[Cite as *State v. Smead*, 2010-Ohio-4462.]

STATE OF OHIO) IN THE COURT OF APPEALS
)ss: NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT)

STATE OF OHIO Appellee v. MARK ELLIOTT SMEAD Appellant	C. A. No. 24903 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 02 0579

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

MOORE, Judge.

{¶1} Appellant, Mark Smead, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In the late hours of February 23, 2009, or early morning hours of February 24, 2009, police responded to Smead's home on a call involving a shotgun. When they arrived, a man informed the police that the shooter, Smead, was still inside. The police entered the home and first found the victim, Smead's wife's boyfriend, on the floor screaming. They then encountered Smead. Smead informed the police that he had shot the victim. The police arrested Smead.

{¶3} On March 11, 2009, Smead was indicted on one count of felonious assault with a firearm specification, in violation of R.C. 2903.11(A)(1)/(A)(2), R.C. 2941.145; one count of attempted murder with a firearm specification, in violation of R.C. 2903.02(A)/(B), R.C.

2923.02, R.C. 2941.145; and one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(3). Smead pled not guilty to the counts in the indictment and the matter proceeded to a jury trial. Smead stipulated to having a prior felony drug conviction from 1981.

{¶4} At trial, Smead contended that he shot the victim in self-defense. He argued that the victim had threatened him earlier in the day and that the victim and his friend forced themselves into his home. At the conclusion of trial, the jury found Smead not guilty of felonious assault, attempted murder, and the accompanying firearm specifications. The jury found Smead guilty of having a weapon while under disability. On July 14, 2009, the trial court sentenced Smead to one year of incarceration. Smead timely appealed his conviction and has asserted five assignments of error for our review.

II.

{¶5} As a threshold issue, we must first discuss the State's motion to dismiss this appeal, asserting that the journal entry from which Smead appeals is not a final appealable order. We do not agree.

{¶6} On June 29, 2009, after the jury verdict but before Smead's sentencing hearing, the trial court issued a journal entry stating that on June 22, 2009, the jury found Smead guilty of having a weapon while under disability and not guilty of felonious assault, with a firearm specification, and not guilty of attempted murder, with a firearm specification. The entry further referred the case to the Adult Probation Department for a limited pre-sentence investigation and report and set the date for a sentencing hearing. On July 6, 2009, the trial court held the sentencing hearing. On July 14, 2009, the trial court issued its sentencing entry, in which it stated that the jury found Smead guilty of having a weapon while under disability. The trial

court's sentencing entry further sentenced him to a total of one year of incarceration. This entry did not mention the jury's findings of not guilty of felonious assault and attempted murder.

{¶7} In its December 21, 2009 motion to dismiss filed with this Court, the State contends that the July 14, 2009 sentencing entry is not a final appealable order because it does not dispose of or mention the felonious assault or attempted murder counts. The State cites this Court to our previous decision in *State v. Roberson*, 9th Dist. No. 09CA0099555, 2009-Ohio-6369. In that case, Roberson was indicted on 15 counts. The journal entry from which he appealed did not contain any reference to the disposition of counts 3, 4, 5, 6, or 15 of the indictment. We determined that this order was not a final, appealable order because it did not dispose of all the charges brought in a single case against him. *Roberson*, supra, citing *State v. Goodwin,* 9th Dist. No. 23337, 2007-Ohio-2343, at ¶13. We went on to explain that during his appeal, the trial court amended its journal entry to clarify that counts 3, 4, 5, and 6 had been dismissed. We stated that, despite this amendment, the entry still failed to state any disposition as to count 15. Accordingly, we concluded that the journal entry in question was not a final, appealable order. Upon review, we clarify our holding in *Roberson* to make clear that we did not pronounce a blanket rule requiring the trial court to dispose of every count in a single judgment entry.

{¶8} Notably, in Roberson, we cited to *Goodwin*, supra, for the proposition that "a Journal Entry must dispose of all charges brought in a single case against a defendant in order to be final." *Roberson*, at ¶6. In *Goodwin*, this Court stated the issue before it as: "whether a trial court's failure to dispose of any of the charges against a defendant in a single case renders its judgment non-final in regard to all the charges." *Goodwin*, supra, at ¶12. Thus, the issue before this Court in *Goodwin* was whether a trial court must *resolve* all counts in an indictment in order

for this Court to have jurisdiction over the appeal. We answered this question in the affirmative. The issue of whether those resolutions must appear in one single journal entry is a separate issue, which has recently been discussed by the Ohio Supreme Court in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

{¶9} The certified question before the Court in *Baker* was, in part, whether "'the plea, the verdict or findings, and the sentence,' Crim.R. 32(C), must be contained in one document[.]" Id. at ¶1. The Court emphasized that

> "[W]e are discussing a 'judgment of *conviction*.' In *State v. Tuomala*, 104 Ohio St.3d 93, 2004-Ohio-6239, [] at ¶14, we explored the meaning of the word 'conviction': 'A 'conviction' is an 'act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.' Black's Law Dictionary (7th Ed.1999) 335. Thus, the ordinary meaning of 'conviction,' which refers exclusively to a finding of 'guilt,' is not only inconsistent with the notion that a defendant is not guilty (by reason of insanity or otherwise), it is antithetical to that notion. Indeed, the notion that a person is *convicted* by virtue of being found *not guilty* is an oxymoron (a 'not guilty conviction')." Id. at ¶11.

{¶10} The Court determined that "a defendant is entitled to appeal an order that sets forth the manner of *conviction* and the sentence." (Emphasis added.) Id., at ¶18. This must occur in a single document. Id. at ¶17 ("Only one document can constitute a final appealable order.") As "[a] court cannot sentence a defendant who is found not guilty[,]" we interpret *Baker* to mean that a journal entry that does not contain reference to counts that were *dismissed* or upon which the defendant was *acquitted*, does not render the journal entry invalid for lack of a final appealable order. *Baker*, at ¶12. Likewise, a court cannot sentence a defendant on a count that has been dismissed. Accordingly, because the record in the instant case reveals that the trial court resolved all the charges against Smead in its June 29, 2009 entry, and on July 14, 2009, issued a single entry setting forth the manner of conviction (i.e., guilty of having a weapon while

under disability) and the sentence (one year of incarceration), Smead has appealed from a final, appealable order. Accordingly, the State's motion to dismiss is overruled.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED IN DENYING [] SMEAD'S PROPOSED JURY INSTRUCTIONS AND BARRING A DEFENSE TO R.C. 2923.13 THAT RECOGNIZES AN INDIVIDUAL'S INHERENT RIGHT TO SELF-DEFENSE IN THE HOME GROUNDED IN THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION, INCORPORATED BY THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE."

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN DENYING [] SMEAD'S PROPOSED JURY INSTRUCTIONS AND BARRING A DEFENSE TO R.C. 2923.13 THAT RECOGNIZES AN INDIVIDUAL'S INHERENT RIGHT TO SELF-DEFENSE IN THE HOME GROUNDED IN THE SECOND AMENDMENT TO THE UNITED STATES CONSTITUTION, INCORPORATED BY THE FOURTEENTH AMENDMENT'S PRIVILEGES OR IMMUNITIES CLAUSE."

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ERRED IN DENYING [] SMEAD'S PROPOSED JURY INSTRUCTIONS AND BARRING A DEFENSE TO R.C. 2923.13 THAT RECOGNIZES AN INDIVIDUAL'S INHERENT RIGHT TO SELF-DEFENSE IN THE HOME, GROUNDED IN SECTION 4, ARTICLE I OF THE OHIO CONSTITUTION, THE OHIO COMMON LAW AND THE OHIO STATUTORY RIGHTS TO SELF[-]DEFENSE, AND THE DEFENSE OF NECESSITY."

{¶11} In his first three assignments of error, Smead contends that the trial court erred when it declined to give jury instructions recognizing his inherent right to self-defense in the home, thus barring a defense to the weapons under disability charge. We do not agree.

{¶12} Smead contends that the trial court "denied any instruction that would recognize the defense of self-defense, inherent in the Second Amendment, of using a firearm in the home." He explains that the trial court rejected any instruction that attempted to "redefine 'use' consistent with the inalienable right of self-defense in the home." Smead did not raise any issue regarding the Ohio Constitution, Ohio statutory law, Ohio common law, or necessity below.

Even if we were to agree with Smead's contention that an individual has an inalienable right of self-defense in his home that could qualify as a defense to the charge of having a weapon under disability, we conclude that the trial court did not err by so failing to instruct the jury.

{¶13} "A trial court must give jury instructions which are a correct and complete statement of the law." *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 312. Further, a jury charge "should be a plain, distinct and unambiguous statement of the law *as applicable to the case*[.]" (Emphasis added.) *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. Whether a statement of law is applicable to the facts of the case is a question of law.

{¶14} R.C. 2923.13 states, in pertinent part:

> "(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:
>
> "***
>
> "(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 adjudged a juvenile delinquent for commission of any such offense[.]"

{¶15} The indictment tracks the language of this section. Specifically, the indictment stated that Smead,

> "on or about the 24th day of February, 2009, *** did commit the crime of HAVING WEAPONS WHILE UNDER DISABILITY, in that he did without being relieved from disability as provided in Section 2923.14 of the Revised Code, knowingly acquire, have, carry, or use any firearm or dangerous ordnance, to wit: shotgun, and was convicted of an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse[.]"

{¶16} Smead contends on appeal that the trial court declined to redefine the word "use" for purposes of R.C. 2923.13. Specifically, the trial court determined that the Second Amendment was not an affirmative defense to the charge. As we stated above, even if we were to disagree with the trial court's reasoning, we conclude that it reached the right result in

declining to give the requested instruction. *In re Estate of Baker*, 9th Dist. No. 07CA009113, 2007-Ohio-6549, at ¶15 ("[a]n appellate court shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such an error is not prejudicial.").

{¶17} Smead does not protest the instruction that the trial court gave, rather, he contends that the jury should have been instructed additionally that the Second Amendment provided a defense to the use of the weapon for self-defense. The requested instruction, as stated on appeal, was that:

> "And, the Defendant's knowing use, acquiring, having, or carrying of the firearm was not in connection with the immediate self defense against another who was in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence occupied by the Defendant."

{¶18} The evidence before the trial court, however, did not require this additional instruction. Again, the charge "should be a plain, distinct and unambiguous statement of the law *as applicable to the case*[.]" (Emphasis added.) *Marshall,* supra.

{¶19} Smead's own testimony demonstrated that he *had* the weapon, for purposes of R.C. 2923.13, prior to his *use* of the gun. In other words, Smead possessed the gun prior to any need to use the gun for self-defense. "In order to 'have' a firearm, one must either Actually or Constructively possess it. Actual possession requires ownership and, or, physical control. Constructive possession may be achieved by means of an agent." *State v. Hardy* (1978), 60 Ohio App.2d 325, 327. The record reveals that Smead actually possessed the weapon at issue, as it is clear that he had physical control of it.

{¶20} Smead testified that he lived at 1675 Preston Avenue, in Akron, Ohio. He explained that he used to live there with his wife, but that she moved out in late January, 2009.

He explained that when he returned home on February 2, 2009, from an out-of-state trip, his wife had moved most of their belongings out of the home. Smead subsequently bagged up her remaining belongings and gave them to her new boyfriend. The record reveals that Smead's ex-wife's belongings were removed from the home prior to the February 23-24 incident. Smead testified that on the evening of February 23, around 7:30 p.m., he had a phone conversation with the victim, wife's boyfriend, in which the victim threatened to come to Smead's home and beat him up. After the phone call, Smead "went upstairs. I grabbed that shotgun and I stuck it—leaned it on the chair next to the foyer into the living room actually, in the living room." When asked why he did this, Smead stated "[b]ecause [wife's boyfriend] is a lot bigger and a lot tougher than I am. I figured if he did come over, he would—I would show him the gun and he would leave." He testified that the victim in fact came to his home around 11:00 p.m. Smead explained that he heard the victim drive up to the home as he was falling asleep. Once he saw the victim approach his home, he "grab[bed] the gun[.]"

{¶21} On cross-examination, Smead stated that "I have one functioning gun." He further explained that the weapons were not hidden and were open and accessible. He explained that although he was concerned enough that wife's boyfriend would act on his threat that he took the precaution to retrieve his loaded shotgun, he did not call the police or lock the house door. He further reiterated that between the time that he got the gun and the time the victim arrived at the home, he fell asleep. He explained that "it was three hours later. I didn't think he was going to make it." Smead explained that the gun was loaded and that he "loaded that gun a hundred years ago for [his ex-wife] when I was truck driving. I was gone a lot. She said I don't have any protection; why don't you load one of them shotguns. I loaded the shotgun. It's been loaded ever since."

{¶22} It is clear that Smead had possession of the gun, i.e., exerted physical control over the gun. R.C. 2923.13(A) states that "[u]nless 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[.]" Although he testified that the he loaded the gun "a hundred years ago[,]" R.C. 2923.13 simply purports to prevent a previously convicted individual from "knowingly acquir[ing], hav[ing], carry[ing], or us[ing] any firearm[.]" To be convicted of this charge, the State was not required to show that Smead loaded the gun while he was under a disability. Instead, the State simply needed to prove that Smead *had* the gun. Smead does not argue that the Second Amendment would provide a defense for *having* the gun. Smead's arguments relate to his *use* of the gun in the act of defending himself. As we conclude that the evidence at trial clearly supported a finding by the jury that Smead *had* the gun prior to any need for self-defense, the trial court's instruction on this issue satisfied the mandate that the instruction be "a plain, distinct and unambiguous statement of the law *as applicable to the case*[.]" (Emphasis added.) *Marshall*, 19 Ohio St.3d at 12.

{¶23} Accordingly, Smead's first, second, and third assignments of error are overruled.

<u>ASSIGNMENT OF ERROR IV</u>

"THE STATE VIOLATED SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION WHEN IT FAILED TO SPECIFY A PARTICULAR CULPABILITY ELEMENT IN COUNT THREE OF [] SMEAD'S INDICTMENT FOR HAVING WEAPONS WHILE UNDER DISABILITY UNDER R.C. []2923.13(A)(3)."

{¶24} In his fourth assignment of error, Smead contends that his indictment failed to specify a particular culpability element with regard to the charge of having weapons while under disability. We do not agree.

{¶25} Smead points to the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, for the proposition that a defendant can challenge for the first time on appeal an indictment that omits an essential element of a crime. He contends that his indictment fails to state the requisite mens rea. He further contends that because R.C. 2923.13 does not state a mens rea the applicable mens rea is recklessness. The Ohio Supreme Court, however, has recently overruled its decisions in *State v. Colon*, 118 Ohio St.3d 26 and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, concluding that "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state." *State v. Horner*, Slip Opinion No. 2010-Ohio-3830, at paragraph one of the syllabus. Further, the defendant's failure to raise this issue below forfeits all but plain error on appeal. *Horner*, at paragraph three of the syllabus. Smead notes that he did not raise this issue below, but specifically declined to address plain error on appeal. Accordingly, we conclude that Smead has forfeited this argument on appeal. Id.

{¶26} Smead's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

"THE TRIAL COURT ERRED WHEN IT ADMITTED EVIDENCE THAT WAS NOT RELEVANT AND THE PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE PURSUANT TO EVID. R. 403."

{¶27} In his fifth assignment of error, Smead contends that the trial court erred when it admitted evidence that was not relevant and the probative value was substantially outweighed by the danger of unfair prejudice pursuant to Evid.R. 403. We do not agree.

{¶28} In the instant case, the jury viewed photographs and a video of a syringe and spoon located in Smead's bathroom. Evid. R. 403(A) explains that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of

unfair prejudice, of confusion of the issues, or of misleading the jury." Smead contends that the probative value of the images of the drug paraphernalia was substantially outweighed by the danger of unfair prejudice.

{¶29} Smead asserted the defense of self-defense. Self-defense is an affirmative defense, in which the defendant's burden includes proving his state of mind; that is, that he had a bona fide belief that he was in imminent danger of death or great bodily injury. *State v. Robbins* (1979), 58 Ohio St.2d 74, 80. "Since Ohio has a subjective test to determine whether a defendant acted in self-defense, the defendant's state of mind is a crucial issue." *State v. Scott*, 8th Dist. No. 90671, 2008-Ohio-6847, at ¶32, citing *State v. Koss* (1990), 49 Ohio St.3d 213, 215. At trial, upon Smead's initial objection, the trial court explained that it would admit the evidence, a videotape including images of the drug paraphernalia, because it was evidence relevant to Smead's state of mind thus serving to rebut his claim of self-defense. When evidence, in the form of a close up of photograph of the previously discussed drug paraphernalia, was later testified to, Smead renewed his objection. The trial court sustained the objection and the State withdrew the photographic exhibit. Upon resuming questioning, the prosecutor informed the witness, in front of the jury, that the State had withdrawn the exhibit. Therefore, the State ceased questioning on the issue.

{¶30} Even if we were to agree with Smead's contention that this evidence was improperly admitted, he has failed to show how he was prejudiced. The evidence was presented to show Smead's state of mind with regard to his assertion of self-defense. As Smead was found not guilty of all the charges except having a weapon while under a disability, there can be no prejudice from any alleged improper evidence with regard to these charges. Smead does not assert that this improperly admitted evidence in any way prompted the jury to convict him of

having a weapon while under a disability. Accordingly, any error in the admission of this evidence was harmless. Crim.R. 52(A). Smead's fifth assignment of error is overruled.

III.

{¶31} Smead's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellant.

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