[Cite as *State v. Maxwell*, 2010-Ohio-4214.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 24807
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
ROBERT B. MAXWELL	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 12 4219

DECISION AND JOURNAL ENTRY

Dated: September 8, 2010

BELFANCE, Presiding Judge.

{¶1} Defendant-Appellant Robert Maxwell appeals his conviction from the Summit County Court of Common Pleas for having weapons under disability. This Court affirms.

I.

{¶2} On December 27, 2008, the Akron Police Department responded to a service call at 280 Ripley Avenue, Akron, Ohio. When law enforcement officers arrived, Mr. Maxwell was in the driveway in front of the residence. He was placed into custody by the arriving officer because he had unpaid fines in municipal court. The officers then proceeded to search the residence with the permission of Mr. Maxwell's wife. Upon entering the master bedroom, the officers discovered three operable firearms in plain view.

{¶3} In January 2009, Mr. Maxwell was indicted on one count of having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. Following

a jury trial in April 2009, Mr. Maxwell was found guilty as charged in the indictment. On May 7, 2009, the trial court sentenced Mr. Maxwell to a definite term of one year for his conviction.

{¶4} Mr. Maxwell has timely appealed his sentence and conviction, asserting one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "APPELANT'S [sic] CONVICTIONS WERE BASED UPON INSUFFICIENT EVIDENCE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. THE TRIAL COURT ERRED BY DENYING APPELEANT'S [sic] CRIM R 29 [sic] MOTION."

{¶5} In his sole assignment of error, Mr. Maxwell alleges his conviction was not supported by sufficient evidence, was against the manifest weight of the evidence, and that the trial court erred when it denied his Crim.R. 29 motion at the end of the State's case and at the close of all of the evidence. We disagree.

Sufficiency of the Evidence and Crim.R. 29 Motion

{¶6} "Whether a conviction is supported by sufficient evidence is a question of law that [we] review [] de novo." *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The evidence is sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows the factfinder to reasonably conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. Id.

{¶7} Mr. Maxwell also argues that the trial court erred when it denied his Crim.R. 29(A) motion at the end of the State's case. Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. "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." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. Because the sufficiency of the evidence and Crim.R. 29 arguments require this Court to review the evidence to determine whether it was sufficient, we will review these claims together.

{¶8} The elements of the offense of having a weapon under disability relevant to Mr. Maxwell's conviction are as follows:

> "(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[.]" R.C. 2923.13.

{¶9} Mr. Maxwell stipulated to having a conviction which would constitute a disability under the statute. Therefore, Mr. Maxwell challenges the sufficiency of the evidence supporting the finding that he knowingly acquired, had, carried, or used a firearm.

{¶10} R.C. 2901.22(B) defines the mental state of "knowingly" as follows:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶11} "In order for an individual to 'have' a firearm within the meaning of R.C. 2923.13, he must actually or constructively possess it." *State v. Najeway*, 9th Dist. No. 21264, 2003-Ohio-3154, at ¶10. "'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.'" Id., quoting *State v. Messer* (1995), 107 Ohio App.3d 51, 56. Finally, "circumstantial evidence can be used to support a finding of constructive possession." Id. at ¶10.

{¶12} In this case, circumstantial evidence does support the jury's conclusion that Mr. Maxwell had constructive possession of the firearms. Officer Simcox of the Akron Police Department (A.P.D.) testified that Mr. Maxwell was listed as the resident of 280 Ripley Avenue. Officer Sabol of the A.P.D. testified that Mr. Maxwell was in the driveway in front of the residence when he arrived on scene. Officer Yurick of the A.P.D. testified that he observed men's clothing and men's shoes in the master bedroom where the weapons were discovered. He also testified that the weapons were in plain view. Gail Pillo, Mr. Maxwell's mother, testified on cross-examination that Mr. Maxwell and his wife were the only adults living at 280 Ripley Avenue.

{¶13} In viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence from which the jury could have found that Mr. Maxwell knowingly, constructively possessed the weapons confiscated from the residence. Mr. Maxwell's conviction was based upon sufficient evidence. We further conclude that the trial court did not err when it denied Mr. Maxwell's Crim.R. 29 motion at the close of the State's case. The evidence presented by the State in its case-in-chief was such that reasonable minds could reach different conclusions as to whether each material element of a crime has been proved

beyond a reasonable doubt. The portion of Mr. Maxwell's assignment of error challenging the sufficiency of the evidence is overruled.

Weight of the Evidence

{¶14} Mr. Maxwell also challenges the weight of the evidence supporting his conviction. In reviewing a challenge to the weight of the evidence, the 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 and a new trial ordered.'" *State v. Thomas*, 9th Dist. Nos. 22990 & 22991, 2006-Ohio-4241, at ¶7, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶15} In reversing a conviction as being against the manifest weight of the evidence, "the appellate court sits as the 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." Id. at ¶8, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Accordingly, "this Court's 'discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶16} In this case, Sergeant Andrews testified that on December 27, 2008, a 911 call was placed by a man with the last name Maxwell referencing a missing person at 280 Ripley Avenue, Akron, Ohio. Officers Simcox, Yurick, and Sabol of the A.P.D. all responded to the 911 call referencing 280 Ripley Avenue. Officer Sabol testified that Mr. Maxwell was in the driveway in front of the residence when he arrived on scene. Officer Simcox testified that Mr. Maxwell was listed as the resident at that address. He further testified that he received permission from Mr. Maxwell's wife to enter the house. Officer Simcox testified that upon entering the master bedroom he observed men's clothing and men's shoes in the room. He also testified that he observed three firearms in plain view upon entering the bedroom. All three

officers testified on cross-examination that they never saw Mr. Maxwell in actual, physical possession of the firearms.

{¶17} The sole witness for the defense was Gail Pillo, Mr. Maxwell's mother. Ms. Pillo testified that "maybe a week-and-a-half before Christmas" Mr. Maxwell and his family left the residence at 280 Ripley Avenue to move in with her at a different address, located in Green, Ohio. She also testified that she was unsure of the exact dates, as Mr. Maxwell had been staying with her on and off for a few months prior to fully moving in. Ms. Pillo stated that Mr. Maxwell changed his mailing address to the address of her residence. She testified that on the date of the arrest, December 27, 2008, Mr. Maxwell's wife and children were present at the 280 Ripley Avenue address to pick up some belongings while Mr. Maxwell was at work.

{¶18} On cross-examination, Ms. Pillo acknowledged that Mr. Maxwell owns the home located at 280 Ripley Avenue. She further testified that no adults besides Mr. Maxwell and his wife reside at that address. Ms. Pillo testified that the firearms in question used to belong to Mr. Maxwell, but that she took them away from him after his first conviction. She testified that she had been holding on to the firearms for some time, and that she recently gave the firearms to Mr. Maxwell's wife to take back to the 280 Ripley Avenue address in order to sell them. Ms. Pillo could not testify as to the exact date the guns were taken from her address or the exact date that Mr. Maxwell moved out of the 280 Ripley Avenue address.

{¶19} After independently reviewing the evidence, this Court cannot find that the jury's conclusion that Mr. Maxwell had constructive possession of the firearms was against the manifest weight of the evidence. Mr. Maxwell owns the house located at 280 Ripley Avenue. Mr. Maxwell and his wife were the only adults living at the house, and he was present at the address on the date the firearms were found. Exercising dominion or control over the area where

the firearm is found can support an inference of constructive possession. *State v. Pitts* (Nov. 6, 2000), 4th Dist. No. 99 CA 2675, at *9. Further, the firearms were found in plain view. Based on testimony that the firearms were in plain view and based on Mr. Maxwell's dominion and control over the residence, it was not unreasonable for the jury to infer his knowledge of the weapons on the premises. See *State v. Fry*, 9th Dist. No. 23211, 2007-Ohio-3240, at ¶¶48-49.

{¶20} After a careful review of the record, we conclude that a reasonable finder of fact could have found the weapons to be within the constructive possession of Mr. Maxwell. We cannot say that the jury clearly lost its way in convicting Mr. Maxwell of having weapons under a disability. Accordingly, Mr. Maxwell's assignment of error is overruled.

III.

{¶21} Mr. Maxwell's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, 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.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

WALTER T. MADISON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.