

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
CHARLES EDWARD TURNER	:	Case No. 2009CA00007
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Case No. 2008CR1313

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 7, 2009

APPEARANCES:

For Plaintiff-Appellee

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Farmer, P.J.

{¶1} On August 26, 2008, the Stark County Grand Jury indicted appellant, Charles Turner, on one count of felonious assault with a firearm specification in violation of R.C. 2903.11 and R.C. 2941.145, one count of having a weapon while under a disability in violation of R.C. 2923.13, one count of possession of cocaine in violation of R.C. 2925.11, and one count of illegal use of food stamps in violation of R.C. 2913.46. Said charges arose from an incident between appellant and Marlon Campbell over a parking space on a public street. Several witnesses observed the incident.

{¶2} A jury trial on the felonious assault count with the firearm specification and the weapon under disability count commenced on October 14, 2008. The jury found appellant guilty as charged. Appellant subsequently pled guilty to the remaining two counts. By judgment entry filed October 27, 2008, the trial court sentenced appellant to an aggregate term of fourteen years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

II

{¶5} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ADMIT PROPER IMPEACHMENT EVIDENCE."

I

{¶6} Appellant claims his convictions were against the manifest weight and sufficiency of the evidence. We disagree.

{¶7} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The 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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and 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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶8} Appellant was convicted of felonious assault with a firearm specification in violation of R.C. 2903.11(A)(2) and R.C. 2941.145(A) which state the following, respectively:

{¶9} "(A) No person shall knowingly do either of the following:

{¶10} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

{¶11} "(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense."

{¶12} Appellant was also convicted of having a weapon while under a disability in violation of R.C. 2923.13(A)(3) which states the following:

{¶13} "(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

{¶14} "(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."

{¶15} Appellant argues inconsistencies in the testimony of the various witnesses and the victim, Mr. Campbell, made the evidence inherently unreliable.

{¶16} It is uncontested that appellant has been convicted for possession of cocaine. T. at 5. Appellant stipulated to this at trial, and agreed it would be the basis for the weapon under disability count. Id. It is also uncontested that Mr. Campbell's injuries included facial lacerations and a broken tooth which required dental surgery to

remove the root of the tooth. T. at 123-127; State's Exhibits 1A-1E. The identification of appellant is also basically unchallenged. He was identified as the aggressor by Mr. Campbell, Mr. Campbell's neighbor, Tonya Bertram who was a personal friend of appellant's, and Ms. Bertram's sister, Stacy Walls. T. at 124, 196, 208.

{¶17} The essential challenge is whether appellant had a firearm and used the firearm during the assault.

{¶18} Every witness and Mr. Campbell testified appellant possessed a firearm, fired it two times in the air, and pistol-whipped Mr. Campbell in the face. T. at 118-122, 149, 171-174, 189-190, 202-206. The inconsistency argued by appellant is where appellant's vehicle was parked. Mr. Campbell testified appellant parked in front of his mother's house and he asked appellant to move it. T. at 117. The other witnesses all testified that appellant's vehicle was parked in Ms. Bertram's driveway. T. at 151, 170, 190-191.

{¶19} Although there exists an inconsistency in Mr. Campbell's testimony vis-à-vis the other witnesses, it was not relevant to the fact that appellant possessed a firearm, fired it two times in the air, and pistol-whipped Mr. Campbell.

{¶20} Upon review, we find sufficient credible evidence to substantiate the convictions.

{¶21} Assignment of Error I is denied.

II

{¶22} Appellant claims the trial court erred in failing to admit impeachment evidence as he should have been permitted to cross-examine Mr. Campbell about his prior conviction for possession of marijuana. We disagree.

{¶23} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶24} During cross-examination, defense counsel questioned Mr. Campbell about his condition at the time of the incident:

{¶25} "Q. So you say you had absolutely no alcohol that day?

{¶26} "A. Right.

{¶27} "Q. Okay, smoking any marijuana?

{¶28} "A. No.

{¶29} "Q. Are you saying that you don't smoke marijuana?

{¶30} "A. I don't." T. at 130.

{¶31} Defense counsel proffered that on May 6, 2008, Mr. Campbell was convicted in the Canton Municipal Court for possession of marijuana. T. at 131. The trial court found the conviction was two to three months after the incident sub judice and denied its admission. T. at 131-132.

{¶32} The applicable rules of evidence governing impeachment by conviction of crimes are Evid.R. 608 and Evid.R. 609. Under Evid.R. 609, a minor misdemeanor conviction is not permitted:

{¶33} **"(A) General rule**

{¶34} "For the purpose of attacking the credibility of a witness:

{¶35} "(1) subject to Evid. R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.

{¶36} "(2) notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶37} "(3) notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance."

{¶38} Evid.R. 608(B) states the following:

{¶39} "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in Evid. R. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

{¶40} As noted by the trial court, Mr. Campbell's conviction was on May 6, 2008, three months after the incident in this case (February 25, 2008). The conviction was for a minor misdemeanor for possession, not smoking marijuana. The question was not about possessing marijuana, but using it.

{¶41} Upon review, we find the trial court did not err in failing to admit the impeachment evidence.

{¶42} Assignment of Error II is denied.

{¶43} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

