action in pursuing the person lying in his front yard, the ordinance contains a conjunctive “and” which includes a showing that Appellant did not use or intend to use the item as a weapon.

{¶17} Even if Appellant was upset that he was the person who called the police for help and felt it unfair that the officers directed him to drop the bat, his conduct toward them after dropping the bat, i.e. using profanity, flicking the

cigarette toward the officer, taken together with his declaration that he was going to pick up the bat again provided sufficient evidence upon which a reasonable jury could conclude beyond a reasonable doubt that at that time, he possessed the bat as a weapon.

{¶18} Accordingly, I concur in the result reached by the majority.

APPEARANCES:

STEPHEN R. COOK, Attorney at Law, for Appellant.

MAX ROTHAL, Director of Law, DOUGLAS J. POWLEY, Chief City Prosecutor, and GERALD LARSON, Assistant City Prosecutor, for Appellee.