[Cite as *State v. Munn*, 2009-Ohio-5879.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1363

Appellee — Trial Court No. CR0200802265

v.

Andre G. Munn, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: November 6, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bohner, Assistant Prosecuting Attorney, for appellee.

Matthew N. Fech, for appellant.

* * * * *

KNEPPER, J.

{¶ 1} This is an appeal from a judgment issued by the Lucas County Court of Common Pleas following a jury verdict finding appellant guilty of having a weapon while under disability. Because we conclude that the trial court did not err in its rulings and appellant's conviction was supported by sufficient evidence and was not against the manifest weight of the evidence, we affirm.

{¶ 2} Appellant, Andre M. Munn, Jr., was indicted on a single count of having a weapon while under disability, in violation of R.C. 2923.13(A)(2). The charge stemmed from evidence obtained through a search warrant for a residence where appellant allegedly was living with his girlfriend.

{¶ 3} A jury trial was held and testimony was presented that Toledo Police had been looking for a policeman's sniper rifle and body armor that had been stolen from his vehicle in March 2008. Retired Toledo Police Detective Robert Baumgartner testified that a confidential informant told him that appellant had shown him guns, including a camouflage rifle and body armor at a residence at 31 Pearl Street, Toledo, Ohio. In the presence of the detective, the confidential informant then called appellant on a cell phone. The phone conversation between appellant and the confidential informant then prompted the detective to verify that appellant lived at the Pearl Street address. The detective received information, however, that appellant had moved to 1105 East Manhattan Street, Toledo, Ohio. After the police drove by the Manhattan Street residence and saw appellant at the house, they obtained a search warrant for certain weapons and drugs at that house.

{¶ 4} Although the police did not find the sniper rifle or body armor, they did find an AK47 type assault weapon loaded with 30 rounds of ammunition and one in the chamber in a closet in an upstairs front bedroom. They also found a semi-automatic handgun next to the bed in the bedroom. Detective Baumgartner stated that a search

warrant was also executed at the Pearl Street address, but nothing was found because the property was vacant.

{¶ 5} Toledo Police Sergeant Christopher Delaney then testified that he assisted in the investigation and warrants served at the Manhattan residence. He stated that during the search the following items were found in the master bedroom: a "Norinco assault rifle," a Beretta 9 millimeter pistol, a bag of ammunition, a magazine ammunition clip for the pistol, a magazine ammunition clip for the rifle, a black neoprene stomach band, and a scale. In addition, there was a yellow and black backpack that contained several boxes of ammunition and a YMCA/JCC membership card with appellant's photo on it. Sergeant Delaney acknowledged he had no paperwork or actual proof of who owned either of the weapons, but only that it was found at the Manhattan residence.

{¶ 6} In a first floor closet at the foot of the stairway, the officer found appellant's postrelease control reporting order papers from the Adult Parole Authority. The police also found male clothing found in a dresser and in the bedroom closet where the assault rifle was found. He also stated that appellant's presence at the Manhattan residence prior to the search, along with the discovery of appellant's postrelease paperwork and men's clothing in the bedroom closet indicated that appellant was living at the Manhattan address.

{¶ 7} Toledo Police Lieutenant David Schmidt also testified that he supervised the investigation and also participated in the execution of the search warrants at both locations. Lieutenant Schmidt stated that he searched in an upstairs middle bedroom and

its closet. He stated that he found a rifle magazine in the closet in a shoe box containing men's shoes. In another shoe box on the bedroom floor, the officer also found a variety of other items, including identification for a "Patrick Munn," and a YMCA card for "Andre Munn" with appellant's photo, a box of rifle "slugs," and paperwork dated October 2007, addressed to "Andre Gene Munn, Jr." with an address and social security number.

{¶ 8} The box also contained two wallets. One held, among other things, a parole officer's business card, an Ohio Social Program identification card with the name "Andre Munn, Jr.," another business card from the Ohio Rehabilitation and Correction Adult Parole Authority, a U.S. Department of Labor OSHA training certificate card with a number and "Andre G. Munn" on it, a birth certificate for Andre G. Munn, and another paper with "Andre Munn" on it. The other wallet contained an Ohio ID card for "Patrick D. Munn," a lottery payoff ticket, and business cards from a variety of businesses. Lieutenant Schmidt also found photos on a small table near the living and dining room area and collected them during the search. One of the photos showed a female holding a handgun; another photo showed a male who, according to the lieutenant, resembled appellant, and was also holding the same or similar handgun.

{¶ 9} On cross-examination, Lieutenant Schmidt acknowledged that he did not know who was renting the Manhattan residence at the time the search warrant was executed or that appellant was actually living at that address. He stated, however, that the

police believed that appellant lived at that address because of information obtained as a result of police surveillance and the items obtained from the search.

{¶ 10} Tonya Brown, appellant's girlfriend, testified that at the time of the two searches, she had just moved from the Pearl Street residence to the Manhattan residence, along with her 13 and 15 year old daughters. She stated that appellant had helped her move and had keys to both homes. When asked whether she had previously seen the weapons found at the Manhattan residence, Brown invoked her Fifth Amendment rights against self-incrimination. She stated, however, that, to her knowledge, her daughters did not own any guns.

{¶ 11} Brown also stated that appellant kept some items at her house and in her bedroom, such as underclothes, for when he stayed overnight. She said that he and other companions had access to her bedroom area. Brown also testified that appellant did not live with her, but with his mother at "1018 Eavesham." In response to a question submitted by the jury, Brown answered that she had no idea who owned the guns found at her residence.

{¶ 12} Toledo Police Detective Andre Cowell then testified that he also participated in the search of the two residences. Detective Cowell said that, according to his sources, appellant resided at the Manhattan address. He further stated that Patrick Munn was not residing at the Manhattan address at the time of the search because he was incarcerated in prison in Chillicothe with four more years of a sentence to serve. Detective Cowell also testified that a confidential informant is someone who has a

previously established relationship with police information. He also said that the police rely on information received from an informant because of this relationship and because the information is then verified by follow-up surveillance and other methods.

{¶ 13} The detective then stated that the only items he found that were inventoried were a baggie of marijuana in the top dresser drawer and a yellow sandwich bag containing 3 razor blades. Detective Cowell acknowledged that the firearms were not fingerprinted because he had touched a weapon, failing to use the proper precautions. He further acknowledged that there was no direct evidence of who owned the weapons. Detective Cowell also stated that a week after the search, he spoke with Tonya Brown while investigating her report that someone had broken into her home.

{¶ 14} The parties also stipulated to the admission of a certified judgment entry showing appellant's previous conviction for aggravated robbery and a lab report showing that both weapons recovered were operable. The state then rested.

{¶ 15} Appellant moved for acquittal pursuant to Crim.R. 29, which the court denied. Appellant then presented two witnesses in defense. The first witness, Margret Faye Munn, appellant's mother, testified that appellant had lived with her at the Eavesham address since the time of his release from prison in October 2007. She stated that appellant generally stayed at her residence at night, but occasionally stayed overnight with his girlfriend, Tonya Brown. She said that appellant's clothing was at her home, he lived and slept there, he received mail there, and had given her address to the parole

board as his residence. She testified that appellant had slept at her home the night before he was arrested.

{¶ 16} Appellant's mother also stated that police had come to her home and she permitted them to conduct a search. She said that when police found her handgun in the home, they did not confiscate it, saying it was not the weapon they sought. Appellant's mother also testified that she was not aware that appellant was not supposed to be around weapons. She testified, however, that appellant did not know she had the handgun, which has been registered to her deceased former boyfriend.

{¶ 17} The second witness, Tony Rome, testified that he had known appellant since childhood and was like an older brother to appellant. On the morning of May 22, 2008, Rome stated that he was walking along a Toledo street when appellant drove by in a truck/SUV and stopped to pick him up. After picking up and dropping off a bale of straw for his girlfriend's dogs at the Manhattan address, appellant picked up his cousin. Sometime later, police stopped appellant's vehicle and arrested him. Rome and appellant's cousin were searched, along with the truck, but police found no contraband. Responding to a jury question, Rome stated that he had never seen appellant with guns.

{¶ 18} Appellant renewed his Crim.R. 29 motion for acquittal, which the court denied. The jury found appellant guilty and the court imposed a sentence of five years incarceration in the Ohio Department of Rehabilitation and Corrections, to run consecutively to his remaining sentence for a prior conviction. He was also assessed costs of prosecution.

{¶ 19} Appellant now appeals from that judgment, arguing the following four assignments of error:

{¶ 20} "A. The trial court erred in failing to grant appellant's Criminal Rule 29 motion for acquittal because there was insufficient evidence to prove he was criminally liable.

{¶ 21} "B. Appellant received ineffective assistance of counsel.

{¶ 22} "C. Appellant's right to confrontation as protected by the Sixth Amendment to the Constitution was violated when retired Sgt. Baumgartner testified to what the confidential informant allegedly told him about appellant.

{¶ 23} "D. Appellant's conviction was based upon insufficient evidence and was against the manifest weight of the evidence."

I.

{¶ 24} We will address appellant's assignments of error out of order. In his third assignment of error, appellant contends that his Sixth Amendment constitutional right to confrontation of witnesses was violated when the court permitted testimony regarding what a confidential informant told retired Sergeant Baumgartner.

{¶ 25} Testimonial statements of a witness who does not appear at trial may not be admitted or used against a criminal defendant unless the declarant is unavailable to testify and the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington* (2004), 541 U.S. 36, 59. Nevertheless, the *Crawford* court noted that "The

[Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id.

{¶ 26} "Extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. * * * The testimony was properly admitted for this purpose." *State v. Thomas* (1980), 61 Ohio St.2d 223, 232; *State v. Guyton*, 8th Dist. No. 88423, 2007-Ohio-2513, ¶ 17. Where statements are offered to explain an officer's conduct while investigating a crime, such statements are not hearsay. *Thomas*, supra; *State v. Blevins* (1987), 36 Ohio App.3d 147, 149.

{¶ 27} In this case, the statements of the informant were not admitted for the truth of the matter asserted, i.e., that appellant was in possession of a weapon. Rather, the informant told the detective that he had seen appellant who had showed him some guns, including a "camouflage sniper rifle and body armor" in a residence at 31 East Pearl Street, Toledo, Ohio. As a result, the statements were admitted merely to explain why the police sought a search warrant for that address and investigated where appellant was currently living. Therefore, the trial court did not err in permitting the detective to testify as to the statements made by the confidential informant.

{¶ 28} Accordingly, appellant's third assignment of error is not well-taken.

II.

{¶ 29} In his second assignment of error, appellant argues that he did not receive effective assistance of counsel because trial counsel (1) only asked three questions during

voir dire; (2) did not file a motion for disclosure of the confidential informant; and (3) failed to object to hearsay statements made by the confidential informant to the police.

{¶ 30} In order to prove ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 694.

{¶ 31} An attorney properly licensed in Ohio is presumed to be competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. An appellate court must ultimately determine, "whether, in light of all the circumstances, the challenged act or omission fell outside the wide range of professionally competent assistance." *State v. DeNardis* (Dec. 29, 1993), 9th Dist. No. 2245, citing *Strickland*, supra, at 690.

A. Voir Dire Questioning

{¶ 32} Techniques and decisions regarding juror voir dire are subjective and based upon each attorney's trial strategy. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 64; *State v. Mason* (1998), 82 Ohio St.3d 144, 157. Trial counsel "is in the best position to determine whether any potential juror should be questioned and to what

extent." *State v. Murphy*, 91 Ohio St.3d 516, 539; see, also, *State v. Bradley*, 42 Ohio St.3d 136, 143, (1989); *State v. Williams*, 8th Dist. No. 90845, 2009-Ohio-2026. "In some cases, asking few or no questions of a prospective juror 'may be the best tactic for a number of reasons. For example, questioning by other parties may convince counsel that the juror would be favorable for the defense, and that further questions might only antagonize the juror or give the prosecution a reason to use a peremptory challenge or even grounds for a challenge for cause.' [Citation omitted]." *Mundt*, supra, ¶ 63-65. Therefore, an appellate court will not "'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" Id., ¶ 63, quoting *Mason*, supra.

{¶ 33} In this case, the court and the prosecutor asked many questions of the jurors. Consequently, appellant's counsel may have been satisfied with the jurors' answers and, as trial strategy, did not want to risk alienating any of them by asking unnecessary questions. Appellant's counsel also exercised a peremptory challenge to remove one of the jurors. Therefore, we cannot say that counsel's voir dire questioning fell below an objective standard of reasonableness.

B. Disclosure of Confidential Informant

{¶ 34} Generally, regarding the disclosure of a confidential informant's identity, "the identity of an informant must be revealed to a criminal defendant when the testimony * * * is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *State v.*

Williams (1983), 4 Ohio St.3d 74, syllabus; *State v. Kelley*, 179 Ohio App.3d 666, 2008-Ohio-6598, ¶ 10.

{¶ 35} In the instant case, the informant's role was minimal in that he gave the initial tip to police that he had seen appellant with guns and where appellant was residing. The informant's testimony, however, was not vital to establishing any element of the crime. Furthermore, since the charges stemmed from the evidence found allegedly near appellant's personal papers and belongings, we cannot say that knowing the identity of the informant would have been helpful or beneficial in preparing appellant's defense.

C. Objections to Hearsay Statements of Confidential Informant

{¶ 36} We have already determined that the confidential informant's statements were admitted only to explain the police conduct in seeking a search warrant, and were not offered for the truth of the matter asserted. Therefore, counsel did not err by not objecting to such statements.

{¶ 37} Appellant has failed to establish the first prong of the *Strickland* test, that appellant's trial counsel's representation fell below an objective standard of reasonableness. Therefore, appellant has failed to demonstrate that he received ineffective assistance of counsel.

{¶ 38} Accordingly, appellant's second assignment of error is not well-taken.

III.

{¶ 39} We will address appellant's first and fourth assignments of error together. Appellant contends in his first assignment of error that the trial court erred in denying his

Crim.R. 29 motion for acquittal. In his fourth assignment of error, appellant argues that the conviction was based on insufficient evidence and was against the manifest weight of the evidence.

A. Sufficiency of the Evidence

{¶ 40} The appellate standard of review of a Crim.R. 29 motion for acquittal and a jury's verdict based upon sufficiency of the evidence are the same. *State v. Messer-Tomack*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶ 7-8. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found all the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones* (2000), 90 Ohio St.3d 403, 417, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 41} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. On review for sufficiency, courts do not assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." Id., at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia*, supra. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in the light most favorable to the prosecution,

it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks*, supra, at 273.

{¶ 42} R.C. 2923.13(A)(2) provides:

{¶ 43} "(A) * * *no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

{¶ 44} "(2) The person is under indictment for or has been convicted of any felony offense of violence * * *."

{¶ 45} Aggravated robbery is both an offense of violence and a felony of the first degree. *State v. Thomas*, 6th Dist. No. L-06-1331, 2009-Ohio-1748, ¶ 30, citing to *State v. Duncan*, 8th Dist. No. 87220, 2006-Ohio-5009, ¶ 6. See, also, R.C. 2901.01(A)(9).

{¶ 46} Appellant first argues that no evidence was presented that appellant was convicted of a felony offense of violence. The parties stipulated and it is undisputed that appellant had been convicted of the offense of aggravated robbery. Since aggravated robbery is defined as an offense of violence, the jury did not have to separately make that finding.

{¶ 47} Appellant also argues that there was insufficient evidence to demonstrate that appellant had possession of the weapons found at the Manhattan address. In order to "have" a firearm, one must either actually or constructively possess it. *State v. Hardy* (1978), 60 Ohio App.2d 325, 327; *State v. Messer* (1995), 107 Ohio App.3d 51, 56. "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." *State v. Wolery* (1976), 46 Ohio St.2d 316, 329.

{¶ 48} In this case, evidence was presented that appellant was seen at the Manhattan residence and that he either lived there or stored some of his possessions there. The weapons were found in a bedroom, a private area of the residence, among men's clothing and shoes. In addition, paperwork, identification cards, a birth certificate, and other personal documents were found among the items in the bedroom and in the residence. Although circumstantial, this evidence was sufficient to establish to the jury that appellant, at least, had constructive possession of the weapons found. Therefore, we conclude that some evidence was presented from which the jury could have found all the elements of R.C. 2923.13(A)(2).

B. Manifest Weight of the Evidence

{¶ 49} When asked to overturn a conviction as against the manifest weight of the evidence, the appellate court must review the entire record, weighing the evidence and all reasonable inferences. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Acting as a "thirteenth juror," the court may consider the credibility of witnesses, to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. Id. A conviction on manifest weight grounds will be reversed only in the most "'exceptional case in which the evidence weighs heavily against the conviction.'" Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 50} In this case, we have reviewed the entire record and, as noted previously, evidence was presented that appellant's belongings were at the Manhattan residence. The presence of a wallet and identification cards and other very personal documents, such as the birth certificate and his postrelease control paperwork from 2007, indicates that appellant was either living at the Manhattan property or stored his possessions there. In addition, the weapons were found in a bedroom closet which contained men's clothing. Appellant's girlfriend denied that the weapons found belonged to her or her two teenage daughters. Consequently, a logical inference is that the weapons belonged to the person whose personal documents were nearby, which was supported by the presence of men's clothing. Therefore, we conclude that, based upon the testimony of the witnesses and evidence presented, we cannot say that the jury clearly lost its way or that the evidence weighs heavily against the conviction.

{¶ 51} Accordingly, appellant's first and fourth assignments of error are not well-taken.

{¶ 52} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, J.

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JUDGE

Richard W. Knepper, J.
CONCUR.

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JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.