

IN THE OHIO SUPREME COURT
Case Nos. 2007-1802 and 2007-1852

STATE OF OHIO :
 :
 Plaintiff-Appellee :
 :
 vs. :
 :
 HOWARD CLAY :
 :
 Defendant-Appellant :

On Appeal and Notice of Certified
Conflict from the Cuyahoga County
Court of Appeals, Eighth District
Case No. 88823

APPELLANT'S MERIT BRIEF

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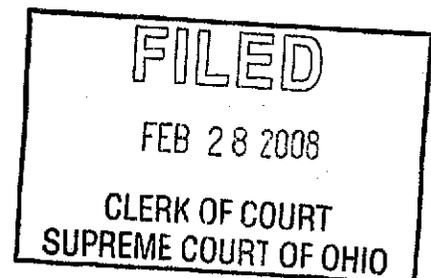


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STATEMENT OF THE CASE AND FACTS

This case raises the question of whether or not an individual can be convicted of having a weapon under disability when the disability is based on a pending indictment and the State failed to demonstrate that the defendant had notice and/or knowledge of that indictment.

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 a weapon while under disability (Count Three). Each felonious assault charge carried one-year and three-year firearm specifications. The disability, alleged in Count Three, was that Mr. Clay, at the time of the alleged felonious assault offense, was under indictment for an illegal drug offense.

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. (Tr. at 33-34, 59-60, and 119). Although the victim had never seen the shooter before that night and only viewed him for a total of "[s]even seconds," he ultimately identified Clay at trial as the assailant. (Tr. at 38, 51, 58, 66-67, and 70).

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. (Tr. at 134). The State did not, however, present any evidence that Mr. Clay was aware of that indictment at the time of the shooting. Indeed, Clay was not arraigned on the August 4, 2005 indictment until ten days *after* the March 6th shooting. (Tr. at 137).

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 into 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 the following three assignments of error:

ASSIGNMENT OF ERROR I: Appellant's conviction for having a weapon while under disability is not supported by sufficient evidence as required by state and federal due process.

ASSIGNMENT OF ERROR II: Appellant's conviction for having a weapon while under disability violates due process when the disability is based on a pending indictment of which the defendant is unaware.

ASSIGNMENT OF ERROR III: Appellant's convictions of felonious assault and having a weapon under disability are against the manifest weight of the evidence.

On August 23, 2007, the Eighth District affirmed his convictions, though it recognized the existence of a conflict with a Sixth District decision regarding the resolution of Clay's first and second assignments of error. *State v. Clay*, Cuyahoga App. No. 88823, 2007 Ohio 4295, ¶¶ 1 and 21 ("Opinion Below"). Mr. Clay filed a motion to certify a conflict. After the Eighth District granted the motion and certified the conflict, Mr. Clay filed a notice of certified conflict with this Court. *State v. Clay*, Case No. 2007-1802. While his notice of certified conflict was still pending with this Court, he also filed a memorandum in support of jurisdiction, raising two propositions of law. *State v. Clay*, Case No. 2007-1852.

On December 26, 2007, this Court determined that a conflict existed and ordered briefing on the following issue:

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.

That same day, this Court also accepted Mr. Clay's discretionary appeal to address the following propositions of law raised by his jurisdictional memorandum:

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.

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.

Because the certified conflict and propositions of law are interrelated, this Court ordered consolidated briefing on the issues raised by both.

Mr. Clay's consolidated merit brief follows.

SUMMARY OF ARGUMENT

The central issue before this Court is whether a defendant can be convicted of having a weapon while under disability when he or she is unaware of the factual basis for the disability (i.e. a pending indictment). Mr. Clay submits that such a conviction is improper for two reasons. First, as a matter of statutory construction, knowledge of the factual basis for the disability is an essential element of the offense. Second, due process requires that a defendant have notice of factual basis for the disability and that the State prove that the defendant acted with criminal intent.

Finally, if this Court concludes that Clay's conviction for having a weapon while under disability must be vacated, it must then determine whether to remand the case for resentencing on Clay's remaining convictions. Although this Court has held that a sentencing error with respect to one conviction does not affect sentences for other convictions in a multi-offense case, see *State v. Saxon* (2006), 109 Ohio St. 3d 176, 179-82, the reversal of a *conviction* in a multi-offense case *does* require a new sentencing hearing on the remaining convictions because a trial court is statutorily required to consider a defendant's entire criminal history in imposing a sentence for any one conviction.

ARGUMENT

This Court should adopt the following propositions of law:

1. 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. (Answer to Certified Question).
2. 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. (Proposition of Law I).
3. 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. Appellant Cannot Be Convicted of Having a Weapon While Under Disability Unless He Was Aware of the Pending Indictment.

- A. Appellant's conviction for having a weapon while under disability must be vacated because the State failed to prove that appellant had knowledge of the pending indictment. (Certified Question and Proposition of Law I)*

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 a pending 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.

The essential facts are not in dispute. Clay was charged with having a weapon while under disability pursuant to R.C. 2923.13(A)(3) based on a pending indictment for a drug offense. Clay had been indicted for drug possession and drug trafficking prior to the shooting on March 6, 2006. (Tr. at 134). However, the State did not present any evidence that appellant knew he was under indictment for the drug offenses at the time of the shooting. Indeed, appellant was not arraigned on the drug offenses until ten days after the shooting. (Tr. at 137).

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 knowledge of the pending indictment, which served as the factual basis for appellant's disability, is an essential element of the offense which the State must prove beyond a reasonable doubt to obtain a conviction.

R.C. 2923.13(A)(3) 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 other words, R.C. 2923.13(A)(3) includes being "under indictment for" a drug offense as a disabling condition that makes it illegal for an individual to "acquire, have, carry, or use" a firearm. The question is whether R.C. 2923.13(A)(3) requires the State to prove that a defendant had knowledge of the pending indictment to obtain a conviction for having a weapon while under disability when the indictment serves as the basis for the disability.

R.C. 2923.13(A)(3) unambiguously requires the State to prove knowledge of the pending indictment. When, as here, "the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply the rules of statutory interpretation." *Silver Lake v. Metro Reg'l Transit Auth.* (2006), 111 Ohio St. 3d 324, 326; *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. "An unambiguous statute is to be applied, not interpreted." *Sears*, 143 Ohio St. 312 at paragraph five of the syllabus. A "normal, commonsense reading" of a subsection of a criminal statute, like R.C. 2923.13(A)(3), "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 both the act of acquiring, having, carrying, or using a firearm and the “under indictment” elements of the offense. Thus, in order to obtain a conviction, the State must prove not only that appellant knowingly acquired/used a firearm but also that he did so *knowing* that he was under indictment at the time.

Even if this Court were to find R.C. 2923.13(A)(3) to be ambiguous, it must apply the rule of lenity in construing the statute. *State v. Arnold* (1991), 61 Ohio St. 3d 175, 178. The rule of lenity provides that statutes defining criminal offenses must be strictly construed against the State and liberally construed in favor of the appellant. R.C. 2901.04(A). Applying the rule of lenity to this case and strictly construing R.C. 2923.13(A)(3) against the State, an individual only violates the statute if he or she was aware of the existence of a prior indictment.

In rejecting appellant’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 construction of the statute is not only at odds with the plain language of the statute and the rule of lenity but also criminalizes conduct that is otherwise perfectly legal and indeed constitutionally protected (possession of a gun) by virtue of a fact (existence of an indictment) of which defendants are unaware. *Cf. State v. Schilling*, Tuscarawas App. No. 2000AP040034, 2000 Ohio App. LEXIS 4340, *11; *see also State v. Burks*, Sandusky App. No. S-89-13, 1990 Ohio App. LEXIS 2500, *7-8 (Sixth District). 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 v. United States* (1994), 511 U.S. 600, 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 v. United States* (1985), 471 U.S. 419, 425-26. In light of these fundamental principles, the United States Supreme 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 States’ 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 that 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 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 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.

In short, when the disabling condition is based on a pending indictment, the State must prove, as an essential element of R.C. 2923.13(A)(3), that the defendant was aware of that indictment at the time he acquired/used the gun. Because the State failed to do so in this case, Clay's conviction is based on legally insufficient evidence and must be vacated.

B. Appellant's conviction for having a weapon while under disability absent proof of criminal intent or without notice of the underlying disability constitutes a violation of his due process rights. (Proposition of Law II)

By convicting Clay of having a weapon under disability despite the State's failure to prove that appellant 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 and by permitting a conviction based on a fact (pendency of the indictment) of which he had no notice. Under the lower court's construction of R.C.

2923.13(A)(3), conduct that may be perfectly legal and is indeed constitutionally protected (possession of a gun) is criminalized by virtue of a fact (existence of a pending 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.

1. The Eighth District's Interpretation of R.C. 2923.13(A)(3) Improperly Eliminates the State's Burden of Proving Criminal Intent.

Due Process under the Fourteenth Amendment requires the State to prove the predicate facts necessary to establish criminal intent or *scienter*. *Morissette 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*, 471 U.S. at 20-21 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).

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 *Morissette*, 342 U.S. at 250). 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 appellant was aware of the pending indictment, the Eighth District established a conclusive presumption offensive to due process.

2. The Eighth District’s Interpretation of R.C. 2923.13(A)(3) Violates Appellant’s Due Process Right to Notice.

In addition to removing the State’s burden of proving criminal intent, the Eighth District’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 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. Basic fairness requires that an individual not be held criminally responsible for conduct (possession of weapon) that is constitutionally protected by the Second Amendment of the United States Constitution and Article I, Section 4 of the Ohio Constitution and that would have been perfectly legal except for a fact of which he was unaware.

Indeed, appellate courts, other than the Eighth District, that have upheld convictions of having a weapon while under disability based on a pending indictment have seized and relied upon the fact that the State had proven the defendant knew 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) (noting that defendant “knew of the prior indictment”); *State v. Schilling*, 2000 Ohio App. LEXIS 4340, *11 (Fifth District) (justifying its conclusion on the basis that “the indictment itself should alert a defendant to potential restrictions on his otherwise normal, lawful activity”); *State v. Frederick*, Butler App. Nos. CA88-07-111 and CA88-07-118, 1989 Ohio App. LEXIS 2827, *9 (Twelfth District) (conviction requires proof that defendant was “aware he was under indictment.”) In *Toddy*, the case relied on by the trial court in this case, the Eleventh District explained:

It is significant that appellant is not claiming he did not know he had been indicted. Rather, his claim is that he had no notice that being under indictment creates the disability restriction now at issue. The facts are clear that appellant knew he had been indicted.

Toddy, 2001 Ohio App. LEXIS 1549, at *5-6.

II. Remedy: Appellant Must Be Resentenced on His Remaining Counts of Conviction.

If this Court vacates Clay's weapon under disability conviction, it must also vacate his sentence on the felonious assault charges because the trial court necessarily considered Clay's weapon under disability conviction in fashioning its sentence on the remaining charges. *State v. Foster*, Franklin App. No. 07AP-419, 2007 Ohio 6279, ¶ 51 (remanding a multi-conviction case for resentencing when one of the convictions was vacated on appeal).

In sentencing Clay on the felonious assault charges, the trial court was required to consider, among other things, Clay's other criminal convictions, including his conviction for having a weapon while under disability, as an indicator of potential recidivism (i.e. likelihood to commit future crimes). R.C. 2929.12(D)(2) & (3). Consistent with these sentencing provisions, trial courts routinely enhance a defendant's sentence on a particular offense because of his or her other criminal convictions, because those convictions are indicative of his or her likelihood to recidivate. Indeed, a defendant's recidivism is "a traditional, if not the most traditional basis, for a sentencing court's increasing an offender's sentence." *Almendarez-Torres v. United States* (1998), 523 U.S. 224, 243. Because a defendant's other convictions are a sentencing factor considered by the trial court in fashioning a sentence for a particular conviction, vacating one of these convictions requires the trial court to resentence the defendant on the remaining convictions in a multi-offense case.

Although the State may suggest that this Court's decision in *State v. Saxon* (2006), 109 Ohio St. 3d 176 compels a different conclusion, *Saxon* is inapposite and its logic inapplicable. *Saxon* did *not* involve a situation where a defendant had been convicted of multiple offenses and one of those convictions was vacated on appeal. Rather, *Saxon* involved a case where a defendant had been convicted and sentenced for multiple offenses and the sentence for one of the

convictions was vacated on appeal. 109 Ohio St. 3d at 177-78. The distinction between vacating a conviction and vacating a sentence is one of legal significance.

In *Saxon*, this Court held that, “based upon an appealed error in the sentence for a single offense,” an appellate court may only modify, remand, or vacate the sentence for the offense challenged on appeal and not the sentences for other offenses which were not challenged on appeal. *Id.* at paragraph three of the syllabus. *Saxon* is predicated on the theory that trial courts impose a sentence for each individual offense that is wholly independent of the sentences imposed for other offenses. *Id.* at 179-81. Based on the theory that each sentence is independent, this Court thus concluded that “[n]o purpose can be served by forcing a judge to revisit properly imposed, lawful sentences based upon an error in the sentence for a separate offense.” *Id.* at 182.

Saxon’s logic does not apply when a defendant successfully challenges one of his convictions (as opposed to just the sentence for that conviction) on appeal. While there may be “no potential for an error in the sentence for one offense to permeate the entire multigroup of sentences,” *Saxon*, 109 Ohio St. 3d at 179, an erroneous *conviction* does permeate the sentences for other offenses. Although the trial court imposed independent *sentences* for each of appellant’s convictions, each of those sentences was based, at least in part, on appellant’s entire criminal history. By considering a conviction (having a weapon while under disability) which was not supported by legally sufficient evidence, the trial court necessarily relied on an inaccurate criminal history in imposing appellant’s sentence for felonious assault. Accordingly, to the extent that this Court vacates appellant’s conviction for having a weapon under disability, it must also vacate his sentences on the remaining charges and remand the case for a resentencing.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Howard Clay respectfully asks this Court to answer the certified question in the affirmative, adopt Clay's two propositions of law, reverse the decision of the Eighth District Court of Appeals, vacate his conviction for having a weapon while under disability, and remand his case for resentencing.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was served upon WILLIAM D. MASON, ESQ., Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 20 day of February 2008.


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APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs

HOWARD CLAY

Defendant-Appellant

07-1852

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

 NOTICE OF APPEAL OF APPELLANT HOWARD CLAY

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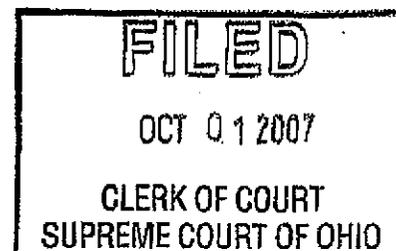
IN THE SUPREME COURT OF OHIO

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
 BY: CULLEN SWEENEY, ESQ. (0077187) (COUNSEL OF RECORD)
 Assistant Public Defender
 310 Lakeside Avenue, Suite 200
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 (216) 443-7583
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 COUNSEL FOR APPELLANT HOWARD CLAY

WILLIAM MASON, ESQ.
 Cuyahoga County Prosecutor
 BY: THORIN FREEMAN, ESQ. (0079999)
 Assistant Prosecuting Attorney
 Justice Center, 9th Floor
 1200 Ontario Street
 Cleveland, OH 44113
 (216) 443-7800
 COUNSEL FOR APPELLEE STATE OF OHIO



NOTICE OF APPEAL OF APPELLANT

Appellant Howard Clay hereby gives notice of appeal 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 on August 23, 2007 journalized September 4, 2007.

This case involves a felony, raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,



CULLEN SWEENEY, ESQ.
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, OH 44113 on this 5 day of October, 2007.



CULLEN SWEENEY, ESQ.
Counsel for Appellant

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:

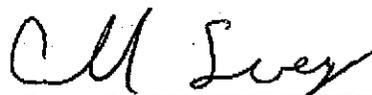
Whether knowledge of the pending indictment is required for a conviction for having a weapon while under disability pursuant to R.C. 2923.13(A)(3) when the disability is based on a pending indictment.

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,

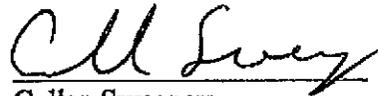
ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender



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 [**4] 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 knowledgo 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 arraignment 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.

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CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 2

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USCS Const. Amend. 2

Right to bear arms.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

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CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENTS
AMENDMENT 14

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USCS Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

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Oh. Const. Art. I, § 4 (2008)

§ 4. Bearing arms; standing armies; subordination of military power

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

1 of 1 DOCUMENT

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

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Oh. Const. Art. I, § 16 (2008)

§ 16. Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

HISTORY:

(As amended September 3, 1912.)

LEXSTAT ORC ANN. 2901.04

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH JANUARY 25, 2008 ***

*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JANUARY 15, 2008 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

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ORC Ann. 2901.04 (2008)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

LEXSTAT ORC ANN. 2923.13

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL; CORRUPT
 ACTIVITY
 WEAPONS CONTROL

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ORC Ann. 2923.13 (2008)

§ 2923.13. Having weapons while under disability

(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:

(1) The person is a fugitive from justice.

(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.

(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.

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence, has been adjudicated as a mental defective, has been committed to a mental institution, has been found by a court to be a mentally ill person subject to hospitalization by court order, or is an involuntary patient other than one who is a patient only for purposes of observation. As used in this division, "mentally ill person subject to hospitalization by court order" and "patient" have the same meanings as in *section 5122.01 of the Revised Code*.

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 146 v S 2. Eff 7-1-96; 150 v H 12, § 1, eff. 4-8-04.

LEXSTAT ORC ANN. 2929.12

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR FELONY

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ORC Ann. 2929.12 (2008)

§ 2929.12. Seriousness and recidivism factors

(A) Unless otherwise required by *section 2929.13* or *2929.14 of the Revised Code*, a court that imposes a sentence under this chapter upon an offender for a felony has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in *section 2929.11 of the Revised Code*. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing.

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is more serious than conduct normally constituting the offense:

(1) The physical or mental injury suffered by the victim of the offense due to the conduct of the offender was exacerbated because of the physical or mental condition or age of the victim.

(2) The victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.

(3) The offender held a public office or position of trust in the community, and the offense related to that office or position.

(4) The offender's occupation, elected office, or profession obliged the offender to prevent the offense or bring others committing it to justice.

(5) The offender's professional reputation or occupation, elected office, or profession was used to facilitate the offense or is likely to influence the future conduct of others.

(6) The offender's relationship with the victim facilitated the offense.

ORC Ann. 2929.12

(7) The offender committed the offense for hire or as a part of an organized criminal activity.

(8) In committing the offense, the offender was motivated by prejudice based on race, ethnic background, gender, sexual orientation, or religion.

(9) If the offense is a violation of section 2919.25 or a violation of *section 2903.11, 2903.12, or 2903.13 of the Revised Code* involving a person who was a family or household member at the time of the violation, the offender committed the offense in the vicinity of one or more children who are not victims of the offense, and the offender or the victim of the offense is a parent, guardian, custodian, or person in loco parentis of one or more of those children.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(1) The victim induced or facilitated the offense.

(2) In committing the offense, the offender acted under strong provocation.

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(4) There are substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(1) At the time of committing the offense, the offender was under release from confinement before trial or sentencing, under a sanction imposed pursuant to *section 2929.16, 2929.17, or 2929.18 of the Revised Code*, or under post-release control pursuant to section 2967.28 or any other provision of the Revised Code for an earlier offense or had been unfavorably terminated from post-release control for a prior offense pursuant to division (B) of *section 2967.16 or section 2929.141 [2929.14.1] of the Revised Code*.

(2) The offender previously was adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has a history of criminal convictions.

(3) The offender has not been rehabilitated to a satisfactory degree after previously being adjudicated a delinquent child pursuant to Chapter 2151. of the Revised Code prior to January 1, 2002, or pursuant to Chapter 2152. of the Revised Code, or the offender has not responded favorably to sanctions previously imposed for criminal convictions.

(4) The offender has demonstrated a pattern of drug or alcohol abuse that is related to the offense, and the offender refuses to acknowledge that the offender has demonstrated that pattern, or the offender refuses treatment for the drug or alcohol abuse.

(5) The offender shows no genuine remorse for the offense.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(1) Prior to committing the offense, the offender had not been adjudicated a delinquent child.

(2) Prior to committing the offense, the offender had not been convicted of or pleaded guilty to a criminal offense.

- (3) Prior to committing the offense, the offender had led a law-abiding life for a significant number of years.
- (4) The offense was committed under circumstances not likely to recur.
- (5) The offender shows genuine remorse for the offense.

HISTORY:

146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 148 v S 9 (Eff 3-8-2000); 148 v S 107 (Eff 3-23-2000); 148 v S 179, § 3 (Eff 1-1-2002); 149 v H 327. Eff 7-8-2002.