

[Cite as *State v. Bland*, 2015-Ohio-1797.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, |) | CASE NO. 14 MA 9 |
| |) | |
| PLAINTIFF-APPELLEE, |) | |
| |) | |
| VS. |) | OPINION |
| |) | |
| MICHAEL BLAND, |) | |
| |) | |
| DEFENDANT-APPELLANT. |) | |

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| CHARACTER OF PROCEEDINGS: | Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 13CR344 |
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| JUDGMENT: | Affirmed. |
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APPEARANCES:

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| For Plaintiff-Appellee: | Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6 th Floor Youngstown, Ohio 44503 |
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| For Defendant-Appellant: | Jason Patrick Small 20 West Federal Street, Suite M6 Youngstown, Ohio 44503-1424 |
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JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 7, 2015

{¶1} Defendant-appellant Michael Bland (“Appellant”) appeals his conviction and sentence entered in the Mahoning County Common Pleas Court for improperly discharging a firearm at or into a habitation with an accompanying firearm specification, and for having a weapon while under disability. Four issues are presented in this appeal. The first is whether the trial court abused its discretion when it denied Appellant’s motion for mistrial. The second is whether the convictions for improperly discharging a firearm at or into a habitation and having a weapon while under disability are against the manifest weight of the evidence. The third issue is whether the state presented sufficient evidence for the charges to go to the trier of fact. The final issue is whether the trial court erred when it considered Appellant’s adjudication as a delinquent for committing aggravated robbery, a felony if committed by an adult, for purposes of finding he was under a disability.

{¶2} For the reasons expressed below, all assignments of error lack merit. Appellant’s conviction and sentence are hereby affirmed.

Statement of the Facts and Case

{¶3} On February 13, 2013 between 4:00 p.m. and 4:30 p.m., two shots were fired at Charles Pinson’s house located at 1344 Wick Avenue, Youngstown, Ohio. Pinson was home at the time and identified Appellant as the shooter. After the shooting, Appellant fled and the police were called.

{¶4} As a result of the incident, Appellant was indicted on one count of improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1)(C), a second-degree felony; one count of attempted aggravated burglary in violation of R.C. 2911.11(A)(2)(B) and R.C. 2923.02(A)(2), a second-degree felony; and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(2)(B), a third-degree felony. Both the improperly discharging a firearm into a habitation and attempted aggravated burglary had attendant firearm specifications, violations of R.C. 2941.145(A). The having a weapon while under disability charge specified that the disability arose from being adjudicated a delinquent for committing aggravated robbery.

{¶15} The case was bifurcated; the having a weapon while under disability charge was tried to the bench, while the other two charges were tried to the jury. The jury trial occurred first. After the presentation of all of the evidence, the trial court granted defense counsel's Crim.R. 29 motion to dismiss the attempted aggravated burglary charge. The jury returned a guilty verdict on the improperly discharging a firearm into a habitation and the attendant firearm specification. Thereafter, the trial court found Appellant guilty of the having a weapon while under disability charge. The trial court then sentenced Appellant to an aggregate sentence of eleven years. He received eight years for improperly discharging a firearm into a habitation, and three years for the attendant gun specification. Those two sentences were ordered to run consecutively. As to having a weapon while under disability charge, Appellant received a three year sentence. That sentence was ordered to be served concurrent with the sentence for improperly discharging a firearm into a habitation.

{¶16} Appellant timely appealed from his conviction and sentence.

First Assignment of Error

"Defendant was denied due process of law when the court failed to declare a mistrial when prejudicial testimony was offered concerning identification of the defendant."

{¶17} Appellant orally moved for a mistrial following the testimony of Eden Davenport, Pinson's girlfriend. 01/14/14 Tr. 247. The motion was based on Davenport's testimony:

Q. Okay. And do you remember anything out of the ordinary happening that day [February 13, 2013]?

Yes. I do.

Q. Okay. I would like to talk to you specifically about that. And I know you're anxious and nervous, so we will go slow.

Oaky. *[sic]*

Q. Can you tell what out of the ordinary – how those events started?

Well, Charles [Pinson] was in – I mean, in the bed sick. And Michael Bland, he was at the store, I guess or whatever. And he was drinking something, some drink or whatever.

01/14/14 Tr. 236.

{¶8} An objection was then lodged by defense counsel, which the trial court sustained. 01/14/14 Tr. 236. The trial court then instructed the jury to disregard any testimony from Davenport as it related to seeing Appellant at the store. 01/14/14 Tr. 238. As she proceeds to testify she mentions Appellant's name again:

Q. So what happens next?

Okay, so I walk from the kitchen to my hallway. And Charles gets up out of the bed and he goes to the door, he sees who it is. And he ask them who is it, he said Michael Bland. And he – Charles, he doesn't open the door, but he says, get off my property.

Q. You heard Charles say, get off my property?

Yes, because at that time I was standing in the hallway.

Q. Okay.

And he told him that, and then Michael Bland said, well I'mma shoot this MF'er up.

01/14/14 Tr. 240.

{¶9} Another objection was lodged at this point and was sustained by the trial court. The prosecutor then instructed the witness to only tell the jury what she saw with her own eyes and what she heard with her own ears. 01/14/14 Tr. 241.

{¶10} The testimony continues with questioning about whether Davenport could see the person at the door. 01/14/14 Tr. 242. She responded that she could not. 01/14/14 Tr. 242. She was then asked whether she recognized the voice. 01/14/14 Tr. 242. Her response was, "It was his voice, I know that." 01/14/14 Tr. 242. Defense counsel objected and the court sustained the objection. 01/14/14 Tr.

242. The prosecutor then asked whether she knew Appellant, to which Davenport responded, "No." 01/14/14 Tr. 242. The prosecutor then established that Davenport would not be able to recognize Appellant's voice. 01/14/14 Tr. 242. Davenport's direct examination concluded with her testifying that two shots were fired into the house. 01/14/14 Tr. 243.

{¶11} The above testimony established that Davenport did not see the person at the door, she did not know Appellant, and she could not identify his voice. In urging the court to grant his motion for mistrial, Appellant argued that Davenport's testimony mentions his name numerous times even though she had no knowledge that Appellant was the person at the door. 01/14/14 Tr. 247. The defense conceded that it did not believe the prosecutor deliberately elicited the information from the witness. 01/14/14 Tr. 248. The defense also acknowledged that the trial court acted in due diligence and gave a cautionary instruction. However, the defense did not believe that a cautionary instruction would be sufficient in this case.

{¶12} The prosecutor responded to the argument by asserting that it tried to keep the witness within the "bounds." 01/14/14 Tr. 248. The prosecutor then added that Davenport's testimony indicated Davenport does not know Appellant, that she could not recognize his voice, and that she did not see who was at the door. The prosecutor was of the opinion that the testimony makes it clear to the jury Davenport was not testifying she saw him or heard his voice, and a cautionary instruction would be enough. 01/14/14 Tr. 248-249.

The trial court agreed with the state and offered the following reasoning:

Well, I guess one thing that the transcript can't reflect, and never does, is the witness testifying on the stand. And there are certainly those witnesses who, as you gauge their testimony under the instruction given to a jury at the conclusion of the case, as I viewed this witness' testimony, her manner of testifying, her demeanor, for whatever it's worth in the record, I did not see any deliberate attempt to get this testimony in. * * *

Having said that, I plan on again instructing the jury now specifically that any testimony from this witness as it relates to either the visual or audible identification of Michael Bland is not to be considered for any purpose and is to be disregarded in their deliberations is, in fact sufficient. This case has been and always has been – I know, Attorney Zena, you are arguing that the fact of this case demand a mistrial based upon this testimony. I believe another cautionary instruction from the court to this jury that they are to disregard any identification testimony from this witness as it relates to the defendant is sufficient and certainly no comment will be permitted during closing argument from counsel as to any other identification of the defendant other than, I assume from the next witness, who we haven't heard from yet.

01/14/14/ Tr. 250-251.

{¶13} In line with that reasoning, prior to the next witness being called to testify, the trial court instructed the jury to disregard Davenport's testimony as it related to the identification of Appellant. 01/14/14 Tr. 251-252.

{¶14} On appeal, Appellant maintains that the motion for mistrial should have been granted and the failure to grant such motion denied him his right to a fair trial.

{¶15} A trial court's ruling on a motion for mistrial is reviewed for an abuse of discretion. *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900 (1988). The term abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶16} In determining whether the declaration of mistrial is proper, both the Ohio and United States Supreme Courts have been "reluctant to formulate precise, inflexible standard." *State v. Widner*, 68 Ohio St.2d 188, 429 N.E.2d 1065 (1981); see also *Arizona v. Washington*, 434 U.S. 497, 513, 98 S.Ct. 824 (1978) and *Glover* at 19

(“[T]his court has declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise.”). The Ohio Supreme Court “grants great deference to the trial court’s discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.” *Glover* at 19. “The trial judge was in the courtroom, observing counsel, the witnesses, and the reactions of the jurors.” *Id.* at 20.

{¶17} This court does not find that the trial court abused its discretion in denying the motion for mistrial. In *State v. Herring*, a case where the defense moved for a mistrial based on a witness’ in-court identification of the defendant that was allegedly improper, the Ohio Supreme Court found no merit with the appellate argument that the trial court abused its discretion in denying the motion for mistrial. 94 Ohio St.3d 246, 762 N.E.2d 940 (2002). In that case, similar to the case before us, the trial court denied the motion for mistrial and, before the next witness was called, the court instructed the jury to disregard the identification portion of the witness’s testimony. *Id.* On appeal, the defendant contended that no instruction could cure the prejudice of the witness’s identification. *Id.* The Ohio Supreme Court rejected this contention, saying that “jurors are generally presumed to follow the trial court’s instructions, including instructions to disregard testimony.” *Id.* at 254.

{¶18} In *Herring*, the Ohio Supreme Court also made the statement, “[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.” *Id.* quoting *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140, 155. That statement is apt in the situation before us. While the jury may have heard Davenport testify that it was Appellant at the door, the state, on direct examination, clarified that testimony. Davenport clearly testified that she did not see the person at the door, she does not know Appellant, and she could not recognize Appellant’s voice if she heard it. When considered in conjunction with the curative instructions, the jury could intelligently weigh the purported identification testimony and understand why it was instructed to disregard it. Nothing in the record suggests that

the instruction to disregard was not followed. Furthermore, the trial court gave ample justification as to why the motion was being denied; as it succinctly elucidated it was in the best position to determine if the situation warranted a mistrial. Hence, based on Davenport's entire testimony, the two curative instructions, and the trial court's reasoning for denying the motion for mistrial, the trial court did not abuse its discretion in denying the mistrial motion. This assignment of error lacks merit.

Second Assignment of Error

"Michael Bland's convictions for improperly discharging a firearm at a habitation and having a weapon while under disability are against the manifest weight of the evidence."

{¶19} When reviewing a judgment under a criminal manifest weight standard of review, "[t]he court reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶20} This court's discretionary power to reverse on manifest weight grounds and grant a new trial is exercised only in the exceptional case where the evidence weighs heavily against conviction. *Thompkins* at 387, 678 N.E.2d 541. This standard is a high one because the trier of fact was in the best position to determine credibility issues, by having personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Ali*, 154 Ohio App.3d 493, 2003–Ohio–5150, 797 N.E.2d 1019, ¶ 36 (7th Dist.). A reviewing court, therefore, should not interfere with witness credibility and factual determinations of the jury unless the record demonstrates that a reasonable juror simply could not have found the witness to be credible. *State v. Mock*, 187 Ohio App.3d 599, 2010–Ohio–2747, 933 N.E.2d 270, ¶ 40 (7th Dist.).

{¶21} The jury convicted Appellant of improperly discharging a firearm into a habitation in violation of R.C. 2923.161(A)(1). The trial court found, based on the evidence presented at the jury trial, Appellant was guilty of having a weapon while

under disability in violation of R.C. 2923.13(A)(2). These statutes respectively provide:

(A) No person, without privilege to do so, shall knowingly do any of the following:

(1) Discharge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual.

R.C. 2923.161.

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

* *

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

R.C. 2923.13.

{¶22} The only element contested in this case is Appellant's identity as the perpetrator of the shooting. It is well settled that in order to support a conviction, the evidence must establish beyond a reasonable doubt the identity of the defendant as the person who actually committed the crime at issue. *State v. Johnson*, 7th Dist. No. 13JE5, 2014-Ohio-1226, ¶ 27.

{¶23} Charles Pinson testified that he was living at the residence located at 1344 Wick Avenue in Youngstown, Ohio on February 13, 2013. Pinson testified that sometime around 4:30 p.m. he was home and heard someone banging on the door. 01/14/14 Tr. 255. Pinson avowed that he peeked out the window and saw that the person banging on the door was Appellant. 01/14/14 Tr. 256. He explained he knows Appellant from the neighborhood. 01/14/14 Tr. 263. He indicated that he did

not answer the door because he was sick, he did not want to be bothered, and he did not want to let Appellant into his house. 01/14/14 Tr. 256-257. The banging on the door continued for 15 minutes. 01/14/14 Tr. 257. Eden Davenport confirmed that the banging lasted that long. 01/14/14 Tr. 239. Pinson testified that the banging was so hard that there was a gap between the joists and the door. 01/14/14 Tr. 258. When the banging became unbearable, Pinson went to the door and told Appellant he was not going to let him in the house. 01/14/14 Tr. 258. Pinson testified he and Appellant had an exchange through the closed door that eventually went onto the front porch:

A.* * * He [Appellant] said, let me in this MF'ing house. I said, no, just get off my property. He said, well, I will shoot this MF'ing house up. And that's when I opened the door and I stepped out on my front porch. And then Michael Bland backed up off of my porch and there was a pedestal where the roof connects to and there's – there's a – some big brick where my flowerbed, well, goes around the front of my house. And he pulls out a gun, he points it at me. Click, it misfires. At that time I went back around – I went back into my house – ran back into my house, slammed the door and told her [Eden Davenport] to get on the floor.

01/14/14 Tr. 258-259.

{¶24} Two shots were then fired into the house. 01/14/14 Tr. 259. The police were called and arrived to the scene shortly after the shooting.

{¶25} Officer Melvin Johnson testified that Pinson informed him Appellant shot at Pinson's house. 01/14/14 Tr. 180-183. Officer Johnson averred that two 9mm casings and one live 9mm round were recovered from the scene. 01/14/14 Tr. 192, 198. No forensics were done on the two casings and the live round. Tr. 217. Detective Sergeant Ramon Cos explained that no forensics were done because the victim knew the suspect and identified the suspect. 01/14/14 Tr. 217.

{¶26} The narrative in Officer Johnson's report as to what Pinson informed him occurred on February 13, 2013 is as follows:

Victim states that there was a knock at his door sometime between 1630 and 1650 hrs. When he answered it, Bland was standing there and demanded entrance by saying to him, "Let me up in this Mutha F**". Victim states that he yelled back to Bland, "No! You're not coming into my house!"

Victim states that suspect first tried to push his way into the house, by forcing the door with his body. After a failed attempt, suspect yelled something to the effect of, "I will shoot this bitch up!" Victim states that suspect went from the East facing front porch onto the front lawn near the hill and tried to fire a handgun, but it misfired. Victim states that he saw the weapon and described it as a green and black Daewoo. Victim further states that he watched the suspect, from a window, re-chamber another round and suspect then fired twice at the victim's house.

State's Exhibit 7.

{¶27} This narrative is not signed by Pinson because he cannot read or write. 01/14/14 Tr. 267. He testified that no one read him the report when it was finished. 01/14/14 Tr. 299. Thus, he was not able to correct any inaccuracies or add to it.

{¶28} Pinson's testimony also revealed that he was convicted of attempted carrying a concealed weapon in 2005 and that he received a 180 day sentence. 01/14/14 Tr. 265-266. Pinson indicated that he has not been in trouble with the law since then and that he works every day to try to make a "decent living." 01/14/14 Tr. 265. He indicated that he does home construction/improvement work. 01/14/14 Tr. 264-265.

{¶29} He also testified that in 2005 a counselor at Turning Point Counseling diagnosed him with bipolar and schizophrenia, but he disagreed with that diagnosis. 01/14/14 Tr. 269. He avowed that he was given medication in 2005 but that medication made him feel like he "was going to jump out" of his body, so he refused to take it. 01/14/14 Tr. 270. Thus, he has had no medication since 2005. 01/14/14 Tr. 270.

{¶30} Pinson's identification testimony is the only evidence that identified Appellant as the shooter. Admittedly, Eden Davenport's testimony does indicate that Appellant was the shooter. However, Eden Davenport testified that she did not see the shooter and she could not identify the shooter by voice. The trial court twice instructed the jury to disregard her testimony as to identification and to not consider it in deliberations. Tr. 238, 251-252. Without consideration of her testimony, Pinson's identification testimony is clear – he has always indicated that Appellant was the shooter. While his testimony is not identical to the narrative in the police report, it is very similar and any discrepancies could be resolved by the fact that Pinson cannot read and the narrative was not read to him to verify its accuracy before it was put in the formal report. Furthermore, despite the small inaccuracies between the testimony and the narrative, identification of the perpetrator remains consistent. Pinson has always maintained that Appellant is the perpetrator of the crime.

{¶31} Admittedly, Pinson's prior 2005 conviction and prior mental health diagnosis could affect his credibility. However, those facts do not render him not credible per se. While the trier of fact heard about the conviction and the mental health determination, it also heard that he has not been convicted of any other crime and that he works hard to make a living for his family. The trier of fact is in the best position to properly weigh the information in determining whether Pinson was credible. Credibility is not determined solely from the words a person utters, but also from the person's demeanor, voice inflections, and gestures. Given the verdicts, the triers of fact (trial court and jury) found Pinson credible. Nothing in the record presents this court with a solid basis to overturn that credibility determination; there is no basis to find that a reasonable trier of fact could not find the witness to be credible.

{¶32} This assignment of error is meritless. The conviction is not against the manifest weight of the evidence.

Third Assignment of Error

"The convictions were not supported by sufficient evidence and the trial court erred when it overruled Michael Bland's motion for Criminal Rule 29 acquittal."

{¶33} At the close of the state's evidence, Appellant moved for an acquittal based on Crim.R. 29, that there was insufficient evidence to sustain convictions for the charges. 01/14/14 Tr. 308. He renewed the motion at the end of the trial. 01/14/14 Tr. 312. As explained above, the trial court granted the motion on the attempted aggravated burglary charge, but denied it on the remaining charges. 01/14/14 Tr. 313-315.

{¶34} On appeal, Appellant argues the trial court erred in denying the Crim.R. 29 motion and the convictions are supported by insufficient evidence because other than Pinson's testimony, there is no evidence Appellant was the shooter. This is a similar argument to the one made under the second assignment of error.

{¶35} An appellate court reviews a denial of a motion to acquit under Crim.R. 29 using the same standard it uses to review a sufficiency of the evidence claim. *State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965 (1995); *State v. Rhodes*, 7th Dist. No. 99BA62, 2002–Ohio–1572, at ¶ 9. Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *Thompkins*, 78 Ohio St.3d at 387. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith* at 113.

{¶36} The recitation of the testimony under the second assignment of error provides sufficient evidence to prove identity. Pinson testified Appellant was the person banging on his door, he saw Appellant pull the gun from his waistband and attempt to shoot at Pinson, and Appellant shot at Pinson's house twice.

{¶37} Furthermore, Pinson also testified he had sufficient familiarity with Appellant to identify him. Pinson indicated he knows Appellant from the neighborhood. 01/14/14 Tr. 263. He explained he has frequently seen Appellant around the neighborhood and one time, in the year prior to this incident, Appellant

showed up at Pinson's house, uninvited, to a small gathering Pinson was having. 01/14/14 Tr. 263.

{¶38} When viewed in the light most favorable to the prosecution, this testimony is legally sufficient, as a matter of law, to establish identity. Thus, this assignment of error is deemed meritless.

Fourth Assignment of Error

"The trial court erred when it considered a conviction from a juvenile court proceeding for the purposes of sustaining a conviction under a weapons disability."

{¶39} Appellant was convicted of having a weapon while under disability, a violation of R.C. 2923.13(A)(2). This statute provides "no person shall knowingly * * * use any firearm if * * * the person * * * 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." R.C. 2923.13(A)(2). It is undisputed Appellant was adjudicated a delinquent in 2005 for having committed aggravated robbery, which is a felony of violence if committed by an adult.

{¶40} Given the language of R.C. 2923.13(A)(2), a prior delinquency adjudication for a violent felony is permitted to be considered in determining whether the offender was under a disability. Therefore, any argument that the trial court did not comply with the statute fails.

{¶41} Appellant's argument on appeal appears to be a constitutional argument. He contends that it was impermissible for the trial court to consider his 2005 delinquency adjudication for aggravated robbery for purposes of finding him guilty of having a weapon while under disability. He argues, "the constitutional implications of preserving delinquency convictions for use in increasing adult criminal penalties violate due process."

{¶42} The state asserts that the constitutional argument is waived because it was not sufficiently preserved for appeal purposes. The state's position is based on defense counsel's objection to the state presenting a certified copy of Appellant's prior delinquency adjudication for aggravated robbery to prove disability:

Oh. Well, then Your Honor, as to the statement of the prosecuting attorney regarding procedurally what we are doing today, it is my understanding, and she is correct, that we are going to proceed in that fashion. My understanding also is, Your Honor, that I understand, and I always lodge this objection, but I'm going to, just to preserve the record, that I object to a juvenile court proceeding being considered as a necessary element for sustaining a conviction of weapons under disability. I do understand that the case law in Ohio is such that it is sufficient, but I want to preserve that objection --.

01/27/14 Tr. 3.

{¶43} This objection could be considered an argument that R.C. 2923.13 is unconstitutional because it permits consideration of a juvenile adjudication to find a disability. However, the argument is vague. There is no specific constitutional argument set forth.

{¶44} The state is correct that the failure to raise a constitutional issue at the trial level waives the right to assert it at the appellate level. *State v. 1981 Doge Ram Van* (1988), 36 Ohio St.3d 168, 170 (holding that the failure to raise a constitutional issue at the trial level waives the right to assert it at the appellate level). See also *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. However, we do not need to render a decision as to whether the argument was preserved for appellate purposes because even if it was sufficiently preserved, the argument fails.

{¶45} The constitutional argument in the appellate brief focuses on the differences between the adult and juvenile systems and asserts that R.C. 2151.358, as amended in 1992, cannot turn those differences "on their heads." This issue has been tested in the appellate courts and has failed. *State v. Earls*, 1st Dist. No. C-040141, 2004-Ohio-6432; *State v. Kelly*, 10th Dist. No. 99AP-1302, 2000 WL 1199228 (Aug. 22, 2000); *State v. Bonner*, 12th Dist. No. CA93-09-176, 1994 WL 105521 (Mar. 28, 1994).

{¶46} In *Bonner*, the constitutional challenge to R.C. 2923.13(A)(2), as it pertains to juvenile adjudications, concerned division (H) in R.C. 2151.358. The

argument was that R.C. 2151.358(H) precluded the use of evidence of a prior juvenile delinquency adjudication to establish the disability element of R.C. 2923.13, the having a weapon while under disability statute. *Bonner*.

{¶47} In finding no merit with that argument, the Twelfth Appellate District explained that pursuant to Evid.R. 608(D), evidence of a juvenile adjudication is not admissible, except as provided by statute. *Id.* It then focused its attention to the then current version R.C. 2151.358(H), which stated:

Evidence of a judgment rendered and the disposition of a child under that judgment is not admissible to impeach the credibility of the child in any action or proceeding. Otherwise, the disposition of a child under the judgment rendered or any evidence given in court is admissible as evidence for or against a child in any action or proceeding in any court in accordance with the Rules of Evidence and also may be considered by any court as to the matter of sentence or to the granting of probation.

Id. quoting R.C. 2151.358(H) (version as amended in 1992).

{¶48} The *Bonner* court found that this version of the statute permitted the state to use an individual's prior juvenile delinquency adjudication to establish the disability under R.C. 2923.13(A)(2). *Id.* In reaching this conclusion, the *Bonner* court acknowledged it had previously held that pre-1992 version of R.C. 2151.358(H) precluded the use of evidence of prior juvenile delinquency adjudication to establish the disability under R.C. 2923.13(A)(2). *Id.* That version provided:

The disposition of a child under the judgment rendered or any evidence given in court is not admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of the child may be considered by any court only as to the matter of sentence or to the granting of probation.

Id. citing pre-1992 version of R.C. 2151.358(H).

{¶49} Clearly, the change in the statutory language permits the prior adjudication to establish the disability; the *Bonner* decision is sound.

{¶50} Other appellate courts agree. *State v. King*, 12th Dist. No. CA2001-11-263, 2002 WL 1485348 (July 8, 2002); *State v. Kelly*, 10th Dist. No. 99AP-1302, 2000 WL 1199228 (Aug. 22, 2000). See also *State v. Earls*, 1st Dist. No. C-040141, 2004-Ohio-6432, ¶ 7-9 (arguing R.C. 2923.13(A)(2) is unconstitutional as overbroad because juvenile had no notice of the underlying disability. The argument was deemed meritless because notice of disability status is not an essential element of R.C. 2923.13(A)(2), only knowledge as to the possession element of the offense is required, not knowledge of a disability.).

{¶51} It must be noted that the general assembly made amendments to R.C. 2151.358 in 2006. Division (H) was removed from R.C. 2151.358 and was moved to R.C. 2151.357. However, the only alteration in the wording of the division was the addition of the statement concerning repeat violent offenders. The current version of division (H) reads:

Evidence of a judgment rendered and the disposition of a child under the judgment is not admissible to impeach the credibility of the child in any action or proceeding. Otherwise, the disposition of a child under the judgment rendered or any evidence given in court is admissible as evidence for or against the child in any action or proceeding in any court in accordance with the Rules of Evidence and also may be considered by any court as to the matter of sentence or to the granting of probation, and a court may consider the judgment rendered and the disposition of a child under that judgment for purposes of determining whether the child, for a future criminal conviction or guilty plea, is a repeat violent offender, as defined in section 2929.01 of the Revised Code.

R.C. 2151.357(H) (current version).

{¶52} Considering that the changes to division (H) did not affect the language allowing for a juvenile adjudication to be considered for purposes of finding a disability, the changes to R.C. 2151.357(H) and R.C. 2151.358(H) do not alter the persuasive reasoning espoused in *Bonner*. Therefore, considering prior appellate

decisions, Evid.R. 608(D), the language of R.C. 2151.357(H)/R.C. 2151.358(H) and the language of R.C. 2923.13(A)(2), we find no merit with the argument presented. R.C. 2923.13(A)(2) is not unconstitutional and a juvenile adjudication for a violent felony is permitted to establish the disability.

{¶53} This assignment of error is meritless.

Conclusion

{¶54} All assignments of error lack merit. Appellant's conviction and sentence are hereby affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.