[Cite as *State v. Wallace*, 2021-Ohio-3303.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHNNY RAY WALLACE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0093

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 17 CR 1301

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Judge Stephen W. Powell, Judge of the Twelfth District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Chief Prosecuting Attorney, Criminal Division, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. Edward A. Czopur, DeGenova & Yarwood, Ltd., 42 North Phelps Street, Youngstown, Ohio 44503, for Defendant-Appellant.

Dated: September 13, 2021

WAITE, J.

{¶1} Appellant Johnny Ray Wallace appeals a July 16, 2019 Mahoning County Common Pleas judgment entry convicting him of murder, a firearm specification, and having weapons while under disability following his jury trial. Appellant contends that he was not brought to trial within 90 days after a superseding indictment charged him with an additional crime for which he did not sign a speedy trial waiver. As to his convictions, he argues the trial court improperly admitted evidence consisting of ammunition seized during the execution of a search warrant that was inconsistent with the bullets used in the shooting. In addition, he claims that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural Argument

{¶2} On November 28, 2017 the victim, Collin Brown, and his girlfriend, Casey Pemberton, visited the Last Call Lounge to meet with friends. (Trial Tr., p. 282.) The building consists of a bar area and a billiards room which are separated by an interior door that is typically kept closed. To gain entry into the bar area from the outside, patrons must press a button located near the exterior door and wait to be let in by a bartender who presses a "buzzer" to unlock the door.

{¶3} Brown and Pemberton frequently visited the bar and were considered well-known regulars. On the night of the incident, Lisa Cappitti served as bartender. Cappitti

was familiar with both Brown and Pemberton. When they arrived, they joined Pemberton's friend, Robin Castro. Castro was seated on the barstool closest to the restroom area. (Trial Tr., p. 303) The restrooms are to the left when facing the bar and less than five feet from Castro's seat. Pemberton sat down next to Castro. Brown stood behind her as no other seats were available.

{¶4} At some point, Brown went to the jukebox where he was met by someone named Jim. Brown returned to the bar and told Pemberton that he had to use the men's room, apparently to avoid Jim, who was known for being talkative. Both Pemberton and Castro testified that Jim followed Brown into the restroom. Then, Appellant got up from his seat at the bar and said "[h]ell the fuck no," and walked into the restroom. (Trial Tr., p. 357.) He pulled Jim out of the restroom, telling him "not now, Jim. You gotta wait." (Trial Tr., p. 357.) Pemberton testified that she entered the men's restroom to check on Brown and he told her that he was fine and would be right out. She testified that Brown and Appellant were the only people inside the restroom at that time.

{¶5} Shortly thereafter, a gunshot was heard from inside the men's room. According to Pemberton, she looked at the restroom door and saw Appellant walk out with a smirk on his face. (Trial Tr., p. 289.) She jumped up and ran to the men's room, crossing paths with Appellant just before she entered. She asked him what he had done as she entered the men's room and found Brown laying on the ground.

{¶6} According to Castro, she makes a habit of watching the restroom door and the security monitor, both of which are visible in the same line of sight when someone sitting on that stool looks forward. She does this because she often helps "buzz" people inside when the bartender is busy, although Cappitti stated that she had asked Castro

several times not to use the buzzer. Castro testified that Pemberton was not watching the restroom door, but she admitted that she was not looking at Pemberton, because she focused on watching the security monitor. Castro testified that Pemberton asked her who was inside the men's room when they heard the gunshot. Castro responded that the only occupants were Brown and Appellant, who she referred to as "Tre." (Trial Tr., p. 358.)

{¶7} Pemberton jumped up and ran to the men's room. Castro followed behind. They crossed paths with Appellant and Castro heard Pemberton ask him what he had done. Castro saw Appellant fumble with his hat as he exited the restroom. She testified that the hat, which appeared to be a stocking cap, fell off of his head. He made a lazy effort to catch it, but was preoccupied with tucking in his shirt. The hat fell to the ground and Appellant left without retrieving it. Castro heard Appellant say to someone "I gotta get the hell – we gotta get the hell out of here" as he left. (Trial Tr., p. 378.)

{¶8} When police arrived, Cappitti informed them that someone named "Tre Loc" shot Brown. (Trial Tr., pp. 455; 538.) She showed officers a photo of Appellant and described him as a black male with long dreadlocks. Investigators located a black knit stocking cap by the restroom door that was consistent with Castro's description of Appellant's hat. (Trial Tr., p. 492.) DNA testing on a sample obtained from an area inside the hat that would be expected to rest against the wearer's forehead was consistent with Appellant's DNA profile. (Trial Tr., p. 656.) Testing on the hat also revealed the presence of gunshot residue. (Trial Tr., p. 564.)

{¶9} Police located Appellant and searched his residence. They seized boxes of various caliber ammunition and a holster. When police arrested and transported Appellant to the police station, they noticed that his hair was short and choppy, as if it had

been cut in a hurry. He admitted to the officers that he had seen his photograph on the news and asked his girlfriend to cut his hair. (Trial Tr., p. 543.) Appellant gave a confusing statement to police, both denying that he had been inside the restroom and that he was not the only one in the restroom. He denied that his nickname is "Tre Loc," but officers pointed to tattoos on each hand reading "Tre Loc." (Trial Tr., p. 717.) Appellant did not respond.

{¶10} On December 7, 2017, Appellant was indicted on one count of murder, an unclassified felony in violation of R.C. 2903.02(A), (D), with an attenuated firearm specification in violation of R.C. 2941.145. Trial was held, but the jury deadlocked and a mistrial was declared.

{¶11} On August 2, 2018, the state filed a superseding indictment that included not only the original charges but also an additional charge of having a weapon while under a disability, a felony of the third degree in violation of R.C. 2923.13(A)(2), (B). The weapons disability charge was severed and tried in a bench trial at the close of the second jury trial. On retrial, the jury at one point informed the court that it could not reach a unanimous decision and the court provided a "*Howard* charge." See *State v. Howard,* 42 Ohio St.3d 18, 537 N.E.2d 188 (1989) (a charge given to a deadlocked jury in order to encourage it to reach a decision.) The jury did reach a verdict thereafter, and found Appellant guilty on both the murder and firearm specification charges. The court found Appellant guilty of the weapons disability charge.

{¶12} On July 16, 2019, the trial court sentenced Appellant to three years of incarceration for the firearm specification, to run prior to and consecutive to Appellant's sentence of fifteen years to life for murder. That sentence was ordered to run consecutive

to Appellant's sentence of thirty-six months for his weapons disability conviction. Thus, Appellant received an aggregate total of twenty-one years to life in prison. The court credited Appellant with 590 days of time served. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

> Appellant was denied his right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitutions, Article I, Section 10 of the Ohio Constitution, and R.C. 2945.71 relative to the charge of having a weapon under disability.

{¶13} Appellant explains that he was originally charged with murder with an accompanying firearm specification. When trial on these offenses ended in mistrial, the state filed a superseding indictment charging the same offenses but adding an additional count of having weapons under a disability. Appellant concedes that he signed a speedy trial waiver pertaining to the original indictment, thus the convictions stemming from that indictment do not implicate the speedy trial provisions. However, he did not sign a waiver regarding the later weapons charge. He argues that for the weapons charge, the state was required to bring him to trial within 90 days. Appellant claims that he was tried 326 days after the superseding indictment was filed, thus he was not brought to trial within the statutory time limits.

{¶14} In response, the state argues that Appellant waived this argument, as he failed to file a motion to dismiss the weapons disability charge based on speedy trial grounds. Even so, the state argues that Appellant requested a continuance on March 11, 2019 until June 17, 2019. On June 17, 2019, the trial court continued the trial based on

its schedule. Trial actually commenced on June 24, 2019. When considering these tolling events, the state contends that Appellant was tried within ninety days of the superseding indictment.

{¶15} Ohio recognizes both a constitutional and a statutory right to a speedy trial. *State v. King*, 70 Ohio St.3d 158, 161, 637 N.E.2d 903 (1994). The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.

{¶16} In addition to the Sixth Amendment, Ohio provides a statutory speedy trial right. R.C. 2945.73(B) provides: "[u]pon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." "A person against whom a charge of felony is pending: * * * (2) Shall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2). "For purposes of computing time * * * each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E).

{¶17} Review of a trial court's decision regarding a motion to dismiss based on a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. High*, 143 Ohio App.3d 232, 757 N.E.2d 1176 (7th Dist.2001), citing *State v. McDonald*, 7th Dist. Nos. 97 C.A. 146, 97 C.A. 148, 1999 WL 476253 (June 30, 1999). The trial court's findings of fact are given deference if supported by competent, credible evidence. *Id*. However, a reviewing court must independently review whether the trial court properly applied the law to the facts of the case. *Id*. Further, an appellate court must strictly construe the relevant statutes against the state. *Id*., citing *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996).

{¶18} The prosecution and the trial court are required to try an accused within the time frame provided by statute. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977); see also *State v. Cutcher*, 56 Ohio St.2d 383, 384, 384 N.E.2d 275 (1978). However, the general assembly recognized that some degree of flexibility is necessary, so extensions of the time limits are given in certain circumstances. *State v. Lee*, 48 Ohio St.2d 208, 209, 357 N.E.2d 1095 (1976). R.C. 2945.72 provides an exhaustive list of events and circumstances that extend, or “toll,” the speedy trial limit.

{¶19} In accordance with R.C. 2945.72(A)-(I) the speedy trial time frame is extended for any period of time where the defendant: is unavailable for hearing or trial; is mentally or physical incompetent to stand trial; lacks counsel; causes delay by neglect or improper acts; files a motion, proceeding, or other action; seeks removal or change of venue; has his or her trial stayed due to a statutory requirement or order of another court; has his or her own motion for continuance granted or when any period of reasonable

continuance is granted other than on defendant's own motion; and lastly when the defendant files an appeal.

{¶20} Procedurally, "[w]e have consistently held that a defendant's failure to file a motion to dismiss on speedy-trial grounds constitutes a waiver of the issue on appeal." *State v. Mock*, 7th Dist. No. 08 MA 94, 187 Ohio App.3d 599, 2010-Ohio-2747, 933 N.E.2d 270, (7th Dist.), ¶ 15; citing *State v. Turner*, 168 Ohio App.3d 176, 2006-Ohio-3786, 858 N.E.2d 1249, (5th Dist.), ¶ 21; *State v. Trummer*, 114 Ohio App.3d 456, 470-471, 683 N.E.2d 392 (7th Dist.1996). "Even if an appearance of a violation of R.C. 2945.71 appears on the face of the record, the failure to raise the question of such a violation denies the appellee the opportunity to establish that tolling of the statute occurred." *Mock* at ¶ 15, citing *Turner* at ¶ 22. Consequently, "[t]he proper approach is the filing of a postconviction-relief petition alleging ineffective assistance of counsel." *Id.*

{¶21} Appellant concedes that he failed to file a motion to dismiss the weapons disability charge based on speedy trial grounds. Thus, even if we were to find he has established that the state knew or should have known of his weapons disability at the time the first indictment was filed, Appellant is limited to filing a postconviction petition in which he must show that he received ineffective assistance of counsel on this issue.

{¶22} Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> Appellant was denied his right to a fair trial, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution when the trial

court admitted evidence of the results of the search warrant executed on his home. (Trial Transcript at 480-482).

{¶23} Appellant argues that the trial court allowed ammunition evidence, found during the execution of a search warrant at his home, to be introduced at trial. However, that ammunition was not the same caliber as the bullets used in the murder. As such, Appellant argues the evidence falls within prohibited "other acts" evidence. He also argues that a holster found during the search was inadmissible because the murder weapon was not recovered and so, cannot be linked to that holster. Appellant contends this evidence is significant, as his first trial ended in mistrial and his second trial almost ended in the same manner.

{¶24} The state argues that the evidence was relevant to the thoroughness of the police investigation in accordance with *State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038. Even if the evidence was inadmissible, the state contends that any error was harmless given the other overwhelming evidence against Appellant.

{¶25} Pursuant to Evid.R. 401, " 'Relevant evidence' means 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." "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987) paragraph two of the syllabus.

{¶26} In *Drummond,* a 9mm weapon was used to commit a murder. During the execution of a search warrant at the defendant's home, police recovered 9mm ammunition, 7.62 x 39 mm ammunition, .45 caliber ammunition, .357 caliber ammunition,

an empty AK magazine, a 9mm handgun, and a bulletproof vest. *Id.* at ¶ 82. The trial court determined that the vest "had questionable relevance but that the ammunition was relevant to show that the defendant had timely access to the means to commit the murder." *Id.* at ¶ 84. The court also held that the evidence tended to show that the defendant was familiar with operating the murder weapon. *Id.* The court also noted that one of the seized weapons and ammunition boxes was the same caliber as that used in the murder, although it was not determined to be the specific weapon used to kill the victim. *Id.*

{¶27} Appellant cites to *State v. Robinson,* 7th Dist. Jefferson No. 05 JE 8, 2007-Ohio-3501. Appellant argues that *Robinson* stands for the proposition that "[e]vidence that a person carries a gun is the type of 'other acts' evidence which is generally inadmissible since it portrays the person as a violent individual who regularly carried guns." *Id.* at ¶ 55. While this is true, *Robinson* reaches the conclusion that other acts evidence is proper if it is admitted for another purpose, such as proving motive, intent, preparation, and plan. *Id.* at ¶ 56, citing *State v. Parrish,* 71 Ohio App.3d 659, 595 N.E.2d 354 (10th Dist.1991); *State v. Bruno,* 8th Dist. Cuyahoga No. CR-375467A, 2001 WL 111716 (Feb. 8, 2001).

{¶28} Officer Greg Miller of the Youngstown Police Department testified about the evidence at issue. Officer Miller described the investigating officers' actions while executing a search warrant at Appellant's residence. This line of questioning was part of a larger discussion of "the scene on the day that this search warrant was executed." (Trial Tr., p. 514.) The first reference to the ammunition involved state's exhibit 35, which was

a photograph of a green Crown Royal bag that contained "some live .22 caliber ammo." (Trial Tr., p. 508.)

{¶29} The second reference pertains to exhibit 46. Officer Miller testified that the photograph shows "a mattress on the floor, there was a magazine, extended magazine found on the floor next to that mattress." (Trial Tr., p. 511.) Officer Miller described an extended magazine as a "[l]arger capacity magazine for pistols, for holding the bullets." (Trial Tr., p. 511-512.) The magazine "appeared to possibly be 9mm size, maybe even a .380." (Trial Tr., 516.) The third reference involves state's exhibit 48, which depicts the area near the mattress where a blue tote is visible. According to Officer Miller, the tote contained a holster.

{¶30} The fourth instance involved several photographs of various cabinet shelves. State's exhibit 50 showed the contents on one shelf, consisting of several boxes of Remington ammunition and "a black plastic case for holding the live rounds, but it should be empty." (Trial Tr., p. 513.) State's exhibit 51 shows another shelf which depicted live, loose rounds. State's exhibit 52 shows another self with a box of Remington ammunition with live ammunition in the back. Finally, state's exhibit 53 depicts another shelf containing one live round and one spent shell casing. The photographs collectively reveal Appellant possessed a 9mm magazine, .22 caliber, .38 caliber, .380 caliber, and .40 caliber ammunition. The line of questioning continued as bags of evidence containing these items were introduced.

{¶31} The Ohio Supreme Court created a three-step analysis when reviewing the admissibility of evidence revealing a prior bad act:

> The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401. The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. See Evid.R 403.

State v. Vance, 7th Dist. Columbiana No. 17 CO 0015, 2018-Ohio-5409, ¶ 15, citing *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶32} "Where there is no reasonable possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal." *Vance*, at ¶ 19; citing *State v. Howard-Ross*, 2015-Ohio-4810, 44 N.E.3d 304, ¶ 22 (7th Dist.); *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus, vacated on other grounds in *State v. Lytle*, 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978).

{¶33} In reviewing the first prong, we look to whether the evidence is relevant. The record reveals the murder weapon was likely a 9mm Luger. Additionally, a .380 caliber cartridge was found at the murder scene, although this cartridge could not conclusively be linked to the murder. Thus, the 9mm magazine and .380 ammunition are

relevant, as both of those could possibly be linked to the murder. However, the remaining ammunition is clearly irrelevant.

{¶34} Next, we must determine whether the state presented the evidence to prove the offender's character, and that the defendant acted in conformity with that character. Even if we find that the evidence was offered to prove Appellant acted in conformity with a certain character, however, we must also determine whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice.

{¶35} On cross examination, defense counsel elicited testimony from Officer Miller that it is not illegal to own or possess any of the items found during the search. However, it was not until Jonathan Gardner’s testimony that the relevance of this ammunition was directly addressed.

{¶36} Gardner is employed by the Ohio Bureau of Criminal Investigations and is assigned to the firearm section. Gardner testified that he tested three items: a fired cartridge found at the bar, an unfired cartridge found at the bar, and the bullet recovered from the victim. The items included 9mm ammunition and a .380 auto caliber cartridge.

{¶37} During Gardner’s testimony, defense counsel addressed all of the ammunition found during the search of Appellant’s residence.

Q: Any of that [ammunition] used in a 9mm weapon?

A: Other than the magazine, none of the ammunition, no.

Q: The magazine which I mentioned, correct?

A: Again, you can -- you can fire a .380 auto through a 9mm Luger, but it's not specifically designed for it.

Q: And you're going to have a problem potentially with jamming if you do that, right?

A: You could.

(Trial Tr., pp. 697-698.)

{¶38} Essentially, defense counsel was able to counter or deflect Officer Miller's testimony through Gardner's testimony. The record reflects the 9mm magazine and possibly .380 caliber ammunition were relevant, as they may be tied to the weapon used in the shooting. However, Gardner, the state's own witness, testified that the .22 caliber, .38 caliber, .40 caliber ammunition recovered during the search of Appellant's residence had no connection to the murder weapon. Further, defense counsel was able to elicit testimony that use of .380 caliber ammunition could cause the suspected murder weapon (a 9mm Luger) to jam. Hence, certain of this evidence was properly admitted and the defense was able to directly attack other evidence.

{¶39} Even if the evidence was not properly admitted, no prejudice has been shown, as there was a plethora of significant evidence supporting the jury's verdict. Three witnesses implicated Appellant at trial. Pemberton and Castro testified that Appellant and Brown were the only people in the restroom at the time of the gunshot. Cappitti informed officers that someone named "Tre Loc" shot the victim. She showed the officers a photograph of Appellant and described him as a black male with long dreadlocks. Although Appellant denied his nickname is "Tre Loc," he has those words tattooed on his

hands. He also admitted that he asked his girlfriend to cut his hair after seeing his photograph on the news. Significantly, a hat was found near the restroom door. A DNA sample taken from this hat was consistent with Appellant's DNA. The hat also contained gunshot residue. Based on this evidence, there is no reasonable probability that the evidence of unrelated ammunition contributed to Appellant's convictions. As such, Appellant cannot satisfy the third prong.

{¶40} Appellant highlights the fact that this matter previously resulted in a hung jury and the instant jury only entered a conviction after receiving a "*Howard* charge." The trial transcripts from Appellant's first trial are not in this appellate record. Thus, we are unable to determine what evidence and testimony was presented to his first jury and whether there was any difference in what was offered in his second trial. Thus, Appellant's argument that Appellant was prejudiced specifically by this contested evidence is speculative, at best.

{¶41} Because Appellant cannot establish a reasonable probability that the testimony contributed to his convictions, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> The Convictions were based on insufficient evidence.

ASSIGNMENT OF ERROR NO. 4

> The conviction for murder, the accompanying firearm specification, and having a weapon under disability, were against the manifest weight of the evidence.

{¶42} Appellant argues that his convictions for murder, the firearm specification, and his weapons disability are not supported by sufficient evidence and are against the manifest weight of the evidence. He contends that the state's two key witnesses contradicted one another, affecting their credibility. Appellant argues that this is significant, as absent that testimony there was no evidence he was inside the restroom at the time of the murder. In addition, Appellant highlights the fact that police did not recover the murder weapon and no gunshot residue was found on his hands.

{¶43} In response, the state argues that both Pemberton and Castro testified that the only people in the restroom at the time of the gunshot were Appellant and Brown. Castro and Pemberton both saw Appellant exit the restroom with a smirk on his face immediately after they heard the gunshot. Cappitti testified she told investigators that the shooter was "Tre Loc," a black male with long dreadlocks. Appellant denied he goes by that nickname but he has the words "Tre Loc" tattooed on his hands. Shortly after his photograph was shown on the news, Appellant asked his girlfriend to cut his hair short. In addition, gunshot residue and Appellant's DNA were found on Appellant's hat.

{¶44} Appellant challenges all three of his convictions. His weapons disability conviction will be separately addressed, as that charge was severed and tried to the bench.

General Law

{¶45} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine

whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09 JE 26, 2011-Ohio-1468, ¶ 34.

{¶46} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.*

{¶47} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. "It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. Id. Weight of the evidence involves the state's burden of persuasion. *Id.* at 390 (Cook, J. concurring)." An appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins,* 78 Ohio St.3d at 387,

678 N.E.2d 541. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶48} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, this Court will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

Murder and Firearm Specification

{¶49} Appellant was convicted of violating R.C. 2903.02(A), which provides that "[n]o person shall purposely cause the death of another or the unlawful termination of another's pregnancy." Pursuant to R.C. 2941.145, a firearm specification applies when "the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm,

indicated that the offender possessed the firearm, or used it to facilitate the offense." Appellant solely attacks the jury's decision that he shot the victim.

{¶50} To establish Appellant's identity as the shooter, the state presented the testimony of Pemberton, Castro, and Cappitti. The state also used evidence of Appellant's actions after the shooting. Pemberton testified that she watched the restroom door after she saw Jim follow Brown inside. She saw Appellant walk into the restroom and saw Jim exit. She continued to watch the door and saw no one else enter or leave that restroom. She also said she walked inside to check on Brown and saw only Appellant inside with him. After she heard the gunshot, she immediately ran into the restroom and crossed paths with Appellant. She claimed that Appellant had a smirk on his face as he exited. Pemberton did not see anyone else leave the restroom after hearing the gunshot and only the victim was inside when she entered and found him on the ground.

{¶51} As noted by Appellant, Castro did contradict minor portions of Pemberton's testimony. She testified that Pemberton did not check on the victim prior to the gunshot. She also testified that Pemberton was not watching the restroom door. However, Castro admittedly was not looking at Pemberton, because she was focused on the security monitor. Her testimony reveals she may not have noticed where Pemberton was looking. Castro also testified that Pemberton asked her who was inside the restroom after the gunshot was heard.

{¶52} Despite these minor inconsistencies in Pemberton's testimony, Castro testified that she was approximately four feet from the men's room door. She was sitting on the last barstool next to the restrooms, which faces the men's room door. In addition, she constantly watches a security monitor located on the bar. She testified that the

restroom door is within her line of sight while she watches the monitor, thus she is also consistently watching that door.

{¶53} On the night in question, Castro saw Brown enter the restroom and noticed Jim followed him. She saw Appellant get up and walk over to the restroom. She heard him say "[h]ell the fuck no" as he walked. (Trial Tr., p. 357.) She saw Appellant push Jim out of the restroom and heard him say "not now, Jim. You gotta wait." (Trial Tr., 357.) At that point, based on her observations, only Appellant and the victim were inside the men's room.

{¶54} When Castro heard the gunshot Pemberton asked her who was inside the restroom. Castro informed her that Appellant and Brown were in the men's room and Pemberton ran into it with Castro following behind her. Castro testified that Appellant exited the men's room as they approached and Pemberton asked him what he had done. Castro watched as Appellant's hat fell off of his head when he tucked in his shirt. She testified that while he made some effort to catch the hat, it fell to the ground and he did not retrieve it.

{¶55} Despite minor contradictions, both witnesses consistently stated that only Appellant and Brown were inside the restroom at the time they heard the gunshot. No other witness placed anyone other than Appellant and Brown inside the men's room. No one else exited the restroom other than Appellant after the gunshot was heard.

{¶56} Importantly, police found a hat consistent with Castro's description of Appellant's hat outside the men's room. This lends credence to Castro's testimony regarding Appellant's actions as he exited the door and the fact that he was inside the restroom shortly before the shooting. DNA testing revealed that Appellant's DNA was

consistent with the DNA sample taken from inside of the hat. Gunshot residue was also found on the hat.

{¶57} Cappitti informed the responding officers that someone named “Tre Loc” shot Brown. (Trial Tr., pp. 455; 538.) She showed officers a photo of Appellant and described “Tre” as a black male with long dreadlocks. When officers picked up Appellant, his hair was short and choppy as if it had been cut in a hurry and Appellant admitted that he asked his girlfriend to cut his hair short after seeing a photograph of himself on the news. Appellant has the word “Tre” tattooed on one hand and “Loc” on the other hand. Appellant also gave a confusing statement to police, both denying that he had been inside the men’s room and claiming that he was not the only one in the restroom.

{¶58} While the evidence is largely circumstantial, “[c]ircumstantial evidence and direct evidence inherently possess the same probative value.” *State v. Prieto*, 7th Dist. Mahoning No. 15 MA 0200, 2016-Ohio-8480, ¶ 34, citing *In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991), paragraph one of the syllabus. In fact, “[e]vidence supporting the verdict may be found solely through circumstantial evidence.” *State v. Smith*, 7th Dist. No. 06 BE 22, 2008-Ohio-1670, ¶ 49.

{¶59} Based on the witness testimony, the hat found at the scene, and Appellant’s effort to change his appearance after seeing his picture on the news, it cannot be said that these convictions are not supported by sufficient evidence or are against the manifest weight of the evidence.

Having Weapon Under a Disability

{¶60} Pursuant to R.C. 2923.13(A).

> (A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (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.

{¶61} The weapons disability charge was tried to the bench following the dismissal of his jury. The state introduced a conviction from a juvenile case involving case number 2010 JA 601. Defense counsel stipulated to the exhibit. Based on the stipulation and the conviction in the instant case, the elements of possessing a weapon while under a disability have been satisfied.

{¶62} Accordingly, Appellant's third and fourth assignments of error are without merit and are overruled.

Conclusion

{¶63} Appellant argues his speedy trial rights were violated as to the weapons disability conviction. He also contends that the trial court improperly admitted evidence of ammunition seized during the execution of a search warrant that was inconsistent with ammunition used in the shooting. He argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. For the reasons

provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

Powell, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.