

[Cite as *State v. Perez*, 2025-Ohio-175.]

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
JACKSON COUNTY

STATE OF OHIO,	:
Plaintiff-Appellee,	: CASE NO. 23CA7
v.	:
Louis A. Perez,	: DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:

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APPEARANCES:

L. Scott Petroff, Athens, Ohio, for appellant<sup>1</sup>.

Randy Dupree, Jackson County Prosecuting Attorney, Jackson, Ohio,  
for appellee.

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CRIMINAL APPEAL FROM COMMON PLEAS COURT  
DATE JOURNALIZED:1-14-25  
ABELE, J.

**{¶1}** This is an appeal from a Jackson County Common Pleas  
Court judgment of conviction and sentence. Louis A. Perez,  
defendant below and appellant herein, assigns two errors for  
review:

FIRST ASSIGNMENT OF ERROR:

"THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A  
CONVICTION OF APPELLANT IN VIOLATION OF HIS DUE

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<sup>1</sup> Different counsel represented appellant during the trial  
court proceedings.

PROCESS RIGHTS AS GUARANTEED BY THE OHIO  
CONSTITUTION AND THE UNITED STATES  
CONSTITUTION."

SECOND ASSIGNMENT OF ERROR:

"THE CONVICTION WAS AGAINST THE MANIFEST WEIGHT  
OF THE EVIDENCE IN VIOLATION OF APPELLANT'S  
RIGHT TO DUE PROCESS AS GUARANTEED BY THE OHIO  
CONSTITUTION AND THE UNITED STATES  
CONSTITUTION."

**{12}** The following facts are taken from our previous decision  
in *State v. Perez*, 2022-Ohio-4352 (4th Dist.):

In November 2021, appellant entered guilty pleas to the offenses of (1) burglary in violation of R.C. 2911.12(A)(3), a third-degree felony, and (2) having weapons under a disability in violation of R.C. 2923.13(A)(3), also a third degree felony. These charges emanated from appellant's act of firing a firearm in a residence while under the influence of methamphetamine and with a prior Texas felony drug possession conviction. The parties' plea agreement included a jointly recommended sentence that required the completion of the Phoenix Program, a community control sanction and the successful completion of Star's six-month program, along with a six-year suspended prison sentence.

Unfortunately, appellant failed to successfully complete the Phoenix Program and the state requested the trial court revoke appellant's bond. Eventually, authorities took appellant into custody and the trial court sentenced him to serve two consecutive three-year prison terms.

*Id.* at ¶ 2-3. On appeal, we concluded that the trial court did not

properly advise appellant of the mandatory nature of the applicable postrelease control requirements and appellant did not enter a knowing intelligent and voluntary guilty plea. Therefore, we reversed the trial court's judgment and remanded the cause for further proceedings consistent with our opinion. *Id.* at ¶ 5.

{¶3} Prior to trial, appellee dismissed one count of aggravated burglary in violation of R.C. 2911(A)(3) and one count of felonious assault in violation of R.C. 2903.11(A)(2). Therefore, on remand, the matter proceeded to trial on a single count of having weapons under a disability.

{¶4} At the March 13, 2023 jury trial Wellston Police Department Sergeant Todd Shong testified that on March 25, 2021, the department received a call concerning a man wearing a blue hat and black sweatshirt near the Sojourner's House, "waving a gun threatening people." The department also received "a call back that stated that [the suspect] had just entered a residence at 228 South Illinois Avenue." Officers responded to that residence, owned by Tina Unger, and found appellant inside. Unger told officers that appellant possessed a firearm when he arrived, but

Unger had taken it from him. Unger gave the weapon, a black 9-mm hand gun that contained one round of ammunition in the chamber, to Shong. Officers took appellant into custody and advised him of his *Miranda* rights. Appellant told Shong "it was his girlfriend's gun."

{15} After Sergeant Shong learned that appellant initially came from the Ewing residence, Shong visited the Ewings and "recovered some live rounds that was given to me by Tiffany Young and the magazine for the firearm and a shell casing that had been fired from the bathroom of that residence." Shong clarified that he received 15 live rounds from Young, and he observed "an apparent bullet hole in the wall of the [same] bathroom." Shong explained that Ewing had eight children at the residence that night and that appellant appeared "to be altered" that evening and "talk[ed] about people chasing him, trying to kill him, trying to shoot him." Shong explained, however, that the department no longer possessed the gun because it had been "forfeited on the original case."

{16} Patrick Ewing testified that on March 25, 2021, he

observed appellant with a firearm in his possession. While inside his home, Ewing "heard two gunshots in my house and then [appellant] come running out and shot 3 or 4 outside. I got the gun from him. I pulled the clip out, but he took the gun back and then ran down towards his aunts. . . after I told him to get off of my property." Ewing described the gun as a black 9-mm and said that appellant "acted like somebody was after him, but there was nobody there." Ewing explained that, after the gunfire, he observed two holes in his bathroom wall.

{17} Ewing explained that three children and his disabled father resided at the home at the time of the shooting. In addition, his cousin, who dated appellant, visited with her boys. Appellant "would stay with me for a little bit. They didn't have nowhere else to go. And I didn't want to see him on the street because like . . . like I said, him and my cousin were dating and I didn't want to see the boys on the street or nothing."

{18} Ewing further testified that the outside shots occurred in his backyard, and two of the three shots "went over by my head."

Ewing had not seen the 9-mm firearm before that day, and he did not know who owned it. Ewing stated that he kept his .22 caliber firearm in his closet.

{¶9} Tina Unger testified that appellant is her husband's cousin. On March 25, 2021, Unger, her daughter, and granddaughter were present when appellant

come just rushing through the door . . . and I told him, I said 'get out.' And he's telling me people were chasing him. They were coming through the wall and coming through the windows and he's like bobbing and weaving and he's got a gun in his hand. And. . . um. . . I got him out into the kitchen and I tried calling his brother and I couldn't get a hold of him so I called the police. And I'm talking to the police on the phone and the cops said to me can . . . [you] get the gun off of him? And, you know, he's going on and on about these people and weaving around and I said, 'Louis give me that gun.' And I mean he gave it to me right away.

Unger described the weapon as a handgun and she gave the gun to officers when they arrived to arrest appellant.

{¶10} At the close of appellee's evidence, the trial court denied appellant's Crim.R. 29 motion for judgment of acquittal. After deliberation, the jury found appellant guilty of having a weapon under a disability. The court considered the pertinent

sentencing statutes and factors and sentenced appellant to serve a 36-month prison term. This appeal followed.

#### Standard of Review

{¶11} As a threshold matter, because appellant challenges both the sufficiency of the evidence and the manifest weight of the evidence, we initially address both standards of review.

{¶12} A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), syllabus; *State v. Blevins*, 2019-Ohio-2744, ¶ 18 (4th Dist.). When reviewing the sufficiency of the evidence, an appellate court's inquiry focuses primarily on the adequacy of the evidence; that is, whether the evidence, if believed, could reasonably support a finding of guilt beyond a reasonable doubt. *Id.* at syllabus. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all

the essential elements of the offense beyond a reasonable doubt.  
*E.g., Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991).

**{¶13}** Furthermore, under the sufficiency of the evidence standard a reviewing court does not assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins*, 78 Ohio St.3d at 390 (Cook, J., concurring). Therefore, when reviewing a sufficiency of the evidence claim, an appellate court must construe the evidence in a light most favorable to the prosecution. See, e.g., *State v. Hill*, 75 Ohio St.3d 195, 205 (1996); *State v. Grant*, 67 Ohio St.3d 465, 477 (1993). A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did. *State v. Tibbetts*, 92 Ohio St.3d 146, 162 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

**{¶14}** "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the



weight of the evidence.” *Thompkins*, 78 Ohio St.3d at 387. “The question to be answered when a manifest weight issue is raised is whether ‘there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt.’ ” *State v. Leonard*, 2004-Ohio-6235, ¶ 81, quoting *State v. Getsy*, 84 Ohio St.3d 180, 193-194 (1998), citing *State v. Eley*, 56 Ohio St.2d 169 (1978), syllabus. A court that considers a manifest weight challenge must “ ‘review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses.’ ” *State v. Beasley*, 2018-Ohio-493, ¶ 208, quoting *State v. McKelton*, 2016-Ohio-5735, ¶ 328. However, the reviewing court must bear in mind that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67 (2001); *State v. Murphy*, 2008-Ohio-1744, ¶ 31 (4th Dist.). “ ‘Because the trier of fact sees and hears the witnesses and is particularly competent to decide “whether, and to what extent, to credit the testimony of particular witnesses,” we must afford substantial deference to its determinations of credibility.’ ” *Barberton v. Jenney*, 2010-Ohio-2420, ¶ 20, quoting

*State v. Konya*, 2006-Ohio-6312, ¶ 6 (2d Dist.), quoting *State v. Lawson*, 1997 WL 476684 (2d Dist. Aug. 22, 1997).

{¶15} Thus, an appellate court will generally defer to the trier of fact on issues of evidence weight and credibility, as long as a rational basis exists in the record for the fact-finder's determination. *State v. Picklesimer*, 2012-Ohio-1282, ¶ 24 (4th Dist.); accord *State v. Howard*, 2007-Ohio-6331, ¶ 6 (4th Dist.) ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight."). Accordingly, if the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. Accord *Eastley v. Volkman*, 2012-Ohio-2179, ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th Ed.1990) (a judgment is not against the manifest weight of the evidence when " ' the greater amount of credible evidence " ' " supports it).

{¶16} Consequently, when an appellate court reviews a manifest

weight of the evidence claim, the court may reverse a judgment of conviction only if it appears that the fact-finder, when it resolved the conflicts in evidence, " 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist. 1983); accord *McKelton* at ¶ 328. Finally, a reviewing court should find a conviction against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175; accord *State v. Clinton*, 2017-Ohio-9423, ¶ 166; *State v. Lindsey*, 87 Ohio St.3d 479, 483 (2000).

I.

{¶17} In his first assignment of error, appellant asserts that sufficient evidence does not support his weapons under disability conviction. At trial, although appellant stipulated that he had previously been "convicted of an offense that prohibited him from acquiring, having, carrying, or using a firearm," appellant

contends that appellee failed to produce evidence of the firearm's operability.

R.C. 2923.13(A)(3) provides:

(A) Unless relieved from disability under operation of law or legal process, 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 felony 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 a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

**{¶18}** Further, R.C. 2923.11(B)(2) defines "firearm":

(B)(1) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including,

but not limited to, the representations and actions of the individual exercising control over the firearm.

**{¶19}** “[T]he state must prove beyond a reasonable doubt that the firearm was operable or could readily have been rendered operable at the time of the offense.” *State v. Gaines*, 46 Ohio St.3d 65, 68-69 (1989). Moreover, as noted above, subsection (B)(2) of the statute expressly allows the trier of fact to rely upon circumstantial evidence to determine if the firearm was operable. *Thompkins*, 78 Ohio St.3d 380 (1997), paragraph one of the syllabus. Thus, empirical analysis of the gun is not required to prove operability. *State v. Murphy*, 49 Ohio St.3d 206, 209 (1990); *State v. Allah*, 2015-Ohio-5060, ¶ 10 (4th Dist.).

**{¶20}** “The trier of fact may consider all relevant facts and circumstances surrounding the crime,” which includes the representations and actions of the individual exercising control over the firearm, including implicit or explicit threats. *Thompkins* at paragraph one of the syllabus, 383; *State v. Obsaint*, 2007-Ohio-2661, ¶ 19 (1st Dist.); *State v. Pope*, 2019-Ohio-3599, ¶ 7 (1st Dist.). Accord *State v. McDade*, 1998 WL 682360, \* 12 (Sept.

25, 1998) ("the implicit threat of simply brandishing a firearm during the commission of a felony constitutes sufficient evidence of operability \* \* \*."); See also *State v. Knight*, 2004-Ohio-1941, ¶ 19 (2d Dist.) ("both a weapon's existence and its operability may be inferred from the facts and circumstances" of a case); *State v. Pope*, 2019-Ohio-3599, ¶ 7 (1st Dist.) ("operability of a firearm may be established by an operability report or testimony of a witness who had test-fired the weapon, but it also may be established by circumstantial evidence.").

**{¶21}** Therefore, the prosecution may establish a firearm's operability "by the testimony of lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime." *In re C.M.*, 2022-Ohio-240, ¶ 40 (3d Dist.), quoting *State v. Murphy*, 49 Ohio St.3d 206 (1990), syllabus.

This may include, for example, testimony that a gunshot was heard or that shell casings or bullet holes were found. It also may include evidence that can be viewed as an acknowledgment by the individual exercising control over the firearm that it was operable, through testimony about how he used the gun, his statements, and his conduct.

*State v. Mitchell*, 1997 WL 218417, \*4 (8th Dist. May 1, 1997), quoting *Tilley v. McMackin*, 989 F.2d 222, 225 (6th Cir. 1993) (examining operability under R.C. 2923.11(B)). See also *State v. Boyce*, 21 Ohio App.3d 153 (10th Dist. 1984) (proof that firearm operational may be inferred from testimony that witness heard gunshot); *State v. Rives*, 1989 WL 6207, \*3 (8th Dist. Jan. 26, 1989) (witnesses' observations and sensory perceptions sufficient to support, beyond a reasonable doubt, jury's finding gun is operable); *State v. Messer*, 107 Ohio App.3d 51, 55 (9th Dist. 1995) (other evidence showing indicia of operability include the actual gun and bullets).

**{¶22}** In the case sub judice, appellant contends that appellee failed to prove that the firearm in question was "capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant." Appellee, however, argues that it adduced sufficient circumstantial evidence to prove operability. Although Sergeant Shong did not observe appellant with the handgun, he (1) described the weapon as a black 9-mm with a brand that "started with a 'Z'," (2) recovered "some live

ammunition rounds" from Tina Unger, (3) recovered "the magazine for the firearm and a shell casing that had been fired from the bathroom of that residence," (4) observed "an apparent bullet hole in the wall of the bathroom" where he recovered a shell casing, (5) "put 15 (rounds) into evidence," and (6) observed that the gun's capacity "is 15 in the magazine."

**{¶23}** Additionally, Patrick Ewing (1) described the gun as a black 9-mm, (2) observed appellant with the firearm, (3) heard 2 gunshots in his home, (4) observed 2 holes in his bathroom wall after he heard the inside shots (5) observed appellant run outside and shoot 3 or 4 more rounds, (6) stated that 2 of the outside shots "went over by my head," (7) removed the weapon from appellant and removed the clip, (8) observed appellant take the gun from him and run towards his aunt's home, and (9) explained that appellant "acted like somebody was after him, but there was nobody there."

**{¶24}** Finally, Tina Unger testified that appellant, her husband's cousin, (1) rushed through her door, (2) brandished a gun, and (3) told her "people were chasing him. . . coming through the wall and coming through the windows and he's like bobbing and



weaving." In response, Unger called 911, removed the gun from appellant, and gave the weapon to Sergeant Shong when he arrived.

**{¶25}** In the case sub judice, after our review we believe the evidence adduced at trial supported appellant's weapons under disability conviction pursuant to R.C. 2923.13(A)(3). In *In re Hamlin*, 1988 WL 69119 (4th Dist. June 28, 1988), this court observed that, although no direct evidence existed "that the revolver was functional, there was circumstantial evidence including the opinion of a trained police officer from which the trier of fact could infer that the gun was capable of firing." *Id.* at \*5. Here, Sergeant Shong and the two eyewitnesses' testimony provided sufficient circumstantial evidence to support the conviction.

**{¶26}** Thus, after our review of the probative evidence, with the inferences reasonably drawn therefrom in a light most favorable to the prosecution, we believe that appellee adduced sufficient evidence, if believed, to prove each element of the offense and to support appellant's weapons under disability conviction. Accordingly, we overrule appellant's first assignment of error.

II.

**{¶27}** In his second assignment of error, appellant asserts that his conviction for having a weapon under a disability is against the manifest weight of the evidence. Specifically, appellant contends that the jury heard little to no evidence about how the firearm operated, and the evidence the jury heard came from sources that provided conflicting information. Appellant further points out that appellee produced no firearm, ammunition, photograph, or testimony to establish the make and model of the firearm. In particular, appellant argues that Sergeant Shong testified that the recovered firearm contained one round of ammunition and the recovered magazine contained 15 rounds. Appellant points out that Shong also testified that the magazine only held 15 rounds, but Ewing stated that he heard 5 or 6 rounds fired - 2 inside and another 3 to 4 outside, for a total of 20-21 rounds. Appellant thus contends that this is impossible as the firearm was only capable of holding 15 rounds plus 1 in the chamber.

**{¶28}** Appellee, however, contends that it established operability when Ewing testified that appellant fired the gun two

or three times and shots "went over by my head." In addition, Sergeant Shong testified that when he took the gun, "it had one round in the chamber," Shong "put 15 [live rounds] into evidence" and he found the magazine "already empty when it was handed to me." Shong also testified regarding "an apparent bullet hole in the wall of the bathroom," where he recovered a shell casing. Finally, Tina Unger testified that appellant rushed into her home, brandished the gun, and told her someone was chasing him. Moreover, appellee contends that the testimony regarding the number of rounds is not in conflict. Appellee points out that Shong testified that he recovered one round in the chamber of the firearm, some live rounds from Tiffany Young, the magazine for the firearm, and a shell casing that had been fired from the bathroom. Shong further testified that he put 15 rounds into evidence and that the magazine that holds 15 rounds was empty when he received it.

**{¶29}** To decide whether the case sub judice is an exceptional case in which the evidence weighs heavily against conviction, this court must review the record, weigh the evidence and all reasonable inferences, and consider witness credibility. *State v. Martin*, 20

Ohio App.3d 172, 175, (1st Dist. 1983). The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Schroeder*, 2019-Ohio-4136, ¶ 61 (4th Dist.); *State v. Dunn*, 2012-Ohio-518, ¶ 16 (4th Dist.); *State v. Wickersham*, 2015-Ohio-2756, ¶ 25 (4th Dist.). Because the trier of fact sees and hears the witnesses, an appellate court will afford substantial deference to a trier of fact's credibility determinations. *Schroeder* at ¶ 62. The jury has the benefit of seeing witnesses testify, observing facial expressions and body language, hearing voice inflections, and discerning qualities such as hesitancy, equivocation, and candor. *State v. Fell*, 2012-Ohio-616, ¶ 14 (6th Dist.); *State v. Pinkerman*, 2024-Ohio-1150, ¶ 26 (4th Dist.). Thus, an appellate court may reverse a conviction if the trier of fact clearly lost its way in resolving conflicts in the evidence and created a manifest miscarriage of justice. *State v. Benge*, 4th Dist. Adams No. 20CA1112, 2021-Ohio-152, ¶ 28.

**{¶30}** R.C. 2923.13(A)(3) provides, "no person shall knowingly acquire, have, carry, or use any firearm . . . if . . . the person . . . has been convicted of any felony offense involving the

illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse. . .” Here, appellant contends that appellee failed to prove beyond a reasonable doubt that the firearm he possessed was operable, or could readily have been rendered operable, at the time of the offense because appellee produced no direct evidence of operability and appellant contends that some evidence conflicted.

**{¶31}** Appellee points out that the trial court instructed the jury that they could “believe or disbelieve all or any part of the testimony of any witness.” A jury, sitting as the trier of fact, may choose to believe all or part or none of the testimony of any witness who appears before it. *State v. Daniels*, 2011-Ohio-5603, ¶ 23 (4th Dist.); *State v. Abudu*, 2023-Ohio-2294, ¶ 65 (8th Dist.). Accordingly, the jury could assess what weight, if any, it would attribute to the testimony of each of the witnesses.

**{¶32}** “‘ A reviewing court should not disturb the fact-finder’s resolution of conflicting evidence unless the fact-finder clearly lost its way.’” *State v. Newman*, 2015-Ohio-4283, ¶ 56 (4th Dist.), quoting *State v. Davis*, 2010-Ohio-555, ¶ 16-17 (4th Dist.). Here,

we do not conclude this to be the exceptional case in which the evidence weighs heavily against the conviction. The record before us is replete with evidence, if believed, that appellant committed the charged crime. Once again, it is not necessary to prove a firearm's operability through empirical analysis. *Murphy; Allah; Mitchell*. The evidence adduced at trial included multiple eye witnesses that observed appellant possess and fire the weapon.

**{¶33}** Thus, after our review of the record, we conclude that ample competent, credible evidence supports appellant's weapons under disability conviction and is not against the manifest weight of the evidence. Accordingly, for all of the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JACKSON, 23CA7

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DGMENT

AFFIRME

D.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed. Appellee shall recover of appellant the 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 Jackson County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY: \_\_\_\_\_



Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.