[Cite as *State v. Vaughn*, 2022-Ohio-3615.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TERRELL VAUGHN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 20 MA 0106

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 20 CR 77A

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

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

Atty. Rhonda G. Santha, 6401 State Route 534, West Farmington, Ohio 44491, for Defendant-Appellant

Dated: September 29, 2022

WAITE, J.

{¶1} Appellant Terrell Vaughn appeals a September 10, 2020 judgment entry of the Mahoning County Court of Common Pleas finding him guilty of two counts of having a weapon while under disability. Appellant challenges the evidence supporting the trial court's finding that he constructively possessed two firearms under both a sufficiency of the evidence and manifest weight of the evidence standard. For the reasons that follow, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter involves a drug and firearm investigation. While certain facts pertaining to the drug investigation are provided for context and completeness, this matter is based on the weapons investigation. The Youngstown Police Department Vice Unit obtained a search warrant for an address located in Youngstown, Ohio. The officers obtained the warrant after several controlled buys were conducted on the premises. It does not appear that the officers discovered who owned or resided at the address during their investigation.

{¶3} On January 16, 2020, a search warrant SWAT team that included Officer Francis Bigowsky, Officer Joseph Burnich, Officer Christopher Staley, and Officer Jim Welch arrived at the address during the evening hours. The officers knocked at the front door and announced their presence. Appellant's codefendant, Richard Cummings, answered the door and the officers entered the house. The officers began to "clear" each room of the residence. Four people were inside the house at the time the police arrived. While Cummings was the first person the team encountered, Appellant was the second.

{¶4} Officer Burnich testified that he located Appellant while attempting to clear a hallway. The hallway does not encompass a large area, as the house itself is quite small. On the left side of the hallway is a small closet-like opening that did not have a door. Officer Burnich saw Appellant as he "stepped out of that closet area." (Trial Tr., p. 51.) He stated that he made contact with Appellant "[a]t the closet entry." (Trial Tr., p. 53.)

{¶5} It appears that Officer Staley was behind Officer Burnich. Officer Staley heard Officer Burnich order Appellant to the ground and observed Appellant as "[h]e was coming out of that closet area." (Trial Tr., p. 75.) After defense counsel reminded Officer Staley that his testimony at the preliminary hearing indicated that he had not observed Appellant "inside" the closet, he amended his testimony by saying that he saw Appellant "[d]irectly next to the closet." (Trial Tr., p. 86.)

{¶6} Appellant's proximity to this closet is important, here. The closet was described as similar to a coat closet, but deeper. While the inside of the closet was cluttered, the officers observed three steps inside. The officers used these steps to access an unfinished attic. The access point to the attic is an uncovered cutout in the ceiling. Photographs in evidence demonstrate that the opening is large enough to comfortably allow a large person to enter into the attic.

{¶7} Three officers entered the attic area after the house was cleared. It appears that Officer Bigowsky entered first. Officer Bigowsky described his height as approximately six foot four or five inches. He testified he could reach his hand into the attic by standing on the bottom step. Officer Staley estimated the access point to be about eight feet from the floor. He stated that he had to use all of the steps and stand on

his toes to hoist himself up into the attic area. (Trial Tr., p. 27.) No evidence was directly presented as to Appellant's height. However, a photograph of Appellant was admitted into evidence and the top of his head can be seen to reach within six inches or so from the top of a door located inside the house. (State's Exh. 9.)

{¶8} The perimeter of the attic's access point is surrounded by wooden studs and is small, but large enough to have allowed one of the officers who described his weight as 300 pounds to enter into the attic. The attic floor is unfinished and wooden studs are visible with insulation lying between the studs. Resting along one of the wooden studs that surround the access point is what is described as a "Hi-Point Model JCP .40 caliber handgun." (Trial Tr., p. 29.) As shown in one of the photographs admitted into evidence, the handle is sticking up into the air and the top of the gun is resting on the floorboard. (State's Exh. 3.) Several inches away from the handgun is what is described as a "Hi-Point 9mm Model 995 rifle." (Trial Tr., p. 29.) No measurements are provided for the rifle but it appears to be at least two to three feet in length. The rifle is at least twice the width of the access point. Unlike the handgun, the rifle appears to have been strategically laid on its side across multiple wooden studs.

{¶9} At the time that the officers discovered these firearms Appellant was under a weapons disability due to a prior conviction. Consequently, on February 20, 2020, Appellant was indicted on two counts of having a weapon while under a disability, felonies of the third degree in violation of R.C. 2923.13(B). The two counts correlated with the two firearms found in the attic. Appellant waived jury trial and the matter proceeded to a bench trial.

{¶10} The state admitted recordings of two jailhouse phone calls into evidence. (State's Exh. 17.) Both calls were made to a female whose name is inaudible. It is clear that both calls were made to the same woman. In the first, Appellant expressed concern that if he did not "beat this charge" he may face federal charges having a possible prison term of up to forty months. He told the woman that he and "Rich" (his codefendant, Cummings) found the guns in the basement, and that he thought Cummings had moved them from the basement to the garage. In the second call, Appellant asked her to contact a man whose name is also inaudible. He wanted her to ask the man to testify that he was present with Appellant and Cummings when they found the firearms in the basement.

{¶11} On June 17, 2020, the court filed a "Judge's Decision" finding Appellant guilty on both counts. On September 10, 2020, the court sentenced Appellant to one year of incarceration on each count to run concurrently. The court noted that Appellant was, in fact, facing federal charges from the incident and ordered his sentence to run concurrent to any sentence received in the federal case. Appellant was credited with 247 days of time served. The court terminated Appellant's postrelease control stemming from an earlier conviction on Appellant's motion requesting such relief, based on the prior court's failure to provide the appropriate notifications in the sentencing entry. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR

> The Trial Court erred in its finding that Appellee, State of Ohio, "produced proof beyond a reasonable doubt that the [Appellant was] Guilty of Counts One and Two of the indictment, Having Weapons While Under Disability, in

violation of Ohio Revised Code Section 2923.13(A)(2) [and] 2923.13(6)." Judge's Decision, pp. 5-6.

{¶12} Appellant challenges his convictions under both a sufficiency and manifest weight standard. Specifically, Appellant argues that the evidence failed to show he constructively possessed either of the firearms at issue. Likewise, he contends that the record is devoid of evidence that he was conscious of even the presence of a firearm.

{¶13} The state responds that Officers Burnich and Staley observed Appellant exit the closet area and that there was no other person near. The state contends that the firearms were accessible without the necessity to physically enter the attic, and could be retrieved by a person standing inside the closet and reaching through the open access point. The state notes that the firearms had apparently not been in the attic for a long period of time, as there was no dust on them. The state also raises Appellant's jailhouse phone calls where he admitted knowledge of the firearms.

{¶14} As previously noted, Appellant advances his arguments under both a sufficiency of the evidence and manifest weight of the evidence argument. "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. Jefferson 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. Jefferson No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶15} 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, 678 N.E.2d 541 (Cook, J. concurring). The 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*, at 387, 678 N.E.3d 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*.

{¶16} "[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. Jefferson 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, we 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).

{¶17} 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*.

{¶18} The offense of having a weapon while under a disability is found in R.C. 2923.13(A)(2), which provides in relevant part:

> (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 as an adult, would have been a felony offense of violence.

{¶19} We begin by noting that Appellant conceded he had a prior conviction causing him to be under a weapons disability. He also does not contest that the firearms in question were operable. He solely argues that he did not own or possess these firearms.

{¶20} In order to "have" a weapon, a defendant must either have actual or constructive possession of the firearm. *State v. Hudson*, 2017-Ohio-645, 85 N.E.3d 371, ¶ 14 (7th Dist.), citing *State v. Haslam*, 7th Dist. Monroe No. 08 MO 3, 2009-Ohio-1663, ¶ 41. Actual possession can be established by proving that the defendant owned or physically controlled the firearm. *State v. Riley*, 7th Dist. Mahoning No. 13 MA 180, 2015-Ohio-94, ¶ 25. Constructive possession is where a defendant knowingly exercises dominion and control over an object regardless of whether the object is within his or her immediate physical possession. *State v. Wolery*, 46 Ohio St.2d 316, 329, 348 N.E.2d 351 (1976). Here, the parties agree that constructive possession is at issue.

{¶21} When looking at constructive possession, a person's mere presence or access to contraband or the area where contraband is found is insufficient to demonstrate dominion and control. *State v. Gardner*, 2017-Ohio-7241, 96 N.E.3d 925, ¶ 35 (8th Dist.), citing *State v. Hall*, 8th Dist. Cuyahoga No. 66206, 1994 WL 677554 (Dec. 1, 1994); *State v. Tucker*, 2016-Ohio-1353, 62 N.E.3d 903 (9th Dist.). Instead, there must be some evidence that the person exercised or had the ability to exercise dominion and control over the contraband. *Gardner* at ¶ 35, citing *State v. Long*, 8th Dist. Cuyahoga No. 85754, 2005-Ohio-5344. "It must also be shown that the person was conscious of the presence of the object." *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1982).

{¶22} Beginning with access to the firearms, the state heavily relied on the testimony of Officers Burnich and Staley. Both officers testified that they observed Appellant in or near the closet. Officer Burnich was the first to locate Appellant. Officer Burnich testified that he saw Appellant as he "stepped out of that closet area." (Trial Tr., p. 51.) He testified that he made contact with Appellant "[a]t the closet entry." (Trial Tr., p. 53.) Defense counsel pointed out that this testimony was different from Officer Burnich's preliminary hearing testimony. At that hearing, Officer Burnich said he saw Appellant coming from the hallway area where the closet is located.

{¶23} Next, Officer Staley testified as to Appellant's location. At the time Officer Staley approached the hallway, Officer Burnich was in the process of ordering Appellant to the ground. Officer Staley testified that he saw Appellant as "[h]e was coming out of that closet area." (Trial Tr., p. 75.) Again, defense counsel pointed to testimony from the preliminary hearing where Officer Staley said "I did not see [Appellant] inside" the closet. (Trial Tr., p. 86.) Officer Staley clarified that he did not see Appellant inside the closet, but that he was "[d]irectly next to the closet." (Trial Tr., p. 86.)

{¶24} Although the officers' testimony does not place Appellant inside the closet at first sighting, it certainly places him in a position where a reasonable finder of fact could determine that Appellant had just exited the closet, and that his purposes of being in that closet was to hide the guns when he discovered that police were executing a search warrant. The closet did not have a door, thus the officers would not have the benefit of hearing or seeing a door shut. Further, although there were some discrepancies from the officers' preliminary and trial testimony, it can be gleaned from their statements that they saw Appellant within the doorway of the closet. Because it had no door and thus, was

just an opening in the hallway, it would be difficult for the officers to describe Appellant's exact position.

{¶25} Again, the firearms were located in the attic, accessible through the large opening in the closet ceiling. Again, Appellant's proximity to the closet is critical. The closet was described as similar to a coat closet but somewhat deeper. The closet floor had three small steps. Apparently, these steps were to assist a person in reaching the access point to the attic.

{¶26} Officer Bigowsky testified that he stepped on one step and was able to reach his hand into the attic area where the guns were found. Officer Staley testified that the access point is about eight feet from the ground, six or six and one-half feet if the steps are used. Officer Staley could hoist his body into the attic by using the steps and standing on his toes. (Trial Tr., p. 27.) While the record contains no evidence of Appellant's height, a photograph was admitted showing the top of his head reached to within six inches of the top of a door located inside the house.

{¶27} Two firearms were found just inside the attic opening. One is described as a "Hi-Point Model JCP .40 caliber handgun." (Trial Tr., p. 29.) It is depicted in a photograph admitted into evidence. See State's Exh. 3, 4. The firearm is shown in the exact position where the officers discovered it, laying so that its handle stuck in the air with the top of the gun lying flat on the ground. The firearm is resting against a wooden stud that surrounds the perimeter of the opening. The state's theory is that Appellant hurriedly reached his hand up into the entrance, dropped the firearm, and it settled into this position, as the position in which it was found is not a typical storage position.

{¶28} The second firearm is described as a "Hi-Point 9mm Model 995 rifle." (Trial Tr., p. 29.) As shown in a photograph admitted into evidence, this firearm was found a few inches away from the handgun. See State's Exh. 6. Unlike the handgun, it seems to have been strategically placed into a storage-like position. The rifle can be seen lying flat across multiple wooden studs and is a little further from the attic opening, perhaps six inches. Additionally, this firearm is long, and from the photograph it appears to be at least two feet in length, which is at least twice the length of the opening. Although it does not appear that someone haphazardly tossed this firearm into the attic, it is very likely that the person hurriedly placing the handgun in the attic knew the rifle was there and that this is the area where the firearms were stored.

{¶29} Appellant knew the firearms were in the house, evidenced by two jailhouse phone calls that Appellant made to the same woman. It is clear that the same female is the recipient of both calls. Recordings of these calls were admitted into the record. See State's Exh. 17. In the first, Appellant told the woman that he had to "beat" the firearms charge because he feared federal charges and a lengthy prison term. He admitted to the woman that he and Cummings found the guns in the basement. While he seemed to express some surprise that the firearms were in the attic, whether he was actually surprised is a matter raising credibility issues.

{¶30} In a second phone call to the same woman, Appellant requested that she ask a man whose name is also inaudible to testify that he was with Appellant and Cummings when they found the firearms in the basement. Apparently Appellant was anticipating a defense based on the fact that he did not own the guns and merely found

them. Appellant seemed to hold a mistaken belief that if he did not own or assert physical possession of the firearms, he could not be convicted of any criminal offense.

{¶31} This record shows Appellant knew the weapons were inside the house. At the time the police entered this house to execute a search warrant, Appellant was discovered in or just outside the entrance of the area in which the guns were stored. At least one of these weapons appeared to have been quickly tossed into the attic.

{¶32} These weapons were discovered during the execution of a search warrant seeking evidence of drug related activities. Significantly, Appellant was under a weapons disability and knew this at the time police entered the house. While Appellant was not charged with any drug related offenses, Appellant certainly knew that once the search of the house was undertaken officers were likely to begin searching individuals at the residence. Appellant was apparently discovered extremely soon after the officers entered the house.

{¶33} This matter is closely aligned with a recent case arising from this Court, *State v. Harrison*, 7th Dist. Jefferson No. 19 JE 0009, 2020-Ohio-3624. In *Harrison,* officers were called to check on a vehicle parked outside of a fast food restaurant. Inside the vehicle were two occupants who appeared to be consuming drugs. *Id.* at ¶ 6. The officers approached the vehicle and observed the appellant, who was the driver, with a marijuana cigarette. The officers subsequently searched the vehicle which belonged to his female passenger's mother. While the appellant did not own the car, it had been in his possession while he completed repairs on it and he had been driving it on the day of the incident. Officers located a gun underneath the passenger seat. Although he denied

knowledge of the gun's existence, the appellant was charged and convicted of having a weapon while under disability.

{¶34} In affirming the appellant's conviction, we relied in large part on his access to the vehicle, the appellant's knowledge of his weapons disability, the rationale that the appellant would seek to hide the firearm based on his weapons disability, and a jailhouse call where the appellant admitted possession of the gun at some point before the incident occurred.

{¶35} In comparing the two cases, we note certain similarities. In *Harrison*, the firearm was located in a vehicle the appellant did not own but of which he had been in possession. It was not under the driver's seat, but underneath the passenger seat where it could still be easily accessed. In the present case, there is no evidence that Appellant owned the house. However, by his own admission, he had been assisting in renovation work at the house. Hence, Appellant obviously had a great deal of access to the house.

{¶36} In *Harrison,* the appellant knew a drug investigation was pending, knew he was under a weapons disability, and hastily hid the weapon in a nearby location that he believed could not immediately be attributed to him. Here, Appellant apparently knew drug activity was occurring in the house, knew police were inside the house and had begun a search, knew of his weapons disability, and was discovered in very close proximity to the area where two firearms were stored. Evidence reflects that one of these weapons was hurriedly placed there. No other person was in this proximity.

{¶37} In *Harrison,* the appellant admitted to a friend in a jailhouse phone call that he forgot the weapon was in the vehicle. Here, Appellant informed a friend that he and two others found the firearms in the basement while completing work on the house. While

Appellant then told the woman that he believed the guns were in the garage, this statement may, or may not, have been true and involved a credibility determination.

{¶38} Also similar to *Harrison,* Appellant attempts to place the blame on another person. When police entered the house, they found four people including Appellant. Appellant's codefendant, Cummings, opened the door for police. One female was found in the hallway, but entered it from a room located on the left side of the hallway. The closet with the attic access is on the right side of the hallway and closer to the front door than the room the female had exited. The remaining woman was found hiding underneath the kitchen sink area. Only Appellant was found in the closet opening and appeared to be exiting the closet.

{¶39} From the totality of these circumstances, it is reasonable for the trier of fact to find that Appellant placed the handgun into the attic and that it was extremely likely he knew where the rifle was located. Thus, the record contains evidence that Appellant exercised dominion and control and was in the conscious presence of both firearms.

{¶40} The state's case is unquestionably built on circumstantial evidence. However, "[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. Belmont No. 06 BE 22, 2008-Ohio-1670, ¶ 49.

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

Conclusion

{¶42} Appellant challenges the evidence supporting the trial court's finding that he constructively possessed two firearms under both a sufficiency of the evidence and manifest weight of the evidence standard. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignment of error is 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.