**[Cite as *State v. Young*, 2009-Ohio-6334.]**

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

State of Ohio — Court of Appeals No. L-08-1190

Appellee — Trial Court No. CR08-1038

v.

Floyd D. Young — **DECISION AND JUDGMENT**

Appellant — Decided: December 4, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

SINGER, J.

**{¶ 1}** Appellant appeals his conviction for having a weapon under disability entered on a jury verdict in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

**{¶ 2}** Carrie Richardson is a longtime resident of a home on Auburn Street in central Toledo. She lives there with several of her grandchildren.

**{¶ 3}** On the evening of December 14, 2007, a group of girls that included Richardson's 15-year-old granddaughter and three of her cousins left the Auburn home to go to a nearby store. According to the 15 year old, while they were at the store, she received a cell phone call from a girl named Sharnay, with whom the 15 year old had previously clashed. Sharnay wanted a rematch.

**{¶ 4}** When the girls returned to the Auburn home, they found Sharnay and what the 15 year old estimated to be two dozen other girls in the front yard and on the street. Verbal sparing between the two groups of girls followed.

**{¶ 5}** While this posturing was going on, a number of vehicles carrying men and boys arrived, parking in the street and in a church parking lot across the street. At some point someone fired two shots. When the shooting began, the crowd scattered.

**{¶ 6}** Police arrived within minutes. They found a freshly broken sidelight window to the house's closed-in porch and what appeared to be a gouge from a bullet in the molding inside. When interviewed by police, Carrie Richardson reported that she was inside and did not see the shooter. She had only heard the two shots and ran to the porch to protect younger children who were playing there. Three of Richardson's granddaughters, however, told police that they recognized the man with the gun. His name was Floyd – they believed – Crawford. He had gone to high school with them. One of the girls described where he lived and told police that he was affiliated with the "Moody Manor Boys."

**{¶ 7}** With this information and some investigation, police believed that the shooter was, in fact, appellant, Floyd D. Young. They created a six picture photo array that included appellant's picture. When police showed the array to the witnesses, each identified appellant as the man with the gun.

**{¶ 8}** On January 7, 2008, a Lucas County Grand Jury handed down a three count indictment, charging appellant with felonious assault, discharging a firearm into a dwelling and having a weapon under disability – all with firearm specifications. Appellant pled not guilty and the matter proceeded to a trial before a jury.

**{¶ 9}** At trial, with some discrepancies in their account of the event, the witnesses from the Auburn house all identified appellant as the man who fired two shots on December 14. In his defense, appellant called three witnesses, each of whom testified to being present the night the shots were fired and each of whom described appellant at the scene as wearing a black hat, white shirt and black pants. Each testified that appellant sat in the middle of the back seat of one of the cars and never left the car.

**{¶ 10}** At the close of evidence, the court entered a judgment of acquittal on the felonious assault charge. The remaining two counts were submitted to the jury which, on deliberation, acquitted appellant of discharging a gun into a habitat, but found him guilty him of having a weapon under a disability with a firearm specification. The court entered judgment on the verdict and sentenced appellant to three years incarceration for the weapons specification and a consecutive three years for the weapons under a disability conviction.

**{¶ 11}** From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following three assignments of error:

**{¶ 12}** "Assignment of Error I: The jury's verdict was against the manifest weight of the evidence.

**{¶ 13}** "Assignment of Error II: The verdicts were not supported by sufficient evidence.

**{¶ 14}** "Assignment of Error III: Plain error occurred when the jury was told, apparently incorrectly, that Young had a prior conviction for aggravated robbery. In such a close case, this unduly prejudiced the jury and resulted in a miscarriage of justice."

I. Weight – Sufficiency of the Evidence

**{¶ 15}** We shall discuss appellant's first two assignments of error together.

**{¶ 16}** A verdict may be overturned on appeal if it is against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the jury lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. For sufficiency of the evidence, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. Id. at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution,

could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. Id. at 390 (Cook, J., concurring); *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. See, also, *State v. Eley* (1978), 56 Ohio St.2d 169; *State v. Barns* (1986), 25 Ohio St.3d 203.

**{¶ 17}** "On the trial of a case, either civil or criminal, the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A verdict will not be disturbed on appeal on sufficiency grounds unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

**{¶ 18}** As the state observed in its closing argument, the only real issue before the jury in this matter was the credibility of the witnesses. All of the witnesses agreed to the confrontation. All of the witnesses agreed that appellant was present. All of the witnesses agreed that shots were fired. The only question was whether the Auburn residents were truthful when they identified appellant as the shooter.

**{¶ 19}** Appellant pointed to inconsistency in the Auburn residents' account of events to suggest that those accounts were fabricated. The state pointed to the homogeneity of the defense witnesses' accounts to suggest that they were fabricated. Whether the jury was persuaded by the state's argument, or independently found some other reason to credit the account of the Auburn witnesses, giving credence to that testimony provides evidence for all of the essential elements of the offense and

specification of which appellant was convicted. Viewing the record as a whole, we cannot conclude that reasonable minds could not reach the same result. Accordingly, appellant's second assignment of error is not well-taken.

**{¶ 20}** Moreover, we have carefully examined the record of these proceedings and fail to find anything to suggest that the jury lost its way or that any manifest miscarriage of justice occurred. As a result, appellant's first assignment of error is not well-taken.

II. Plain Error

**{¶ 21}** The parties stipulated to the introduction of a redacted copy of the judgment entry of appellant's 2006 conviction for aggravated riot in violation of R.C. 2917.02(A)(2) (with purpose to commit or facilitate the commission of any offense of violence). In informing the jury of this stipulation the court stated:

**{¶ 22}** "* * * The record should reflect that the state has offered [and the] defendant will stipulate [to an] exhibit attesting to the fact that the defendant has been convicted of aggravated *robbery* - - aggravated riot, a violation of [R.C.] 2917.02(A)(2) and (C) * * *."(Emphasis added.)

**{¶ 23}** In its charge to the jury, the court stated:

**{¶ 24}** "* * * Before you can find the defendant guilty you must find beyond a reasonable doubt that * * * the defendant knowingly carried or used a firearm and the defendant had been convicted of the offense of aggravated *robbery* in violation of 2917.02(A)(2) and (C), that being a felony of the third degree." (Emphasis added.)

**{¶ 25}** In neither instance did appellant enter an objection to the court's misstatements. On appeal, he now insists that these misstatements worked to his prejudice.

**{¶ 26}** Irregularities in proceedings for which no objection is interposed are waived unless the irregularities constitute plain error pursuant to Crim.R. 52(B). *State v. Worley* (1976), 46 Ohio St.2d 316, 326. "Under Crim.R. 52(B), '[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.' By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. (Citations omitted.)

**{¶ 27}** We note with respect to the first interchange of the words "aggravated robbery" and "aggravated riot," the court corrected itself; thus, there was no error, plain or otherwise. Moreover, even though the court misspoke during instructions, the document to which it referred and which was taken into the jury room clearly referred to a conviction for "aggravated riot," as did the allegations in the indictment. Additionally, either an aggravated robbery or aggravated riot conviction is a conviction of violence

sufficient to invoke the disability. *State v. Nelson*, 8th Dist. No. 83553, 2004-Ohio-2849, ¶ 31; R.C. 2923.13(A)(2); R.C. 2917.02(A)(2). Accordingly, the verbal mistake in the jury instructions did not affect appellant's substantial rights. Appellant's third assignment of error is not well-taken.

**{¶ 28}** On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the court 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.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE