

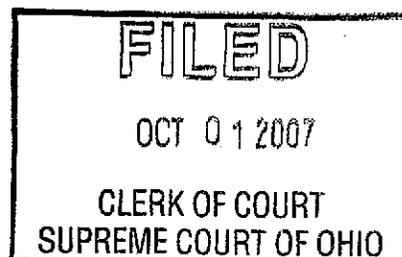
IN THE SUPREME COURT OF OHIO

STATE OF OHIO : Case No. **07-1802**
Plaintiff-Appellee : On Appeal from the Cuyahoga
County Court of Appeals, Eighth
-vs- : District Court of Appeals Case No.
88823
HOWARD CLAY :
Defendant-Appellant :

**NOTICE OF CERTIFIED CONFLICT
FILED ON BEHALF OF APPELLANT HOWARD CLAY**

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
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WILLIAM MASON, ESQ.
Cuyahoga County Prosecutor
BY: THORIN FREEMAN, ESQ. (0079999)
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Justice Center, 9th Floor
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COUNSEL FOR APPELLEE STATE OF OHIO



Notice of Certified Conflict

Appellant Howard Clay hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 88823 (2007-Ohio-4295) on September 4, 2007. The Eighth District Court of Appeals has certified the following question to the Ohio Supreme Court:

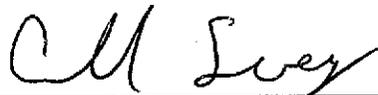
Whether knowledge of the pending indictment is required for a conviction for having a weapon while under disability pursuant to R.C. 2923.13(A)(3) when the disability is based on a pending indictment.

In so certifying the conflict, the Eighth District Court of Appeals has determined that its decision in this matter is in conflict with the Sixth Appellate District's decision in *State v. Burks*, Sandusky App. No. S-89-13, 1990 Ohio App. LEXIS 2500.

Pursuant to S.Ct.R.IV, Section 1, copies of the Eighth District Court of Appeals' order certifying the conflict and copies of all decisions determined to be in conflict have been attached hereto in the Appendix following the certificate of service.

Respectfully Submitted,

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender



Cullen Sweeney, Counsel of Record
Assistant Public Defender
Counsel for Appellant Howard Clay

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Certified Conflict was served upon William D. Mason, Esq., Cuyahoga County Prosecutor and/or upon a member of his staff, on this 19 day of September 2007.



Cullen Sweeney
Assistant Public Defender
Counsel of Record for Appellant

APPENDIX

Order of the Eighth District Court of Appeals certifying a conflict in *State v. Clay*, Cuyahoga App. No. 88823 (September 12, 2007)

Decision of the Eighth District Court of Appeals in *State v. Clay*, Cuyahoga App. No. 88823, 2007 Ohio 4295 (journalized September 4, 2007)

Conflicting Cases:

State v. Burks, Sandusky App. No. S-89-13, 1990 Ohio App. LEXIS 2500

LEXSEE 2007 OHIO 4295

**STATE OF OHIO, PLAINTIFF-APPELLEE vs. HOWARD CLAY,
DEFENDANT-APPELLANT**

No. 88823

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY**

2007 Ohio 4295; 2007 Ohio App. LEXIS 3837

August 23, 2007, Released

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-479292.

DISPOSITION: AFFIRMED.

COUNSEL: FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, BY: Thorin Freeman, Assistant Prosecuting Attorney, Cleveland, OH.

FOR APPELLANT: Robert L. Tobik, Cuyahoga County Public Defender, BY: Cullen Sweeney, Assistant Public Defender, Cleveland, OH.

JUDGES: BEFORE: McMonagle, P.J., Blackmon, J., and Boyle, J. MARY J. BOYLE, J. CONCURS. PATRICIA A. BLACKMON, J., CONCURS IN JUDGMENT ONLY.

OPINION BY: CHRISTINE T. McMONAGLE

OPINION

JOURNAL ENTRY AND OPINION

CHRISTINE T. McMONAGLE, P.J.:

[*P1] Defendant-appellant Howard Clay appeals his felonious assault and having weapons while under disability convictions. For the reasons that follow, we affirm.

[*P2] Appellant was indicted on April 6, 2006, on two counts of felonious assault and one count of having

weapons while under disability. Both felonious assault charges carried one- and three-year firearm specifications. The date of the offense was March 5, 2006. The alleged disability was that, at the time of the instant offense, appellant was under indictment in case number CR-468990 for a drug offense.

[*P3] After appellant waived his right to a jury trial, the case proceeded to trial before the [**2] court. At the conclusion of the State's case, the defense made a *Crim.R.* 29 motion for acquittal on the having a weapon while under a disability count. Counsel conceded that appellant had been indicted on August 4, 2005 on drug charges, but argued that the State did not present any evidence that appellant had notice of the indictment prior to the alleged use of the firearm in this case. The court overruled appellant's motion. Appellant was found guilty of all counts and specifications and sentenced to eight years.

[*P4] At trial, the victim, Christopher Graham, testified that just before midnight on March 5, 2006, he and some friends went to the Gin-Gin bar in Cleveland. One of the friends he was with was Charday Elmore. Graham testified that while at the bar, he had two beers and/or some Hennessy. At approximately 1:00 a.m., Graham and Elmore left the bar with a man named Ken, intending to go downtown.

[*P5] Elmore was their driver and got in the driver's seat of the car in which they were traveling. Graham got in the backseat. ¹ According to Graham, before he closed the door, an individual approached him, said "hey, my dude," pulled out a gun, and shot him in his right thigh for no apparent [**3] reason. He further testified that

after the shooter shot him, the shooter walked around the car and fired another shot at the car window. Graham testified that he did not know the shooter and had never seen him before.

1 Graham testified that he was seated on the passenger side of the car, while Elmore testified that Graham was seated on the driver side of the car. The record is also not clear about where Ken was.

[*P6] Elmore testified that as he was entering his vehicle and starting the engine, he heard two gunshots. He then heard Graham say that he had been shot. Elmore testified that appellant, who he knew from the neighborhood, then approached the driver side of the car and shot at his window. Elmore testified that he only knew appellant's first name, "Howard," and told the police his name when they arrived on the scene. The police report, however, refers to the suspect as "name unknown."

[*P7] The investigating detective, Larry Russell, testified that no gun was recovered, but Elmore's window was shattered and there was a hole in the back seat. Although Graham testified that drugs were not regularly sold around the area and denied that he sells drugs, Detective Russell described the area around [*P4] the Gin-Gin bar as plagued with significant drug activity. Graham admitted that he was arrested on four occasions between 2002 and 2005 for drug offenses and pled guilty in at least two of the cases.

[*P8] Two days after the shooting, Elmore visited Graham in the hospital. According to Graham, Elmore told him that a person named "Howard" shot him. Elmore, however, denied telling Graham the name of the shooter and said that he did not discuss the case with Graham at all during the visit.

[*P9] Detective Russell spoke with Graham a few days later and Graham told him that Elmore had identified "Howard" as the shooter. Detective Russell testified that he confirmed with Elmore that the shooter's name was "Howard," as well as the fact that Elmore did not know "Howard's" last name.

[*P10] Detective Russell explained that he ran the name "Howard" through the police's computer system and stopped his search when he found "Howard Clay," because "Howard Clay" lived four blocks from the

Gin-Gin bar. He then put together a photo array, which included appellant. The detective admitted that he also found several other people named "Howard" who lived in the area.

[*P11] Graham testified that upon being shown the photo array, [**5] he picked appellant "[a]lmost instantly." He testified that he saw the shooter's face for only seven seconds, but nevertheless got a good look at him. He described the shooter as bald, with a goatee, and as being "dirty and raggedly looking." Graham also said the shooter was wearing a hoodie and coat. He explained that, despite the hoodie, he could see that the shooter was bald because the hoodie covered only half of his head. Graham also identified appellant in court as the shooter.

[*P12] Elmore also identified appellant in court as the shooter. Elmore described that, at the time of the shooting, appellant was wearing a blue hoodie that was "all the way up" and blue jeans. Elmore testified that he got a good look at appellant after the second shot was fired. According to Elmore, appellant was the "neighborhood crackhead."

[*P13] After being arrested, appellant initially denied any knowledge of the incident, but later gave a written statement indicating that he was there, but did not shoot anybody, and did not know the shooter.

[*P14] In his first and second assignments of error, appellant contends that the State did not present sufficient evidence to sustain his having weapons while under disability [**6] conviction and the trial court misapplied the law in convicting him of the charge, respectively. In particular, he argues that although the State offered a copy of his August 4, 2005 indictment for a drug offense, it never presented any evidence that appellant was aware of the indictment.

[*P15] "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 (1991)*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia (1979)*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Under this standard, an appellate court does not conduct an exhaustive review of the record, or a comparative weighing of competing evidence, or speculation as to the credibility of any

witnesses. Instead, the appellate court presumptively "view[s] the evidence in a light most favorable to the prosecution." *Id.* "The weight to be given the evidence and the credibility of witnesses are primarily for the trier of the facts." *State v. DeHass (1967)*, 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus, [**7].

[*P16] *R.C. 2923.13*, governing having weapons while under disability, provides:

[*P17] "(A) Unless relieved from disability *** no person shall knowingly acquire, have, carry or use any firearm or dangerous ordnance, if any of the following apply:

[*P18] "****

[*P19] "(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 ***."

[*P20] Appellant acknowledges in his brief that this court, in *State v. Gaines (June 10, 1993)*, *Cuyahoga App. Nos. 62756 & 62757*, 1993 Ohio App. LEXIS 2925, held that a defendant does not have to have notice of his disability status for a having weapons while under disability conviction to stand. In *Gaines*, the defendant was arrested after an execution of a search warrant on January 22, 1991. The defendant was subsequently indicted in case number CR-262862 for drug abuse, possession of criminal tools and having weapons while under disability. This court noted that "[d]efendant was not present at the arraignment, apparently because the notices were never received by defendant." 1993 Ohio App. LEXIS 2925, at *2. On July 8, 1991, the defendant was arrested on his outstanding warrant. During [**8] a search of his hotel room, the police found a gun. The defendant was subsequently indicted for having weapons while under disability in case number CR-269492. In addressing the defendant's claim that his conviction for having a weapon while under a disability could not stand because he was unaware of the indictment, this court stated that "*R.C. 2923.13* only requires that defendant be under indictment, not that defendant have knowledge of the indictment." 1993 Ohio App. LEXIS 2925 at *9.

[*P21] We are aware that the Sixth Appellate District held that the State must prove that the defendant had knowledge of the indictment which served to create the disability under *R.C. 2923.13*. *State v. Burks (June*

22, 1990), *Sandusky App. No. S-89-13*, 1990 Ohio App. LEXIS 2500. While we are clearly in conflict with the Sixth District, we are nonetheless constrained to follow our own precedent. Resolution of this conflict is not ours.

[*P22] Appellant's first and second assignments of error are overruled.

[*P23] In his third assignment of error, appellant contends that his convictions were against the manifest weight of the evidence.

[*P24] Manifest weight is a question of fact. *State v. Thompkins*, 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541. If the trial court's judgment [**9] is found to have been against the manifest weight of the evidence, then an appellate panel may reverse the trial court. *Id. at 387*. Under this construct, the appellate court "sits as the 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony." *Id.*

[*P25] In a manifest weight analysis, an appellate court "reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and *** resolves conflicts in the evidence." *Thompkins at 387*. "A court reviewing questions of weight is not required to view the evidence in a light most favorable to the prosecution, but may consider and weigh all of the evidence produced at trial." *Id. at 390* (Cook, J., concurring). An appellate court may not merely substitute its view for that of the jury, but must find that "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." *Id. at 387*. See, also, *id. at 390* (Cook, J., concurring) (stating that the "special deference given in a manifest-weight review attaches to the conclusion reached by the trier of fact."). Accordingly, reversal on manifest weight [**10] grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id. at 387*.

[*P26] Appellant argues that the State's witnesses gave inconsistent descriptions of the assailant, and those inconsistencies render his convictions against the manifest weight of the evidence. Graham described the shooter as bald, with a goatee and as being "dirty and raggedly looking." Graham also said the shooter was wearing a hoodie and coat. He explained that, despite the hoodie, he could see that the shooter was bald because the hood covered only half of his head.

[*P27] Elmore described that, at the time of the shooting, appellant was wearing a blue hoodie that was "all the way up" and blue jeans. Elmore testified that he got a good look at the shooter after the second shot was fired. According to Elmore, appellant was the "neighborhood crackhead."

[*P28] We do not find those descriptions to be so inconsistent as to render the convictions against the manifest weight of the evidence. Further, both Graham and Elmore identified appellant in court as the shooter. Moreover, the court heard the supposed inconsistent descriptions of appellant, and was free to give credence to some, all, [**11] or none of them.

[*P29] Similarly, the court heard the other inconsistencies in the testimony (i.e., whether Graham and Elmore had a discussion at the hospital about the identity of the shooter, and whether Elmore told the police at the scene that the shooter was "Howard") and was free to give credence, or not, to whatever portions of the testimony, if any, it found credible. Those inconsistencies do not render appellant's conviction against the manifest weight of the evidence.

[*P30] We are also not persuaded by appellant's argument that Graham and Elmore colluded to "pin" this crime on appellant because he was allegedly homeless. There is no evidence in the record to support that allegation.

[*P31] Appellant's third assignment of error is overruled.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute [**12] the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*.

CHRISTINE T. McMONAGLE, PRESIDING
JUDGE

MARY J. BOYLE, J. CONCURS

PATRICIA A. BLACKMON, J., CONCURS IN
JUDGMENT ONLY

LEXSEE 1990 OHIO APP. LEXIS 2500

State of Ohio, Appellee v. William D. Burks, Appellant

No. S-89-13

Court of Appeals of Ohio, Sixth Appellate District, Sandusky County

1990 Ohio App. LEXIS 2500

June 22, 1990, Decided

PRIOR HISTORY: [*1] Trial Court No. 89 CR 87.

DISPOSITION: *JUDGMENT REVERSED.*

COUNSEL: John E. Meyers, prosecuting attorney, and Ronald J. Mayle, for appellee.

Jonathan G. Stotzer, for appellant.

JUDGES: Peter M. Handwork, P.J., George M. Glasser, J., Charles D. Abood, J., concur.

OPINION BY: ABOOD

OPINION

OPINION AND JOURNAL ENTRY

This is an appeal from a judgment of the Sandusky County Court of Common Pleas in which defendant-appellant, William D. Burks, was found guilty of one count of having weapons while under disability, in violation of *R.C. 2923.13*.

Appellant sets forth the following assignments of error:

"I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE'S MOTIONS FOR ACQUITTAL ON THE GROUNDS THAT THE PROSECUTION HAD FAILED TO MEET ALL THE PRIMA FACIE ELEMENTS OF AN OFFENSE UNDER *O.R.C. 2923.13*.

"II. THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO GIVE THE JURY THE

APPELLANT'S TRIAL COUNSEL'S REQUESTED JURY INSTRUCTION THAT SINCE THE DEFENDANT, WILLIAM BURKS, DID NOT TESTIFY, THE JURY COULD CONSIDER STATE'S EXHIBIT 3, THE INDICTMENT, ONLY FOR THE LIMITED PURPOSE OF SHOWING THE DEFENDANT WAS UNDER A DISABILITY ON OR ABOUT JANUARY 13, 1989, AND THAT THE JURY COULD NOT AND WOULD NOT [*2] CONSIDER IT FOR ANY OTHER PURPOSE (T2-88/20 - 89/10)"

The facts giving rise to this appeal are as follows. On January 13, 1989, appellant was being pulled over for speeding by Trooper Charles Linek of the Ohio Highway State Patrol when the trooper observed a gun drop from appellant's car and bounce along the shoulder of the road. The gun was retrieved from the berm of the road by a second trooper who had responded to a call for assistance by Linek and appellant was arrested. On February 6, 1989, an indictment was returned by the Sandusky County Grand Jury for one count of having weapons while under disability. Appellant was arraigned on February 7, 1989, and on March 14, 1989, the case proceeded to trial by jury.

At trial, the state offered the testimony of Troopers Charles J. Linek, Jr., Dennis J. Meyers and Dennis Jedel of the Ohio Highway State Patrol; Nancy Root, a deputy clerk of the Sandusky County Court of Common Pleas, and Thomas Fligor, a correctional officer with the Sandusky County Sheriff's Department.

Trooper Linek testified that, while traveling eastbound on the Ohio Turnpike, he observed a vehicle traveling at a high rate of speed. He further testified that as he [*3] proceeded to pull the car over he observed the driver, who he identified as appellant, lean over toward

the right passenger side and, at the same time that appellant's head disappeared from view, he observed the right passenger door open and a gun or what appeared to be a gun, drop from the car and bounce along the shoulder of the road. Trooper Linek stated that he then called for assistance, indicating the location of the firearm in his communication. Trooper Meyers testified that he responded and retrieved the firearm from the shoulder of the road. Appellant, who had identified himself as Timothy Burks, was then arrested and transported to the Sandusky County Sheriff's Department.

Nancy Root testified as to state's exhibit 3, which was a certified copy of an indictment that had been filed on July 28, 1988, and charged appellant with one count of possession of criminal tools and one count of drug abuse. (Case No. 88-CR-542) She testified that this indictment was pending on January 13, 1989, the date of appellant's arrest for this offense of having a weapon while under disability.

Thomas Fligor testified that appellant had been booked into the county jail on July 4, 1988, and an [*4] indictment had been returned (Case No. 88-CR-542) charging appellant with drug abuse.

At the end of the state's case, appellant moved for acquittal arguing that there was insufficient evidence to prove that appellant had possession of a firearm. The court denied appellant's motion and the defense rested without presenting any evidence. The jury returned a verdict of guilty and on March 15, 1989, appellant was sentenced to eighteen months to be served concurrently with the sentence imposed in case No. 88-CR-542. On March 22, 1989, appellant filed a timely notice of appeal.

In his first assignment of error, appellant argues that the trial court erred in denying the motion for acquittal made at the end of the state's case. Specifically, appellant argues that the state failed to prove that the alleged conduct of appellant in acquiring, carrying or using a firearm, occurred while he was knowingly under a disability. Appellant contends that no evidence was presented that, at the time of arrest, he had been served with or had any knowledge of an indictment which would result in a disability. The state responds that notice or knowledge of a disability is not an essential element of *R.C. [*5] 2923.13*.

At the outset, this court notes that the issue of whether or not appellant had knowledge of a disability

was not addressed in the trial court. The issue argued by appellant in his motion for acquittal was rather whether or not appellant knowingly possessed a firearm. The general rule is that an appellate court can consider only such errors as were preserved in the trial court. See, generally, *State v. Glaros (1960)*, 170 *Ohio St.* 471; *State v. Childs (1968)*, 14 *Ohio St.* 2d 56; *State v. Williams (1977)*, 51 *Ohio St.* 2d 112. In the interests of justice, however, this court will consider this issue.

R.C. 2923.13 provides, in pertinent part, as follows:

"(A) Unless relieved from disability * * * no person shall knowingly acquire, have, carry or use any firearm or dangerous ordnance, if any of the following apply:

* * *

"(3) Such 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 * * *."

R.C. 2923.13 does not expressly require notice or knowledge of the disability as an essential element of an offense charged [*6] thereunder.

In *State v. Winkleman (1981)*, 2 *Ohio App.* 3d 465, the Clermont County Court of Appeals stated:

"We find that, in order to obtain a conviction under *R.C. 2923.13(A)(2)*, when the disability stems *solely from prior indictment* for a felony of violence, the state must prove that the defendant had been given notice of its status as a member of the restricted class under *R.C. 2923.13*. The burden is not great, as the arraigning judge could easily incorporate such notice into his general instructions at the time of arraignment. Likewise, such notice could accompany the service of the indictment itself.

"Without such a requirement, it would be possible for an indictment to be outstanding against an individual without his knowledge. Thus, before even being served with the indictment, such person would already be under disability and subject to the penalties of *R.C. 2923.13*."

While it does not appear that this issue has otherwise been addressed in Ohio, we do find the court's analysis in *Winkleman, supra*, persuasive. For the reasons set forth therein this court finds that, in order to obtain a

conviction under *R.C. 2923.13* when the disability stems solely [*7] from a prior indictment, the state must prove that the defendant had been given notice of his status as a member of a restrictive class under *R.C. 2923.13*. We note, however, that this finding is limited to those cases in which a pending indictment rather than a conviction serves as a basis for the disability; no separate notice is required where the underlying disability is based upon a former conviction since the conviction itself puts the defendant on notice. See *State v. Thurairatnam* (Apr. 10, 1984), Darke App. No. 1091, unreported.

In this case, appellant's conviction for having a weapon while under disability was based solely on the indictment for drug abuse, although there is no evidence in the record to show that appellant had any notice of that prior indictment. While the correctional officer from the Sandusky County Sheriff's Department testified that appellant was booked into the county jail on July 4, 1988, and subsequently indicted for drug abuse and a deputy clerk of the Sandusky County Court of Common Pleas testified that an indictment for drug abuse was pending at the time of appellant's arrest on January 13, 1989, no evidence was presented that this indictment [*8] was ever served on appellant or that appellant was ever arraigned on it. There is no evidence that, at the time of appellant's arrest on the current charge of having a weapon while under disability or at any time prior to that arrest, appellant had any knowledge that he had been indicted for an offense which, under *R.C. 2923.13*, would result in a disability. Upon consideration of the foregoing, this court finds that appellant's first assignment of error is well-taken.

In his second assignment of error, appellant contends that the trial court erred in failing to instruct the jury that state's exhibit 3 may only be considered for the limited purpose of establishing the existence of a disability.

Crim. R. 30 provides, in pertinent part, as follows:

"(B) At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility

and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case."

Action by the trial court pursuant to *Crim. R. 30(B)* is discretionary and should not be disturbed on review unless the [*9] court abuses its discretion. *State v. Frost* (1984), 14 Ohio App. 3d 320. See, also, *State v. Guster* (1981), 66 Ohio St. 2d 266.

In this case, appellant was charged with having a weapon while under disability. To establish the alleged disability, the prosecutor introduced state's exhibit 3, an indictment of a prior offense and testimony that the offense was still pending at the time of appellant's arrest. After the court's final instructions to the jury, defense counsel requested the following instruction:

"The indictment, or copy of the indictment which had been marked as state's exhibit 3, be considered by the jury only for the limited purpose of showing that the defendant was under disability on or about January 13, 1989, and that it would not be considered, or could not be considered by the jury for any other purpose."

This request was overruled by the court.

Upon consideration of the particular facts and circumstances of this case as set forth above, we find the trial court did abuse its discretion in failing to instruct the jury as requested by defense counsel. The requested instruction was sound in law and appropriate to the facts of this case. It [*10] was unreasonable for the court to refuse such instruction. Accordingly, appellant's second assignment of error is found well-taken.

On consideration whereof, this court finds substantial justice has not been done the party complaining, and the judgment of the Sandusky County Court of Common Pleas is reversed and appellant is hereby ordered discharged. It is further ordered that appellee pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. See also Supp. R. 4, amended 1/1/80.