[Cite as *State v. Sanders*, 2012-Ohio-400.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-024**
- vs -	:	
HOWARD D. SANDERS a.k.a. J-ROCK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000106.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, #305, Willoughby, OH 44094 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Howard D. Sanders, appeals his convictions for Improperly Discharging a Firearm At or Into a Habitation and Having Weapons While Under Disability, following a jury trial in the Lake County Court of Common Pleas. The issues to be determined by this court are whether a defendant can be convicted of Discharging a Firearm Into a Habitation when he has not been identified by a witness and no gun was found, and whether a jury is prejudiced by testimony that has been

stricken from the record. For the following reasons, we affirm the decision of the court below.

{¶2} On March 23, 2010, the Lake County Grand Jury returned a two-count indictment against Sanders, charging him with Improperly Discharging a Firearm At or Into a Habitation, a felony of the second degree, with a firearm specification, in violation of R.C. 2923.161(A)(1) and R.C. 2941.145, and Having Weapons While Under Disability, a felony of the third degree, in violation of R.C. 2923.13(A)(3).

{¶3} Sanders filed a Motion to Suppress on July 7, 2010, asserting that the police improperly seized Sanders' jacket as evidence. The trial court denied this motion on September 29, 2010.

{¶4} The case was tried before a jury, commencing on January 3, 2011. The following testimony and evidence was presented at trial.

{¶5} On the night of January 8, 2010, Charlotte Powell, an employee at Katie's Pub, was working and saw Sanders, Sanders' girlfriend, Victoria Lombardo, and David Nall all present at Katie's. Powell witnessed Sanders and David arguing with each other, although she could not hear what the argument was regarding. Robin McKenzie, a friend of David's, was also present and saw him and Sanders arguing. Powell subsequently saw Sanders holding a pocketknife in his hand. At that point, at approximately 1:00 a.m. on January 9, 2010, she asked Sanders and David to "stop" and requested that they leave the bar. She observed Sanders and David continuing to argue in the parking lot, asked them to leave again, and they complied.

{¶6} Lombardo explained that she and Sanders had driven to Katie's on the night of January 8 in her gray Chevy Impala. She explained that Powell asked Sanders and David to leave Katie's because they were arguing. She testified that she knew

David and did not get along with him, because he had tried to "hit on her" in the past, a fact of which Sanders was aware.

{¶7} After being asked to leave Katie's, Lombardo and Sanders went to another bar, McTaggart's, where Lombardo discovered that Sanders had blood on his finger. Sanders told her that he cut his hand on his own knife. Lombardo and Sanders next went to Tony's Subway Inn and met up with Dion Williams, also known as "Chubbs." Lombardo testified that they stayed at Tony's until "last call," or around 2:15 to 2:30 a.m. After leaving Tony's, Lombardo let Sanders and Williams out of her car on West Jackson Street, near Silver Drive and Michael Court. She started to drive away, but Williams came up to the car, asked her to stop, and got inside. Lombardo drove away, pulled onto the corner of West Jackson and Grant Street, which was the closest intersection, stopped at a traffic light, and then saw Sanders walking down the street. She let Sanders into the car and drove to their home.

{¶8} Rebecca Carlucci Nall, David's wife, testified that David had gone to Katie's Pub on January 8 and that, after leaving Katie's, he picked her up from her cousin's home at approximately 12:30 a.m. and seemed "upset." David and McKenzie dropped Rebecca off at their apartment, left, and then returned at approximately 1:30 a.m. After returning to the apartment, located at 697 West Jackson, Rebecca, David, and McKenzie spoke for around 45 minutes. Rebecca then sat in the living room, using her computer. She subsequently heard someone try to open the front door, heard a pop, heard glass break, and then "a bullet came through the door [and] hit the sofa." She saw a hole in the curtain on the front door and in the couch located across from the door. She then called 911, at approximately 2:44 a.m.

{¶9} Three individuals, Edgar Becerra, Andres Escobar, and Ismael Rangel, were outside of an apartment at Silver Apartments, located on Silver Court, smoking cigarettes early on the morning of January 9, 2010, at approximately 2 to 2:30 a.m. All three testified that on that morning, they saw two black males conversing, one described as "tall and thin" and the other described as "heavyset." Each witnessed the two men separate, and saw the heavyset man get into a silver Chevy Impala. They saw the thin black male approach an apartment across the street, located at 697 West Jackson, and open the screen door. After seeing the man open the door, they then heard a shot. Each of the witnesses saw the thin male walk away from the apartment and to the south side of the apartment building. All three witnesses testified that both men were wearing dark or black clothing and they did not see either male wearing the cream colored jacket presented as evidence by the State. None of the witnesses saw the thin male holding a gun. However, Escobar testified that he saw the thin man at the door make a motion with his right hand, inside of his sleeve, "as if he were hiding something."

{¶10} Upon receiving the 911 call from Rebecca, several officers responded to the scene of the incident. Lieutenant Anthony Powalie explained that upon responding to 697 West Jackson, he saw that the glass window on the front door was broken. He spoke to the Nalls and McKenzie, who were all inside the apartment at the time the shot was fired. He stated that all three seemed upset and were screaming and crying.

{¶11} Officer Brian Avery also arrived at the scene and conducted an investigation outside. He noticed footprints in the snow outside of the Nalls' apartment, going toward the south, behind the building. He followed the footprints, which ended in

a parking lot south of the Nalls' apartment, near tire tracks from a car. Officer Avery stated that it appeared that the suspect had entered a car.

{¶12} Officer Nicholas Sholtz examined the inside of the Nalls' residence. A pillow on the couch was collected at the scene and a bullet was subsequently removed from the pillow. Officer Sholtz found and collected a shell casing on the porch, near the front door. He also indicated in his testimony that he believed the three witnesses from Silver Apartments were located approximately 160 feet away from the Nalls' apartment when making their observations.

{¶13} Based on information retrieved during the investigation, Officer Avery and several other officers went to Lombardo's house, believing Lombardo was the owner of the silver Impala seen by witnesses. Upon searching Lombardo's car, a cream colored jacket was found, containing two of Sanders' identification cards in the pocket. There were also blood stains on the jacket. Lombardo testified that Sanders had been wearing the jacket at Katie's Pub on the night of the shooting, that Sanders had borrowed the jacket from a friend, and that she did not believe Sanders was wearing the jacket at the time he was dropped off on West Jackson Street.

{¶14} The testimony of each of the officers established that during the course of the investigation, the officers did not find a gun linked to the shooting.

{¶15} Several experts testified regarding the evidence presented at trial. Mitchell Wisniewski, a fingerprint and firearms examiner at the Lake County Crime Laboratory, testified that he was unable to get a print off of the shell casing and the bullet. He testified that the bullet found in the pillow on the Nalls' couch had been fired.

{¶16} Dr. Stephen LeBonne, DNA technical manager at Lake County Crime Lab, stated that Sanders' complete DNA profile was found on the cream colored jacket and

that there was also a weaker profile of DNA for an unidentified individual, who may have also worn the jacket at some time. Dr. LeBonne also found that the blood on the coat belonged to Sanders. Martin Lewis, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation, testified that the cream colored jacket presented by the State also had gunshot residue on the right sleeve, which signified that the jacket "was in close proximity to a firearm when it was discharged" or that it "came into contact with any item or another surface that had gunshot residue on it."

{¶17} Upon the conclusion of the State's case, Sanders moved for acquittal pursuant to Crim.R. 29. The court denied this motion.

{¶18} On January 5, 2011, the jury found Sanders guilty of Improperly Discharging a Firearm At or Into a Habitation, a felony of the second degree, the accompanying firearm specification, and Having Weapons While Under Disability, a felony of the third degree.

{¶19} Sanders filed a Motion for New Trial Pursuant to Crim.R. 34(A)(4) on January 11, 2011. The trial court denied the Motion on February 8, 2011

{¶20} On February 9, 2011, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced Sanders to a term of five years for Improperly Discharging a Firearm At or Into a Habitation and a term of three years for Having Weapons While Under Disability, to be served concurrently. The court also sentenced Sanders to a consecutive, mandatory term of three years for the firearm specification, for a total prison term of eight years.

{¶21} Sanders timely appeals and raises the following assignments of error:

{¶22} "[1.] The Trial Court erred to the prejudice of the Defendant-Appellant Howard Sanders when it denied his motion for acquittal made pursuant to Crim.R.

29(A), Transcript Volume IV of IV, and when it permitted the jury to return a verdict of 'Guilty' against the manifest weight of evidence.

{¶23} "[2.] The Trial Court severely prejudiced the Defendant-Appellant Howard Sanders' rights by permitting statements made by Mrs. Nall (Rebecca Carlucci) and Robin McKenzie as an excited utterance.

{¶24} "[3.] The State failed to prove that the Defendant-Appellant Howard Sanders had a weapon under disability pursuant to R.C. 2923.13."

{¶25} In his first assignment of error, Sanders asserts that, as to the charge of Improperly Discharging a Firearm At or Into a Habitation, the trial court erred by denying his motion for acquittal pursuant to Crim. R. 29(A) and that the jury's verdict was against the manifest weight of the evidence.

{¶26} The Ohio Rules of Criminal Procedure provide that a defendant may move the trial court for a judgment of acquittal "if the evidence is insufficient to sustain a conviction." Crim.R. 29(A). "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e., "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary (6 Ed.1990) 1433. Essentially, "sufficiency is a test of adequacy," that challenges whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. *Id.*

{¶27} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574

N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1971). In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶28} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the greater amount of credible evidence." (Citation omitted) (emphasis deleted.) *Thompkins* at 387. Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" *Id.*

{¶29} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982), syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541 (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine 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 and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the

conviction." *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶30} In order to convict Sanders of Discharging a Firearm At or Into a Habitation, the State was required to prove, beyond a reasonable doubt that Sanders "knowingly * * * discharge[d] a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual." R.C. 2923.161(A)(1).

{¶31} In the present case, the State presented, through the testimony of various witnesses, that Sanders was present on West Jackson Street at approximately the time of the shooting. Lombardo stated that she dropped Sanders off on the street, with "Chubbs," who was described during trial as weighing around 250 pounds. Three witnesses saw two black males, including one described as "overweight," exit a gray or silver Impala, which was of the same type and color as the car driven by Lombardo, on West Jackson Street. These witnesses saw the overweight individual reenter the car, as was also described by Lombardo, saw the other man walk up to 697 West Jackson Street, stand at the door, and then heard a gunshot. They saw the man move toward the south, and Lombardo testified that she picked Sanders up approximately one street over from West Jackson Street, just a few minutes after she had dropped him off. Generally, the testimony of Lombardo and the unrelated witnesses was consistent and established that Sanders was present on West Jackson Street, was at the Nalls' front door, and that a gunshot was heard while Sanders was at the front door.

{¶32} Moreover, the testimony of several witnesses established that David and Sanders had been arguing on the morning of January 9 and were angry with each other. The testimony also showed that David and Rebecca lived in an apartment located at 697 West Jackson Street, into which the shot was fired.

{¶33} In addition, the testimony presented by various officers and experts established that a fired bullet was located inside the Nalls' residence, that there was a hole in the glass on the door and in the curtain, consistent with a bullet. Rebecca testified that she saw the bullet enter through the door and into the couch. The testimony of the experts established that the cream colored jacket, which Lombardo testified Sanders was wearing at some point on January 9, contained gunshot residue on the right sleeve. All of this evidence weighs in support of the State's case.

{¶34} We also note that convictions for Improperly Discharging a Firearm At or Into a Habitation have been affirmed under similar facts. *See State v. Rhodes*, 10th Dist. No. 04AP-50, 2005-Ohio-2293, ¶ 13 (a conviction was supported by the evidence where no person saw the defendant fire a gunshot, but testimony at trial placed the "defendant, by himself, near the back door of [the victim's] apartment immediately prior to the shooting," the doorknob rattled, a gunshot was fired seconds later, and a shell casing was found on the patio outside the apartment door). Although, as in *Rhodes*, much of the evidence presented by the State in the present case was circumstantial, "'[d]irect evidence, circumstantial evidence, or both may establish an element of the charged offense.'" (Citations omitted.) *State v. Griesmar*, 11th Dist. No. 2009-L-061, 2010-Ohio-824, ¶ 50. "Circumstantial evidence and direct evidence inherently possess the same probative value." *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph one of the syllabus.

{¶35} Sanders notes that the testimony established he was not wearing the cream jacket at the time of the shooting. While there was conflicting evidence about when Sanders was wearing the jacket, the record indicates that Sanders was wearing the jacket on the date of the shooting and that it was left in Lombardo's car after the

shooting. Even if Sanders was not wearing the jacket at the time of the shooting, the testimony of Lewis established that touching an item may result in a transfer of gunshot residue, which may have occurred here, as Sanders returned to Lombardo's car after the shooting. Although some conflicting evidence was presented, the jury was in the best position to evaluate the credibility of the witnesses and give proper weight to their testimony.

{¶36} Based on the foregoing, the jury's finding that Sanders was guilty was not against the manifest weight of the evidence.

{¶37} Additionally, there was sufficient evidence to support a conviction for Discharging a Firearm At or Into a Habitation. As outlined above, the State presented the jury with testimony and evidence supporting each element of the crime. Specifically, testimony of several witnesses showed that Sanders was present on West Jackson Street at approximately the time of the shooting, that a man matching his description was at the Nalls' apartment, and that a shot was fired into the Nalls' apartment. There is no dispute that the apartment was inhabited by the Nalls on the date of the shooting. After viewing all of the foregoing evidence and testimony in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime of Discharging a Firearm At or Into a Habitation proven beyond a reasonable doubt.

{¶38} Sanders also raises several specific arguments related to the evidence presented. He first argues that no one identified him as the shooter.

{¶39} Identification of the shooter is not necessary when there is circumstantial evidence of appellant's presence at the scene during the time of the incident. *Rhodes*, 10th Dist. No. 04AP-50, 2005-Ohio-2293, ¶ 12 (no witness need identify the shooter when there is sufficient circumstantial evidence to place the defendant at the location of

the shooting and prove that a gun was fired); *State v. Huber*, 5th Dist. No. 2005CA00190, 2006-Ohio-2600, ¶ 9.

{¶40} Sanders also asserts that no gun was ever found, that there is no physical evidence linking him to the crime, and that the scientific evidence presented was improper because of defects in the chain of evidence sent to BCI.

{¶41} While no gun was recovered in this case, it is not required that the State present the gun used in order to support a conviction for Discharging a Firearm At or Into a Habitation. *State v. Marshall*, 5th Dist. No. 03-CA-106, 2005-Ohio-931, ¶ 26-31 (although neither the gun used or the bullets fired were discovered, a conviction for Discharging a Firearm At or Into a Habitation was upheld when other evidence was presented, including testimony regarding shots being heard and damage consistent with a bullet being fired); *cf. Huber* at ¶ 14, citing *State v. Gaines*, 46 Ohio St.3d 65, 69, 545 N.E.2d 68 (1989) (in cases involving firearm specifications, the State is not required to admit the firearm into evidence but can instead show circumstantial proof of the existence of a firearm through gunshots, bullets, or bullet holes).

{¶42} Additionally, the State does not have to present any physical evidence to support the conviction. *See State v. Fite*, 9th Dist. No. 25318, 2011-Ohio-2500, ¶ 30 (where a defendant was charged with Discharging a Firearm At or Into a Habitation, "the State was not required to present physical evidence," as "[t]he jury was aware that no physical evidence had been presented and [was] able to weigh that fact in reaching its verdict"). We do note, however, that some physical evidence was in fact presented by the State in this case, including the gunshot residue found on the cream jacket, a bullet and shell casing, as well as evidence of damage to the Nalls' residence consistent

with a bullet being fired, which, when coupled with the testimony of the witnesses, was sufficient for a jury to find that Sanders fired a shot into the Nalls' apartment.

{¶43} Regarding Sanders' argument as to defects in the chain of evidence sent to BCI, he advances no facts to support this assertion. The testimony of BCI officials and police officers shows that they did not find any irregularities in the procedure of transmitting the evidence and believed the process was appropriate. Several officers testified that the typical procedure of taping the bags of evidence shut and marking the tape with their initials was used and no evidence was presented to the contrary.

{¶44} Sanders also argues that there was no scientific connection proven between the residue that appeared on the jacket and residue that may have appeared on the curtain and the pillow through which the bullet went, because the curtain and pillow were never tested for gunshot residue.

{¶45} As noted above, the State was not required to provide physical evidence to support its case, as long as adequate circumstantial evidence existed. Additionally, although the State may have failed to test the pillow and the curtain, Lewis testified that he would be less likely to find residue on these items, as they were not in close proximity to the fired gun.

{¶46} Finally, Sanders argued that the trial court improperly failed to find that Sanders had an alibi and thus, there was insufficient evidence to support a conviction. However, Sanders does not point to any evidence supporting an alibi, nor did any witnesses testify on his behalf. The testimony of various individuals, including Lombardo and the three witnesses from Silver Apartments, established that Sanders was on West Jackson Street at some time between 2:30 and 2:45 a.m., at approximately the time of the shooting.

{¶47} The first assignment of error is without merit.

{¶48} In his second assignment of error, Sanders argues that the jury was prejudiced by Lieutenant Powalie's testimony that he was told by the individuals inside of the Nalls' apartment that "J-Rock had shot into their house," which was hearsay, not admissible under any exception. Sanders asserts that although this portion of Lieutenant Powalie's testimony was stricken by the court, "the damage had been done."

{¶49} The State asserts that because the statement was stricken by the trial court, no error was made and no prejudice occurred.

{¶50} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty*., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991); *In re Lambert*, 11th Dist. No. 2007-G-2751, 2007-Ohio-2857, ¶ 84 ("[w]e review the trial court's admission of evidence under an abuse of discretion standard").

{¶51} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is inadmissible at trial, unless it falls under an exception to the Rules of Evidence. Evid.R. 802.

{¶52} Regardless of whether the statement made by Lieutenant Powalie was admissible, Sanders' objection was sustained and the statement stricken by the trial court. Therefore, we must evaluate not whether the statement was admissible but whether, although stricken, the statement prejudiced the jury.

{¶53} In striking the statement from the record, the trial court ordered that the statement be "stricken and disregarded." Further, the written jury instructions present in

the record indicate that the jury was given an instruction regarding stricken evidence, that "any statements that were stricken by the court and which you were instructed to disregard are not evidence and must be treated as though you never heard them."

{¶54} A jury should be "presumed" to have obeyed a court's cautionary or limiting instructions. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991); *State v. Wolf*, 11th Dist. No. 93-L-151, 1994 Ohio App. LEXIS 5993, *10 (Dec. 30, 1994) ("a presumption exists that jurors follow the instructions given to them by the trial court"). In the absence of evidence to the contrary, we presume that the jury in this case followed the trial court's instruction to ignore the statement made by Lieutenant Powalie and did not consider the statement in its deliberations.

{¶55} Regarding the issue of prejudice, this court has found that prejudicial effect is "dissipated" by the court's limiting jury instruction. *State v. Melton*, 11th Dist. No. 2009-L-078, 2010-Ohio-1278, ¶ 2. In addition, the testimony of Officer Sholtz, admitted without either party objecting, was that Nall believed Sanders was the shooter. Therefore, there was already evidence in the record that at least one of the victims residing at 697 West Jackson considered Sanders to be the shooter, eliminating prejudicial effect on the jury. *See State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio 5084, ¶ 222 (defendant experienced no prejudice from testimony that was corroborated by other evidence in the record).

{¶56} The second assignment of error is without merit.

{¶57} In his third assignment of error, Sanders asserts that if the first assignment of error has merit, then the Having Weapons While Under Disability conviction must also be found to be unsupported by the evidence.

{¶58} Essentially, Sanders is asserting that if the evidence does not support a finding that he discharged a weapon into the Nalls' apartment, it also cannot be proven that Sanders had a weapon at all. However, since we find that there was sufficient and competent, credible evidence to support the finding that Sanders discharged a firearm, this argument has no merit.

{¶59} In addition, Sanders makes the argument that the State failed to prove that Sanders "has been convicted of any felony offense of violence," as required under R.C. 2923.13(A)(2). However, the State was not required to prove that Sanders was convicted of an offense of violence, as Sanders was charged under R.C. 2923.13(A)(3), which states that "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person * * * has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse." Moreover, the parties, prior to the beginning of trial, stipulated that Sanders had been convicted of a drug offense under R.C. 2923.13(A)(3).

{¶60} The third assignment of error is without merit.

{¶61} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, finding Sanders guilty of Improperly Discharging a Firearm At or Into a Habitation and Having Weapons While Under Disability, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.