

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

HOWARD CLAY

Appellant

07-1852

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 88823

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT HOWARD CLAY

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: CULLEN SWEENEY, ESQ. (COUNSEL OF RECORD)
0077187
Assistant Public Defender
310 Lakeside Avenue
Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX
cswweeney@cuyahogacounty.us

COUNSEL FOR APPELLANT,

WILLIAM MASON, ESQ.
Cuyahoga County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO



TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL AND PUBLIC INTEREST	1
STATEMENT OF THE CASE AND FACTS	3
LAW AND ARGUMENT	4
<i>Proposition of Law I: Knowledge of the disabling condition (e.g .a pending indictment for a drug offense) is an essential element of having a weapon while under disability.</i>	4
<i>Proposition of Law II: As a matter of due process, a criminal defendant may not be convicted of having a weapon while under disability unless he has received notice of the disabling condition.....</i>	6
CONCLUSION.....	10
SERVICE	10
APPENDIX	
Opinion – Eighth District Court of Appeals <i>State v. Howard Clay</i> (2007-Ohio-4295)	

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GREAT GENERAL
AND PUBLIC INTEREST:**

Defendant Howard Clay was convicted of having a weapon while under disability based on a pending indictment, despite the absence of *any* evidence that he was aware of the pending indictment. In affirming his conviction, the Eighth District held that the lack of notice and/or knowledge of the pending indictment did not preclude a conviction based on that unknown disability. *State v. Clay*, Cuyahoga App. No. 88823, 2007 Ohio 4295, ¶¶ 20-21. The Eighth District's interpretation of the weapon under disability statute potentially imposes "criminal sanctions on a class of persons whose mental state . . . makes their actions entirely innocent." *Staples v. United States* (1994), 511 U.S. 600, 614-15. Such a construction offends basic principles of fairness and due process and provides a chilling effect on the fundamental right to bear arms protected by the Second Amendment of the United States Constitution and Article I, Section 4 of the Ohio Constitution. This Court should accept this case to decide these fundamental questions and resolve a conflict within Ohio's appellate districts.

Although this Court has previously analyzed the pending indictment portion of the weapons under disability statute, it did not reach the precise issues raised by this case. *See State v. Taniguchi*, 74 Ohio St 3d 154. In *Taniguchi*, this Court held that a conviction for having a weapon while under disability is "not precluded when there is an acquittal on, or dismissal of, the indictment which had formed the basis for the charge of having a weapon while under disability." *Id.* at syllabus. In reaching that conclusion, this Court noted that appellant did not argue that he had insufficient notice of the indictment and that therefore the case presented no issues of notice for review. *Id.* at 156, n.1. This Court should accept this case to answer the question left unresolved by *Taniguchi*.

The need for this Court's guidance regarding these issues is particularly acute given the conflict that has developed among the appellate districts. While the Eighth District has held that lack of knowledge/notice of a pending indictment does not preclude a conviction for having a weapon under disability, *State v. Clay*, Cuyahoga App. No. 88823, 2007 Ohio 4295 ("Opinion Below"), the Sixth District has reached the opposite conclusion. In *State v. Burks*, the Sixth District held that a defendant may not be conviction of having a weapon while under disability when the disabling condition is a pending indictment unless the defendant has knowledge of that indictment. Sandusky App. No. S-89-13, 1990 Ohio App. LEXIS 2500, *7-8. Indeed, the Eighth District Court of Appeals has already certified this conflict, and it is pending before this Court, see *State v. Clay*, Case No. 2007-1802.

The Eighth District's construction of R.C. 2923.13(A)(3) criminalizes conduct that may be perfectly legal (possession of a gun) by virtue of a fact (existence of an indictment) of which defendants may well be unaware. By eliminating the element of criminal intent and discounting any notice requirement, the Eighth District has departed from "the usual presumption that a defendant must know the facts that make his conduct illegal." *Staples*, 511 U.S. at 618-19. Our system of criminal justice is predicated on the duty of individuals to choose between right and wrong and the fundamental belief that "an injury can amount to a crime only when inflicted by intention." *Liparota*, 471 U.S. at 425-26. Whether the criminal statute in this case requires a departure from such venerable principles is a question worthy of this Court's attention.

STATEMENT OF THE CASE AND FACTS

On April 6, 2006, Defendant Howard Clay was indicted with two counts of felonious assault (counts one and two) and one count of a having weapon while under disability (count three). Both felonious assault charges carried one and three-year firearm specifications. The alleged disability in count three was that Mr. Clay was, at the time of the alleged felonious assault offense, under indictment for an illegal drug offense (CR 468990).

During a bench trial, the State presented evidence that Mr. Clay shot a stranger in the right thigh. Accordingly to the victim, he was getting into his friend's car outside a bar, at 1:00 a.m. on March 6, 2006, when an individual approached him, said "hey, my dude," shot him, and ran away. Although the victim had never seen the shooter before that night and only viewed him for a total of "[s]even seconds," he identified Clay as the assailant.

The State also presented evidence at trial that Clay had been indicted on drug offenses on August 4, 2005, approximately eight months *prior* to the shooting. The State did not, however, present any evidence that Mr. Clay was aware of that indictment. Indeed, Clay was not arraigned on the August 4, 2005 indictment until ten days *after* the March 6th shooting.

At the close of evidence, the trial court found Mr. Clay guilty of all charges and specifications, but concluded that the felonious assault charges merged with each other and that the firearm specifications merged a single three-year firearm specification. The trial court then sentenced Clay to an aggregate prison sentence of eight years.

Mr. Clay filed a timely appeal with the Eighth District Court of Appeals. On appeal, he raised three assignments of error challenging his convictions. On August 23, 2007, the Eighth District affirmed his convictions, while recognizing the existence of a conflict with a Sixth

District decision. Opinion Below at ¶¶ 1 and 21. Mr. Clay filed a motion to certify a conflict.

The Eighth District granted that motion and certified the following conflict to this 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.

Mr. Clay then filed a notice of certified conflict with this Court, *State v. Clay*, Case No. 2007-1802.

LAW AND ARGUMENT

Proposition of Law I: Knowledge of the disabling condition (e.g. a pending indictment for a drug offense) is an essential element of having a weapon while under disability.

Howard Clay's conviction for having a weapon while under disability is not supported by sufficient evidence because the State failed to establish, beyond a reasonable doubt, that he had knowledge of the indictment for drug offenses which served as the basis for his firearm disability under R.C. 2923.13(A)(3). See *Jackson v. Virginia* (1979), 443 U.S. 307, 319; see also *State v. Jenks* (1991), 61 Ohio St. 3d 259, paragraph two of the syllabus.

A. R.C. 2923.13(A)(3)—Possession of a Firearm While Under Indictment for a Drug Offense

In count three, Mr. Clay was charged with having a weapon while under disability pursuant to R.C. 2923.13(A)(3) which provides, in pertinent part, that “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 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.

In this case, the specific basis of the alleged disability was that Mr. Clay had been indicted for drug possession and drug trafficking on August 4, 2005 (CR 468990). Although the State presented evidence that Clay had been indicted for a drug offense, it failed to present any evidence that Mr. Clay knew he was under indictment for the drug offenses. Mr. Clay was not arraigned on the drug offenses until ten days after he was arrested in the instant case. Moreover, the record is devoid of evidence that Clay was otherwise aware of the indictment. The question presented in this proposition of law is whether such a failure is fatal to the State's case such that it requires the reversal of Mr. Clay's conviction on sufficiency grounds.

B. Knowledge of the Pending Indictment Is an Essential Element of R.C. 2923.13(A)(3).

R.C. 2923.13(A)(3) prohibits, among other things, individuals from knowingly having a firearm while under indictment for a drug offense. A "normal, commonsense reading of a subsection of a criminal statute introduced by the word 'knowingly' is to treat that adverb as modifying each of the elements of the offense identified in the remainder of the subsection." *United States v. X-Citement Video, Inc.* (1994), 513 U.S. 64, 79 (Stevens, J. concurring). Applying such a commonsense reading to R.C. 2923.13(A)(3) illustrates that "knowingly" modifies the "under indictment" element of the offense. Thus, the State must prove Clay *knew* he was under indictment at the time he had the firearm in order to obtain a conviction. Because it failed to do so, Clay's conviction is not supported by sufficient evidence.

In rejecting Clay's contention that knowledge of the indictment is an essential element of the offense, the Eighth District simply followed its prior precedent in *State v. Gaines*, Cuyahoga App. Nos. 62756 & 62757, 1993 Ohio App. LEXIS 2827. *Gaines*, however, offered no explanation and cited no authority for its reading of the statute. It merely stated that the statute "only requires that defendant be under indictment, not that defendant have knowledge of the

indictment.” *Gaines*, 1993 Ohio App. LEXIS 2827, *9. The Eighth District’s holding is at odds with all other districts which have considered the issue and have emphasized the critical importance of a defendant’s awareness that he was under indictment. *See e.g. State v. Toddy*, Ashtabula App. No. 2000-A-0004, 2001 Ohio App. LEXIS 1549, *5-13 (Eleventh District); *State v. Quiles*, Lorain App. No. 92CA005316, 1993 Ohio App. LEXIS 649, *2-4 (Ninth District); *State v. Schilling*, Tuscarawas App. No. 2000AP040034, 2000 Ohio App. LEXIS 4340, *11 (Fifth District); *State v. Frederick*, Butler App. Nos. CA88-07-111 and CA88-07-118, 1989 Ohio App. LEXIS 2827, *9 (Twelfth District); *State v. Burks*, Sandusky App. No. S-89-13, 1990 Ohio App. LEXIS 2500, *7-8 (Sixth District). Indeed, in *Burks*, a case directly on point, the Sixth District reversed a conviction when, as here, the record contained no evidence that the defendant was aware of the indictment which is what made possession of the weapon illegal. 1990 Ohio App. LEXIS 2500, at *7-8.

The prevailing view of the statute makes clear that a defendant cannot be convicted of R.C. 2923.13 when the basis of the disability is a pending indictment *unless* the record contains evidence that the defendant was aware of that indictment. Such a reading of the statute makes good sense. Without knowledge of the indictment, the defendant may well be engaging in conduct that would otherwise be perfectly legal. *Cf. Schilling*, 2000 Ohio App. LEXIS 4340, *11. When the defendant is unaware of the underlying facts which serve to create a disability (i.e. the existence of a pending indictment), a conviction based on that disability is, as discussed in his second proposition of law, also inconsistent with principles of due process.

Proposition of Law II: *As a matter of due process, a criminal defendant may not be convicted of having a weapon while under disability unless he has received notice of the disabling condition.*

By convicting Mr. Clay of having a weapon under disability despite the State’s failure to prove that Clay was aware of the predicate fact leading to the disability (pending indictment), the

trial court improperly alleviated the State of its burden of proof by eliminating the need to prove criminal intent. Under the trial court's construction of R.C. 2923.13(A)(3) as applied to this case, conduct that may be perfectly legal (possession of a gun) is criminalized by virtue of a fact (existence of an indictment) of which the defendant is unaware. In other words, the State can obtain a conviction without demonstrating criminal intent and even if the defendant is unaware of the predicate facts that render unlawful his otherwise legal conduct. Such a construction of R.C. 2923.13(A)(3) violates the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

A. Due Process Violation: Eliminating the Element of Criminal Intent

Due Process under the Fourteenth Amendment requires the State to prove the predicate facts necessary to establish criminal intent or *scienter*. *Morrisette v. United States* (1951), 342 U.S. 246, 271 and 275-76 (explaining that the defendant should not be precluded from arguing that he did not “knowingly convert[]” because he believed the property was abandoned); *see also Liparota v. United States* (1985), 471 U.S. 419, 420-21 and 433-34 (explaining that the government must prove that the defendant “knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulation” to convict him or her of food stamp fraud); *Staples*, 511 U.S. at 614-15 (explaining that the government must prove the defendant “knew the weapon he possessed brought it within the statutory definition of a machinegun.”)

It is well-established that “existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Staples*, 511 U.S. at 605 (quoting *United States v. Gypsum* (1978), 438 U.S. 422, 436). As explained by the United States Supreme Court:

The law condemns the imposition of criminal punishment, particularly imprisonment on the basis of strict liability. ‘The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.’

Liparota, 471 U.S. at 425-26 (quoting *Morrisette*, 342 U.S. at 250). In light of these fundamental principles, the Court has explained that offenses without a *mens rea* are “generally disfavored” and that statutes should not be construed “to dispense with *mens rea* where doing so would criminalize a broad range of apparently innocent conduct.” *Staples*, 511 U.S. at 610.

The United State’s Supreme Court’s analysis in *Staples* is particularly instructive and applicable to the instant case. In *Staples*, the defendant was charged with possession of an improperly registered machinegun under the National Firearms Act. *Id.* at 602. The trial court instructed the jury that the Government need not prove that defendant knew the weapon he possessed had the characteristics which made it a machinegun. *Id.* at 602-604. The Supreme Court rejected the trial court’s construction of the statute because it potentially imposes “criminal sanctions on a class of persons whose mental state – ignorance of the characteristics of weapons in their possession – makes their actions entirely innocent.” *Id.* at 614-15. Even though the statute was itself silent concerning the *mens rea* required for a conviction, the Court concluded that “the usual presumption that a defendant must know the facts that make his conduct illegal should apply.” *Id.* at 618-19. Accordingly, the Court held that, to obtain a conviction, the Government should have been required to prove that the defendant *knew* the features of the weapon brought it within the scope of the Act. *Id.* at 619.

Applying *Staples* in the instant case compels reversal of Clay’s conviction for having a weapon while under disability. A knowing possession/use of a weapon while under a disability requires more than simply the knowledge that the defendant possessed/used a weapon; rather, it

requires knowledge of the facts (pendency of the indictment) that made the possession/use of the weapon illegal. Just as the Government had to prove that Staples knew that the weapon he possessed had characteristics that made its possession illegal, the State, in this case, had to prove that Clay knew he was under indictment and therefore that his possession of the gun was illegal. While Mr. Clay is presumed to know the underlying *law* that he cannot possess a firearm while under indictment for drug trafficking, the State *must* prove the underlying *fact* that Mr. Clay knew he had been indicted for that offense. He cannot be presumed to have known that a grand jury, prior to his offense conduct in the instant case, had convened in secret and returned a true bill of indictment charging him with a drug trafficking offense.

When, as here, intent of the accused “is an ingredient of the crime charged, its existence is a question of fact” which must be proved by the State and found by a trier of fact. *Morissette*, 342 U.S. at 274. A conclusive presumption which effectively eliminates criminal intent necessarily conflicts “with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.” *Id.* at 275. As explained by the United States Supreme Court:

The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

Id. at 263. By relieving the State of its burden of proving that Mr. Clay was aware of the pending indictment, the trial court established a conclusive presumption offensive to due process.

B. Due Process Violation: Lack of Notice

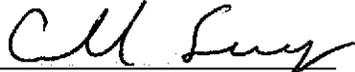
In addition to removing the State's burden of proving criminal intent, the trial court's construction of R.C. 2923.13(A)(3) also violated another touchstone of due process. “Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to

be informed as to what the State commands or forbids.” *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162. Because our system of criminal justice is based on the assumption that individuals are capable of choosing between lawful and unlawful conduct, due process requires that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109. If the Eighth District’s construction of R.C. 2923.13(A)(3) is upheld, individuals may well be convicted despite lacking the information necessary to conform their conduct to what the law requires. Such a law carries the very real risk of “trap[ping] the innocent by not providing fair warning.” *Id.* Due process cannot countenance such an outcome.

CONCLUSION

For the foregoing reasons, Defendant-Appellee Howard Clay respectfully asks this Court to accept jurisdiction over this matter as it presents substantial constitutional questions for review.

Respectfully Submitted,


 CULLEN SWEENEY, ESQ.
 Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum In Support of Jurisdiction was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 5 day of October, 2007.


 CULLEN SWEENEY, ESQ.
 Counsel for Appellant

Judge Ambrose

SEP - 4 2007

m(mci)

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

FILED
SEP 07 2007
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

JOURNAL ENTRY AND OPINION
No. 88823

**FEE
3
TAXED**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

HOWARD CLAY

A511963

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

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

BEFORE: McMonagle, P.J., Blackmon, J., and Boyle, J.

RELEASED: August 23, 2007

JOURNALIZED: SEP - 4 2007

CA06088823

47417549



VOL 642 #00473

ATTORNEY FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Thorin Freeman
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

ATTORNEY FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender

BY: Cullen Sweeney
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113

**FILED AND JOURNALIZED
PER APP. R. 22(E)**

SEP 4 - 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

AUG 23 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

CA06088823

47163760



N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

CHRISTINE T. McMONAGLE, P.J.:

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

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.

After appellant waived his right to a jury trial, the case proceeded to trial before the 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.

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.

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 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.

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."

¹Graham 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.

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 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.

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.

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.

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.

Graham testified that upon being shown the photo array, 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.

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."

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.

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 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.

“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.

R.C. 2923.13, governing having weapons while under disability, provides:

“(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) 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 ***.”

Appellant acknowledges in his brief that this court, in *State v. Gaines* (June 10, 1993), Cuyahoga App. Nos. 62756 & 62757, 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.” *Id.* at 2. On July 8, 1991, the defendant was arrested on his outstanding warrant. During 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.” *Id.* at 9.

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. 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.

Appellant's first and second assignments of error are overruled.

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

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 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.*

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 grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” Id. at 387.

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.

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.”

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, or none of them.

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.

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.

Appellant's third assignment of error is overruled.

Affirmed.

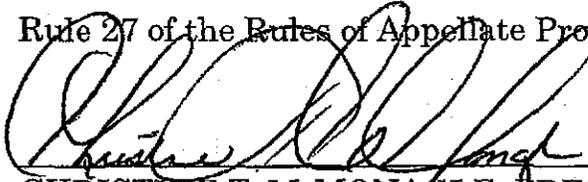
It is ordered that appellee recover from appellant costs herein taxed.

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 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