[Cite as *State v. Boyde*, 2013-Ohio-3795.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-981
v.	:	(C.P.C. No. 11CR-09-4707)
Duane D. Boyde,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 3, 2013

Ron O'Brien, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

Brian J. Rigg, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Defendant-appellant, Duane D. Boyde, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of having a weapon while under disability ("WUD") and one count of carrying a concealed weapon ("CCW"). For the following reasons, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 2} Appellant was indicted on September 1, 2011, on one count of CCW, a fourth-degree felony, in violation of R.C. 2923.12, and one count of WUD, a third-degree felony, in violation of R.C. 2923.13. A jury trial commenced on September 5, 2012, and, as adduced at trial, the charges arose from the following events.

{¶ 3} On August 12, 2011, at approximately 7:46 p.m., Columbus Police Officers Michael Slivanya and Ryan Steele were patrolling in a marked police cruiser. As the officers turned onto Richmond Avenue, they observed appellant and Eric Jordan walking in the middle of the street. According to the officers, Columbus City Code prohibits said conduct when a sidewalk is available. The officers initiated contact with the two individuals, and, as Officer Slivanya exited the cruiser, he noticed a bulge in appellant's right waistband area and alerted Officer Steele to it. Officer Steele testified appellant was "blading," which Officer Steele described is a term referring to a person standing to his or her side in order to partially conceal the opposite part of the body. According to Officer Steele, this behavior puts officers on alert that the individual may be hiding a weapon or contraband.

{¶ 4} Officer Slivanya approached Jordan and Officer Steele approached appellant. According to Officer Steele, as he approached, appellant appeared to be nervous. When asked if he had anything, appellant responded "yeah," prompting Officer Steele to ask if he had a gun. (Tr. 149.) According to Officer Steele, appellant indicated that he had a gun on his person. At that time, appellant was handcuffed and a loaded firearm wrapped in a black plastic bag was recovered from appellant's right pocket. Also recovered from appellant's pocket was a small amount of marijuana. Officer Steele testified another police cruiser arrived at the scene after appellant was arrested, and those officers did not assist in any way. According to the testimony, the scene was cleared at 7:54 p.m.

{¶ 5} Jordan testified that he and appellant have been friends since they were children. According to Jordan, on August 12, 2011, he and appellant were walking and discussing doing something for the kids in the neighborhood. As they crossed the street, Jordan testified two police cruisers arrived. According to Jordan, several officers jumped out of the police cruisers with guns drawn asking, "Where's the gun at? Where's the gun at?" (Tr. 218.) While being detained in a police cruiser, Jordan testified he was able to observe what was happening with appellant. Jordan testified that, while he saw the officers search appellant, he only saw them remove some papers and a wallet from appellant's pockets. Jordan denied that appellant had any weapons.

{¶ 6} Jamie Peters testified that, as she was walking to the store, she observed two police cruisers stop to confront appellant and Jordan. According to Peters, three police officers drew their weapons and demanded, "Where is the gun?" (Tr. 247.) Peters stated she saw the officers pull items out of appellant's pockets, and she was "pretty sure it was a black wallet, some keys and some papers." (Tr. 252.) On cross-examination, Peters testified that she became friends with appellant after this incident and that he asked her to be a witness. Though admitting she refused to discuss what she saw with the prosecutor, she testified she and appellant have discussed her testimony.

{¶ 7} After Peters testified, appellant's counsel stated his "client wants to testify." (Tr. 262.) A discussion was held on the record, and the trial court inquired, "Do you wish to talk to your attorney further about your decision to testify?" (Tr. 264.) Appellant responded in the affirmative. Thereafter, appellant indicated on the record that he did not wish to testify at trial.

{¶ 8} The parties stipulated that the firearm recovered was operable and that the entry reflecting appellant's previously entered guilty plea to robbery, a third-degree felony, in violation of R.C. 2911.02, was a true and accurate certified copy of the same.

{¶ 9} The jury rendered verdicts of guilty on both of the indicted offenses. A sentencing hearing was held, and appellant was sentenced to concurrent 17-month and 30-month terms of incarceration. Additionally, appellant was awarded 49 days of jail-time credit.

II. ASSIGNMENTS OF ERROR

{¶ 10} This appeal followed, and appellant brings the following three assignments of error for our review:

> [I.] Error was committed when the trial court refused to give a jury instruction requested by the defense.
>
> [II.] Appellant was denied his right to the effective assistance of counsel under the Sixth Amendment to the Ohio [and] United States Constitution and Article I, Section 10 of the Ohio Constitution when his counsel fails to waive his client's right to a jury trial on a secondary charge of having weapon under disability.

> [III.] The verdict is against the sufficiency and manifest weight of the evidence.

III. DISCUSSION

A. First Assignment of Error

{¶ 11} In his first assignment of error, appellant contends the trial court abused its discretion in refusing to give his requested jury instruction. The jury instruction sought by appellant included the following language, "For purposes of this case you cannot find the defendant guilty of count two without also having first found the defendant guilty of count one." (Tr. 275.) In determining to exclude the requested language from the jury instructions, the trial court stated:

> While we don't like inconsistent verdicts that is the nature of the beast and something we endure. If I were to grant that, I would think at the same time I would have to grant the state's request that "If you find the defendant guilty of count one, you must also find him guilty of count two." And I don't think the defense would be very pleased with that instruction.

(Tr. 275.)

{¶ 12} A defendant in a criminal case is entitled only to have the law stated correctly by the trial court, not to have his proposed jury instructions presented to the jury. *Columbus v. Harbuck*, 10th Dist. No. 99AP-1420 (Nov. 30, 2000), citing *State v. Snowden*, 7 Ohio App.3d 358, 363 (10th Dist.1982). However, where requested jury instructions are correct statements of the law as applied to the facts of the case, they should generally be given. *Id.*, citing *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). "It is within the sound discretion of a trial court to refuse to admit proposed jury instructions which are either redundant or immaterial to the case." *Bostic v. Connor*, 37 Ohio St.3d 144 (1988), paragraph two of the syllabus. Thus, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶ 9, citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989). The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark*, 71 Ohio St.3d 466, 470 (1994).

{¶ 13} Here, we discern no abuse of discretion in the trial court's refusal to give the requested jury instruction because the requested language is not an accurate statement of the law. Appellant requested that the jury be instructed that he could not be found guilty of WUD, as charged in Count 2 of the indictment, unless the jury first found him guilty of CCW, as charged in Count 1 of the indictment. This is not a correct statement of law because, though both the CCW and WUD charges involved a handgun, the offenses contain different elements, and consistency in the verdicts was not required. To convict appellant of CCW, the state was required to prove that the handgun was either concealed on appellant's person or concealed ready at hand, whereas such was not required for a WUD conviction. R.C. 2923.12; R.C. 2923.13; *State v. Hunter*, 2d Dist. No. 13614 (July 23, 1993) (elements required for CCW conviction not required for WUD conviction); *State v. McMillen*, 8th Dist. No. 61090 (Oct. 15, 1992) (elements of CCW and WUD do not correspond to such a degree that commission of one offense will result in the commission of the other).

{¶ 14} Additionally, as this court has held, "Ohio follows the general rule that consistency between verdicts on several counts of an indictment is unnecessary where the accused is convicted of some counts and acquitted on others, and that the conviction will generally be upheld notwithstanding its rational incompatibility with the acquittal." *State v. Garner*, 10th Dist. No. 97APA07-878 (June 18, 1998), citing *State v. Harris*, 10th Dist. No. 93AP-206 (Dec. 2, 1993); *see also Browning v. State*, 120 Ohio St. 62 (1929), paragraph four of the syllabus.

{¶ 15} Because the jury instruction requested by appellant is not a correct statement of law, we conclude the trial court did not abuse its discretion in refusing to give the requested jury instruction. Accordingly, we overrule appellant's first assignment of error.

B. Second Assignment of Error

{¶ 16} In his second assignment of error, appellant contends his counsel was ineffective for failing to try the WUD charge to the trial court rather than the jury.

{¶ 17} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301 (1965). Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith*, 17 Ohio St.3d 98, 100

(1985). Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101.

{¶ 18} "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Id*. at 687. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id*. To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Id*. at 694.

{¶ 19} According to appellant, if his trial counsel would have tried the WUD charge to the bench, the jury would not have been informed of his prior conviction for robbery. We classify as trial strategy counsel's ultimate decision to try the WUD charge to the jury. *See, e.g., State v. Ingram*, 10th Dist. No. 06AP-984, 2007-Ohio-7136, ¶ 76; *State v. Hanks*, 10th Dist. No. 99AP-1289 (Oct. 31, 2000); *State v. Jones*, 2d Dist. No. 24409, 2011-Ohio-5966, ¶ 11; *State v. Stith*, 10th Dist. No. 95APA07-934 (June 11, 1996); *State v. Hill*, 5th Dist. No. 98CA67 (Jan. 17, 2002).

{¶ 20} In *Hanks*, the defendant was charged with CCW and WUD. Both charges were tried to a jury, and the jury returned guilty verdicts on both offenses. On appeal, the defendant argued he was denied effective assistance of counsel due to his counsel's failure to have the WUD charge tried to the court. This court rejected the defendant's argument after noting (1) the decision to have the WUD charge tried to a jury constituted trial strategy, (2) nothing in the record indicated the jury convicted the defendant because it was prejudiced after learning of the prior conviction, and (3) the jury was not informed of the details of the prior conviction.

{¶ 21} Likewise, in *Ingram*, this court classified as trial strategy counsel's decision to try a WUD charge along with charges of attempted murder and felonious assault to a jury. *Id*. at ¶ 74. This court recognized that the concern with trying a WUD charge to a jury is that, in a case where a defendant does not testify, the jury would learn about a defendant's prior conviction for the sole reason that the WUD charge was tried before them and not a judge. *Id*. at ¶ 77, citing *State v. Love,* 4th Dist. No. 05CA2838, 2006-Ohio-1824, ¶ 49. Nonetheless, the *Ingram* court proceeded to conclude that such reasoning does not compel an automatic finding of ineffective assistance of counsel. *Id*. at ¶ 77. This court reasoned:

> Here, like in *Hanks*, there is nothing in the record to indicate that the jury convicted appellant because it learned about appellant's prior juvenile adjudication. Rather, like *Hanks*, the jury did not learn the details of appellant's prior juvenile adjudication. Given such a factor, and in light of the evidence submitted by appellee on all of the charges, * * * we cannot find that counsel's decision to try the weapons under disability charge unduly prejudiced appellant and rose to the level of ineffective assistance of counsel. See *Hanks*; *Strickland* at 694.

Id. at ¶ 78.

{¶ 22} The record in this case establishes appellant initially wished to testify at trial making the evidence pertaining to his prior convictions admissible and, thus, removing the main concern with trying a WUD charge to a jury. This reinforces that the decision to try the WUD charge to the jury was trial strategy. *Id*. at ¶ 76. However, because he ultimately chose not to testify, appellant asserts he was prejudiced by the introduction of evidence regarding his prior conviction. Like *Hanks* and *Ingram*, there is nothing in the record to indicate the jury convicted appellant because it learned of his prior conviction, and the jury was not informed of the details surrounding the same. Appellant and his counsel may have concluded that the chance of acquittal or a hung jury on the charge was greater by trying the charge to a jury rather than to a judge. *Id*. at ¶ 76, citing *Love*. Given these factors, and the evidence presented against appellant on both of the charges, we cannot find that the decision to try the WUD charge to the jury demonstrates that his trial counsel's performance was deficient.

{¶ 23} Accordingly, we overrule appellant's second assignment of error.

C. Third Assignment of Error

{¶ 24} In his third assignment of error, appellant contends his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Though citing the applicable standards of review pertaining to each assertion made in his stated assignment of error, appellant does not make any specific evidentiary challenges.

{¶ 25} Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *Id*. In determining whether the evidence is legally sufficient to support a 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.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. A verdict will not be disturbed unless, after viewing the evidence in a 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*, 90 Ohio St.3d 460, 484 (2001).

{¶ 26} In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed, but whether, if believed, the evidence supports the conviction. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶ 4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime").

{¶ 27} In determining whether a conviction is against the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review 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 trier of fact clearly lost its way and created such a manifest miscarriage of

justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*, quoting *Martin*.

{¶ 28} In conducting a manifest weight of the evidence review, we may consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶ 6. However, in conducting such review, "we are guided by the presumption that the jury, or the trial court in a bench trial, 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id.*, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 29} Appellant was convicted of CCW, in violation of R.C. 2923.13, which prohibits a person from knowingly carrying or having "concealed on the person's person or concealed ready at hand," a "handgun other than a dangerous ordnance." R.C. 2923.12(A)(2). The offense was charged as a felony because it was also alleged that the firearm was loaded or that appellant had ammunition ready at hand. R.C. 2923.12(F).

{¶ 30} Appellant was also convicted of WUD, in violation of R.C. 2923.13, which provides in relevant 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:
>
> *** * ***
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

{¶ 31} The evidence presented by the prosecution included the testimony of Officers Steele and Slivanya. Officer Steele testified he noticed a bulge near appellant's waistband, and, when asked, appellant indicated to Officer Steele that he had a gun on his

person. Officer Steele testified that he searched appellant and discovered a loaded gun in a black plastic bag, the barrel of the gun being inside appellant's front pocket. It was stipulated that the firearm was operable. It was also stipulated that appellant had a prior conviction for robbery, which, pursuant to R.C. 2901.01(A), is defined as a felony offense of violence.

{¶ 32} When viewed in a light most favorable to the prosecution, as is required for a review of the sufficiency of the evidence supporting a criminal conviction, the evidence presented at trial was sufficient to support appellant's convictions. Based on the evidence presented, the jury could reasonably find appellant guilty of CCW and WUD beyond a reasonable doubt. Consequently, we reject appellant's assertion that the record contains insufficient evidence to support his convictions.

{¶ 33} We next review appellant's argument that his convictions are against the manifest weight of the evidence. As noted above, in conducting a manifest weight of the evidence review, we may consider the credibility of the witnesses. *Cattledge* at ¶ 6. However, in conducting such review, "we are guided by the presumption that the jury, or the trial court in a bench trial, 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id*., quoting *Seasons Coal Co.* at 80.

{¶ 34} The defense presented the testimony of Jordan and Peters, both of whom testified to being friends of appellant. In contrast to the officers' testimony that a firearm was found on appellant, both Jordan and Peters testified they did not see the police recover a firearm from appellant. A conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony. *State v. Anderson*, 10th Dist. No. 10AP-302, 2010-Ohio-5561, ¶ 19. " '[W]here a factual issue depends solely upon a determination of which witnesses to believe, that is the credibility of witnesses, a reviewing court will not, except upon extremely extraordinary circumstances, reverse a factual finding either as being against the manifest weight of the evidence or contrary to law.' " *In re L.J.*, 10th Dist. No. 11AP-495, 2012-Ohio-1414, ¶ 21, quoting *In re Johnson*, 10th Dist. No. 04AP-1136, 2005-Ohio-4389, ¶ 26. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner

and demeanor and determine whether the witnesses' testimony is credible. *Williams* at ¶ 58; *State v. Clarke*, 10th Dist. No. 01AP-194 (Sept. 25, 2001).

{¶ 35} Because the jury is in the best position to determine the credibility of each witness by taking into account inconsistencies, as well as witnesses' manner and demeanor, we cannot conclude this record presents a scenario where the jury clearly lost its way such that a reversal of appellant's convictions is required. Consequently, we find appellant's convictions for CCW and WUD are not against the manifest weight of the evidence.

{¶ 36} Having concluded that appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence, we overrule appellant's third assignment of error.

IV. CONCLUSION

{¶ 37} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and McCORMAC, J., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
