[Cite as *State v. Bellum*, 2024-Ohio-2742.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DEVON J. BELLUM,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 23 JE 0004

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 21 CR 198

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges, and William A. Klatt, Judge of the Tenth District Court of Appeals, Sitting by Assignment (Retired).

JUDGMENT:
Affirmed.

Atty. Jane M. Hanlin, Jefferson County Prosecutor and *Atty. Frank J. Bruzzese*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. Charles C. Amato, Amato Law Office, LPA, for Defendant-Appellant

Dated: May 28, 2024

WAITE, J.

{¶1} Appellant Devon J. Bellum appeals a January 25, 2023 Jefferson County Court of Common Pleas judgment entry convicting him of various offenses stemming from a bar fight. Appellant challenges only his convictions on concealed carry and tampering with the evidence, arguing they are against the manifest weight of the evidence. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter is somewhat complicated by the fact that witness testimony was contradictory and, at times, contradicted the video evidence introduced. The incident in question occurred on October 23, 2021 at the Hillsboro Grill and Tavern located in Mingo Junction, Jefferson County. It involved Appellant and a married couple, Devin Mazik and Katie Scott. While there is no evidence in the record as to Appellant's occupation, Mazik is a Mixed Martial Arts ("MMA") fighter and Scott is a reservist in the military. Mazik also engaged in boxing, wrestling, Brazilian jujitsu, kick boxing, and Muay Thai. On the night of the altercation, Mazik and Scott sat at a table with one of Mazik's friends in what appears to be the bar area of the restaurant. It does not appear that Mazik was acquainted with Appellant prior to the incident, however, Scott was familiar with several members of Appellant's family. She disputed witness testimony suggesting she may have been romantically involved with Appellant during her relationship with Mazik.

{¶3} Testimony shows Appellant ordered and consumed one shot of alcohol and appeared to prepare to leave. Mazik told police that he drank at least four beers. Scott consumed at least one alcoholic beverage. The bartender, Deannja Takach, noticed

Appellant talking to Mazik and Scott. Takach knew all three and stated she believed the conversation was friendly. However, Mazik said that at some point Appellant apparently "flirted" with Scott and Mazik told him, "[h]ey, man, that's my wife. Thank you. I appreciate it." (Trial Tr., p. 202.) Appellant and Mazik began arguing. Takach asked Appellant to leave, even though she later made it clear to responding officers that Mazik both started and escalated the incident.

{¶4} Although Appellant initially complied with Takach's request, he returned several times. According to Takach, Appellant could not find his phone and asked for her help. While outside, Appellant moved his car to a different parking space, apparently parked facing the exit, and left the engine running. When he re-entered the bar, he said he was still attempting to locate his phone, and Takach confirmed that Appellant appeared to be looking for something.

{¶5} At one point, Scott went outside to talk with Appellant. According to Takach, Mazik noticed Scott with Appellant and began aggressively walking towards Appellant. Takach testified that when "Mazik came in, I could tell he was irritated, and that's when it all started to kick off." (Trial Tr., p. 183.) Fearing that the incident was escalating, Takach again asked Appellant to leave. Mazik retreated to an outdoor patio, apparently on the other side of the bar.

{¶6} Takach testified that Mazik's friend attempted to calm him down on the patio. Witnesses testified that Mazik was rocking back and forth and looked ready to fight. Takach wanted Mazik to "go away" while she tried to get Appellant to leave. She testified that as Mazik walked towards her, "I remember telling him, 'Just go back outside

[to the patio],' you know, 'Don't do this,' " and he walked right past me. (Trial Tr., p. 190.) Mazik aggressively pursued Appellant with the stated purpose of engaging in a fight.

{¶7} Takach attempted to push Appellant out of the door, but Mazik became increasingly aggressive and walked up behind Takach, pushed her out of his way and bumped Scott out of his way as well. Appellant reacted by punching Mazik in the face. Although Mazik claimed that Appellant threw the punch towards Takach, surveillance video offered as evidence shows that Mazik had already pushed Takach and she was not anywhere near the punch as it was thrown. Scott then punched Appellant twice in the face. At trial, Scott claimed both that she connected, and missed, both punches. Mazik initially wrote in his statement to police that he "walked right through the punch" by Appellant and chased Appellant into the parking lot. At trial, Mazik changed his statement and alleged that he had been hit hard and "got dropped." (Trial Tr., p. 224.)

{¶8} Witness testimony shows that Mazik pursued Appellant to the parking lot with the admitted intent to engage in a physical fight. The facts are somewhat in dispute at this point, however, all of the witnesses agree Appellant brandished a gun. Mazik first testified that Appellant flashed the gun once, then pulled it from his waistband and aimed it at him. Mazik also testified: "[t]hen as soon as I take three steps forward [towards Appellant], he pulls the gun out, 'Oh yeah, motherfucker,' and that's when [Scott] came over and hit him. Immediately when he pulled the gun out, I went 'Nope, I'm out of here.' No business doing it." (Trial Tr., p. 205.) Scott testified that Appellant appeared to reach for something and that "in my instinct and in my military training, I figured I knew what it was. Then that's when I hit him." (Trial Tr., p. 232.) According to her testimony, she struck Appellant before he pulled the gun. She said that just before she and Mazik went

back inside the bar, she turned towards Mazik and attempted to shield him from any fire. Appellant put the gun away, saying he would not hurt a woman. Appellant then left in his blue BMW.

{¶9} Mazik made inconsistent statements at trial as to whether he had reason to believe Appellant was in possession of a gun during their argument. Mazik first claimed that "I'm going after him. But I knew -- in my head, I knew he had a weapon on him." (Trial Tr., p. 226.) He later testified that when Appellant pulled the gun, he retreated because he did not want to engage with an armed man. He never testified he saw a gun prior to Appellant's act of brandishing it in the parking lot.

{¶10} While Appellant, Scott, and Mazik were in the parking lot, Takach called 911 from inside the bar. She told dispatch about the fight and stated that she saw an odd shape near Appellant's waistline which appeared to resemble a gun. The surveillance video that was admitted into evidence depicting the incident was dark and difficult to view. At trial, all of the witnesses testified that at no point can a gun be seen on the video.

{¶11} Officers William Timko and Staben Ward of the Mingo Junction Police Department, and Sergeant James Lackey from the Jefferson County Sheriff's Office arrived at the bar within minutes of the 911 call, however, Appellant had left by the time they arrived. Mazik and Scott alerted the officers that Appellant had a gun, which Scott stated she recognized from her military experience was a Smith & Wesson. Mazik conceded at trial that he did not tell police Appellant actually pointed the gun at him when he gave his initial statement, claiming that he did not know he had to provide a complete account of the incident at the time. Mazik estimated that he was ten feet from Appellant when the gun was pulled. However, Scott testified that she was twenty to thirty feet away

and Mazik was behind her and further away from Appellant. Neither Mazik nor Scott told the officers at the scene that Scott threw multiple punches. While Mazik testified at trial that he had no idea what type of vehicle Appellant drove or where he went, he can be seen and heard in a police body camera video informing officers that Appellant drove "down the hill" in his blue BMW. (State's Ex. 1.)

{¶12} Takach was clearly agitated by Mazik's actions that evening. She is shown on body camera video informing police that, although Appellant should not have pulled a gun, the whole ordeal was caused by Mazik, who was the aggressor throughout the encounter. Officer Timko also testified that the evidence tended to show that Mazik was the aggressor. Despite this, neither Mazik nor Scott was arrested. Sgt. Lackey testified that, had a gun not been involved, all three individuals (Appellant, Mazik, and Scott) would likely have been charged for their actions during the incident. Thus, it was the involvement of a gun that was at the heart of the police investigation.

{¶13} After leaving the bar, Appellant drove to a house belonging to a friend, Greg Case. At the time, Case was watching a movie with his cousin and his girlfriend. When Case opened the door, Appellant asked him if he wanted to go out. Case said no, as he intended to stay in for the night watching the movie.

{¶14} Law enforcement, believing that Appellant's family lived in a nearby neighborhood to Case, began looking for him in that area. As officers approached the area, they spotted his blue BMW parked on the street. One officer testified that Appellant's car doors were open, however, they are clearly shown in body camera videos to be closed. As they started their search of the area, officers observed Appellant exiting the porch of Case's residence.

{¶15} Officers arrested Appellant, who stated that he was confused as to why he was being arrested instead of Scott, who had punched him three times. As officers searched Appellant for weapons they discovered two box knives that Appellant used for work, a phone charger, and cigarettes on his person. The officers also searched his vehicle.

{¶16} Case testified that almost immediately after he shut the door following his interaction with Appellant, he heard loud voices, followed by pounding on his door. Before officers knocked on the door, Officer Ward can be seen using his flashlight to conduct a search of the porch area. After Case opened the door and while he was talking to one officer, another officer who was searching the porch stated that he had found the gun.

{¶17} Evidence shows that the gun was located underneath a folding chair and behind a gas strong trimmer that was laying on the floor of the porch. The gun was lying flat with the slide horizontally in view, but the handle and trigger could not be seen. Thus, contrary to the officers' testimony that the gun had been tossed onto the porch, it appeared, instead, that the gun had been carefully placed in an apparent attempt to hide it.

{¶18} Officer Ward started to pick up the gun but was stopped by Sgt. Lackey, who told him to leave the gun in place so gloves could be obtained and the weapon could be photographed. When Sgt. Lackey was able to pick up the firearm, he discovered it was loaded, with a bullet in the chamber. He removed the bullets and placed the weapon and bullets in the trunk of Officer Ward's vehicle. Although Sgt. Lackey does not appear in the chain of custody of the gun, he is shown on body camera video removing the gun and bullets and placing them in the trunk of Officer Ward's cruiser. (See State's Ex. A,

14:59.) At trial, Officer Ward insisted that Sgt. Lackey left the premises with the gun and did not deliver it to the Mingo Junction police station until days later. However, the video confirms Sgt. Lackey's version of the events.

{¶19} Case informed officers the gun did not belong to him and that he did not know how it ended up on his porch. Case did not see Appellant holding a weapon and had no reason to believe Appellant was armed when he knocked on the door. The timeframe suggests that Appellant could not have been on the porch for long, because a review of the videos admitted into evidence reveals that approximately one-half of an hour passed between the altercation in the parking lot and Appellant's ultimate arrest.

{¶20} DNA testing of the gun revealed Appellant's DNA profile in a mixed sample, meaning that he was one of multiple people to have touched the gun at some point. Appellant stipulated he was subject to a weapons disability at the time as a result of three prior separate criminal convictions.

{¶21} After officers brought Appellant to the jail, Sgt. Manard Reed of the Jefferson County Sheriff's Office completed a full search of Appellant and located a baggie containing an odorless "gray-type substance, dark substance" he did not recognize. (Trial Tr., p. 493.) Officer Timko testified that the drugs were not found during the initial search because Appellant wore multiple layers of pants. A video played during Sgt. Reed's testimony showed Appellant drop his jeans during the booking process, and that he had only boxer shorts underneath, contradicting Officer Timko's testimony.

{¶22} Sgt. Reed testified that he immediately gave the baggie to Officer Timko, however, Officer Timko testified that he had to call over to the jail days later to find the baggie. Body camera video footage shows that Sgt. Reed handed the drugs to Officer

Timko, who left the jail with the drugs in his possession. This is the second time Officer Timko's testimony was contradicted by other evidence. Regardless, the Ohio Bureau of Criminal Investigations ("BCI") later determined the substance was heroin.

{¶23} On October 26, 2021, a complaint filed in the Jefferson County Municipal Court, Wintersville Division, charged Appellant with one count of having weapons while under disability, a felony of the third degree in violation of R.C. 2923.13(A)(2); one count of tampering with evidence, a felony of the third degree in violation of R.C. 2921.12(A)(1); one count of assault, a misdemeanor of the first degree in violation of R.C. 2903.13(A); and two counts of aggravated menacing, misdemeanors of the first degree in violation of R.C. 2903.21(A).

{¶24} On December 1, 2021, a grand jury indicted Appellant on slightly different charges: three counts of having a weapon while under disability, felonies of the third degree in violation of R.C. 2923.13(A)(3), (B); one count of carrying a concealed weapon, a felony of the fourth degree in violation of R.C. 2923.12(A)(2), (F)(1) with "additional finding No. 1" (at the time of the offense, the firearm was loaded) and "additional finding No. 2" (at the time of the offense, the offender had ammunition ready at hand); tampering with evidence, a felony of the third degree in violation of R.C. 2921.12(A)(1); one count of aggravated menacing, a misdemeanor of the first degree in violation of R.C. 2903.21(A), (B); and one count of possession of heroin, a felony of the fifth degree in violation of R.C. 2925.11(A), (C)(6)(a).

{¶25} A jury trial commenced on January 19, 2023 and ended on January 20, 2023. The jury convicted Appellant on all counts as charged within the indictment. We

note that while Appellant was charged with three counts of weapons disability, only count one was presented to the jury as a result of a stipulation by the parties.

{¶26} In addition to the earlier-mentioned contradictory testimony by several witnesses, another problem arose during trial. Mazik and Scott were apparently speaking loudly about the trial at a nearby restaurant during recess. One of the many jurors in the restaurant cautioned Mazik that several jurors, and apparently the judge, were present in the restaurant. Mazik responded by asking the juror which videos they had been shown. The juror became uncomfortable and brought the issue to the attention of the judge. An in chambers meeting occurred involving the court, both counsel, and the juror. It does not appear that the court admonished Mazik and the juror remained seated.

Motion for a New Trial

{¶27} Problematically, prior to filing his notice of appeal, Appellant filed a motion for a new trial on February 2, 2023. The court's sentencing entry was filed on January 25, 2023. Appellant filed his notice of appeal on February 8, 2023.

{¶28} Due to potential jurisdictional issues, the state filed a brief arguing that the trial court had been stripped of its jurisdiction to rule on the motion due to filing of the notice of appeal. The trial court did not address any jurisdictional concerns, and instead scheduled a hearing on the motion. This hearing occurred almost one month after the trial transcripts were requested in this appeal. No transcripts of this hearing on the motion for new trial were filed.

{¶29} Appellant's motion was based on two alleged violations of his right to a public jury trial. Both alleged violations involved the trial going past the closure of the courthouse at 4:30 p.m. In the more significant instance, it appears the court called for

recess sometime before the closure of the courthouse, but elected to finish the trial after hours. Appellant's family were fixtures at trial and were present for all proceedings prior to the recess. During recess, Appellant's family noticed that his wheelchair-bound brother was experiencing discomfort and decided to take him back to a nursing facility. When they returned, the courthouse was locked and they could not reenter the building. As a result, they were not able to be present during the closing arguments, jury instructions, and deliberations. On August 4, 2023, the trial court filed a judgment entry denying the motion for new trial.

{¶30} Ohio law is clear that "once the court of appeals assumes jurisdiction after the filing of the notice of appeal, the trial court loses jurisdiction to take any further action which would conflict or materially affect that part or portion of the proceeding which is pending on appeal." *Smith v. Bond*, 7th Dist. Belmont No. 13 BE 27, 2015-Ohio-2585, ¶ 10. Because we had already assumed jurisdiction over this matter and the issue before the trial court clearly would have affected our review, the trial court was without jurisdiction to rule on the motion for a new trial. Accordingly, we must strike the court's ruling on that motion.

ASSIGNMENT OF ERROR NO. 1

> The conviction of the Appellant for the Count four of carrying a concealed weapon charge is against the manifest weight of the evidence in violation of Article IV, Section 3, of the Ohio Constitution and should be overturned.

ASSIGNMENT OF ERROR NO. 2

The conviction of the Appellant for the Count five Tampering with evidence charge is against the manifest weight of the evidence in violation of Article IV, Section 3, of the Ohio Constitution and should be overturned.

{¶31} Appellant challenges both his convictions for carrying a concealed weapon and tampering with the evidence. He does not challenge his convictions for having a weapon while under a disability, aggravated menacing, or possession of heroin. His failure to challenge those convictions leaves only his ability to argue there is no evidence that the gun was loaded at the time of the incident in his concealed carry challenge, and that he did not hide the gun with knowledge that a police investigation had commenced as to his tampering charge.

{¶32} Regarding his concealed carry conviction, the state highlights that Appellant had the gun concealed on his person; he brandished the gun, pointed the gun at Mazik and threatened to shoot him, then fled with the gun. The incident was captured on the bar's surveillance system in front of other witnesses. As to the argument about whether the gun was loaded, the state responds that it is hard to imagine a scenario where an unloaded gun is pointed at a person, then the offender returns to his car, loads the gun, flees to his friend's porch and hides the gun. The more logical view is that the gun was loaded, with a bullet in the chamber, at the time it was brandished. As to the tampering conviction, common sensically, it is reasonable to infer that a person who pointed a gun at another person in front of witnesses must understand that a police investigation would immediately follow the incident. On the question of whether it was Appellant who hid the

gun, the gun was found on his friend's porch and Appellant was in the process of leaving that porch when police arrived. The gun tested positive for Appellant's DNA.

{¶33} We note that the state appears to attempt to shift the burden of proof regarding whether a gun is loaded to Appellant, claiming that he is the only one who could truly know whether it was loaded or not. This is not the law in Ohio. It clearly is possible for the state to prove this element through circumstantial evidence, as in this case.

{¶34} The state also appears to suggest, without any legal support, that the action of pointing a gun implies that it was loaded. Not only is this unsupported in law, but the state ignores the possibility that a person may draw an unloaded gun in order to invoke fear in another, and not necessarily with intent to fire the weapon.

{¶35} Although Appellant framed his assignment as solely challenging the manifest weight of the evidence, he includes arguments more akin to an attack on the sufficiency of the evidence, a related but different legal concept.

{¶36} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a

defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶37} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins*, 78 Ohio St.3d at 386. It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id*. at 390 (Cook, J. concurring). The appellate court reviews 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387, 678 N.E.3d 541, 678 N.E.2d 541. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶38} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible

parts. *State v. Barnhart*, 7th Dist. No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶39} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff,* 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

Concealed Carry

{¶40} The elements of the crime of carrying a concealed weapon are found within R.C. 2923.12. Appellant was convicted of violating R.C. 2923.12(A)(2), (F)(1). R.C. 2923.12(A) provides that:

> (A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:
>
> (1) A deadly weapon other than a handgun;
>
> (2) A handgun other than a dangerous ordnance;
>
> (3) A dangerous ordnance.

{¶41} R.C. 2923.12(F)(1) provides in relevant part: "if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if

the weapon involved is dangerous ordnance, carrying concealed weapons in violation of division (A) of this section is a felony of the fourth degree."

{¶42} Appellant's arguments are aimed at R.C. 2923.12(F)(1) which elevates the offense into a felony of the fourth degree. If the elements of subsection (F)(1) are not met, then the offense is only a misdemeanor of the first degree.

{¶43} There is no question that, if believed, the evidence at trial was sufficient to prove that Appellant concealed a hand gun in his waistband. As to subsection (A)(2), Takach testified she observed an odd shape near Appellant's waistband that resembled the shape of a gun. She told the 911 dispatch she believed Appellant had a gun. While Takach never actually saw the gun, Mazik and Scott both testified that Appellant pulled a gun from his waistband and pointed it at Mazik. The gun was retrieved from the same porch where police located and arrested Appellant and his DNA was found in a mixed sample on the weapon. Thus, there was evidence that the weapon was concealed in his waistband, was not visible to the naked eye, and readily at hand.

{¶44} As to subsection (F)(1), there is evidence in the form of body camera video and police testimony that the gun was found loaded and that a bullet was in the chamber. While Appellant now contends that the gun could have been loaded after the incident at the bar, there are no facts in the record to support this contention.

{¶45} While a security camera video did capture the incident, the quality was poor. The parties agree that at no time can a gun be seen on the video. Thus, the jury relied on witness testimony in reaching a verdict. As earlier discussed, however, there were some issues of credibility involving Mazik, Scott, and the officers at the scene, and some issues with physical evidence.

{¶46} Beginning with Mazik, there is no question his testimony was inconsistent and contained a great many contradictory statements. For instance, all of the witnesses and law enforcement opined that Mazik was the aggressor throughout the encounter but Mazik claimed he was passive during the encounter and only became aggressive in response to Appellant's aggression. Mazik claimed that the fight started because Appellant agitated other bar patrons throughout the night and he took it upon himself to deal with Appellant. Eyewitnesses testified that there was no trouble until Mazik became irritated with Appellant because he was talking with Scott. Mazik claimed that he feared Appellant would hurt Takach, however, the undisputed evidence, including Takach's testimony and the surveillance video, shows that it was Mazik who pushed Takach and bumped Scott out of his way. Takach was never in danger from Appellant's actions. Mazik claimed that he never "got into a stance," however, he was described by witnesses and observed on the video to be physically in a fighting stance and rocking back and forth. Despite his claim that he remained calm until Appellant became physically violent, he admitted that he returned inside the bar from the back patio in order to start a fight with Appellant.

{¶47} In his statement to police, Mazik claimed that he "walked through the punch," but testified at trial that Appellant's punch knocked him down. Mazik claimed he knew Appellant was armed, but decided to engage in a physical fight with Appellant regardless, but later said he retreated because he discovered that Appellant had a gun. Mazik initially told police that Appellant merely pulled the gun out and brandished it, however, he testified at trial that Appellant pointed the gun at his head. Mazik also

claimed that Appellant "flashed the gun" before Scott punched him. Scott testified that she hit Appellant while he was reaching towards his waistline.

{¶48} Although Mazik's testimony did raise credibility issues, these did not affect the ultimate determination of the real issue: whether Appellant had a concealed weapon. The elements of the offense required only evidence that Appellant had a loaded gun on his person that was concealed. The jury was aware Mazik's testimony was somewhat contradictory and that he often provided inconsistent statements. The jury appears to have believed Mazik when he testified that Appellant pulled a gun from his waistband and pointed it at him, however, and the jury was free to have come to this conclusion.

{¶49} Turning to Scott, she admittedly punched Appellant three times: twice after he hit Mazik and once when she believed she saw him reach for a gun. She did not tell police that she punched Appellant during the initial investigation. Scott also claimed that she was not previously acquainted with Appellant but knew some of his family members. However, a witness testified about an allegation that Scott and Appellant had engaged in a romantic relationship. While this could be seen to diminish Scott's credibility, again, the jury heard the testimony and obviously believed her when she testified that Appellant pulled a gun from his waistband and pointed it at Mazik.

{¶50} The most erratic testimony came from various members of law enforcement. First, Officer Timko testified that he had to call Sgt. Reed days after the incident in an effort to locate the drugs removed from Appellant's person. Sgt. Reed, however, testified that he immediately handed the drugs to Officer Timko and never again saw the drugs or talked to Officer Timko about the matter. (Trial Tr., p. 496.) Sgt. Reed's

version of events is supported by body camera video. We note that Appellant does not challenge his drug-related conviction.

{¶51} Officer Timko also testified that Sgt. Lackey removed the gun from the scene and delivered it to the Mingo Junction Police Department days later. However, Sgt. Lackey testified that he removed the gun from the porch and placed it in a locker in the trunk of Officer Timko's cruiser. Sgt. Lackey's body camera video confirmed his testimony. Chief Willie McKenzie testified that he spoke with Officer Timko immediately after Officer Timko testified in this case and Officer Timko admitted to the chief that "he couldn't remember exactly what happened at the time." (Trial Tr., p. 566.) While it appears that Officer Timko's recollection was faulty, the jury viewed the body camera video, which showed exactly what happened at the time.

{¶52} Sgt. Lackey testified that Case gave the officers permission before they began searching Case's porch. This is not only contradicted by Case's testimony but also by video from Sgt. Lackey's body camera, which showed officers searching the area prior to and during their conversation with Case. In fact, the video reveals that the officers never asked for permission to search the porch. When this inconsistency came to light, Sgt. Lackey claimed that the officers' actions did not really constitute a "search". (Trial Tr., p. 412.) This assertion is also contradicted by the video. While troubling, it has no impact on Appellant's arguments, as he lacked standing to challenge any search conducted at Case's residence.

{¶53} Sgt. Lackey also claimed that he did not complete a full search of Appellant's person and did not search his pockets, but acknowledged that he removed several items from Appellant's pockets and placed them on top of a police cruiser. (Trial

Tr., p. 418.) This is again contradicted by his body camera video. However, no incriminating evidence was found during these searches that involves this appeal and the search was incidental to a lawful arrest.

{¶54} In addition, there was a chain of custody issue involving the gun. Despite clear evidence that Sgt. Lackey removed the gun from the porch, removed the bullets from the gun, and placed these in the trunk of the cruiser, his initials do not appear in the chain of custody. Outside the presence of the jury, the trial court overruled an objection by the defense concerning chain of custody. The objection was two-fold: (1) the chain was broken from an evidentiary perspective and (2) counsel had no way of knowing that Sgt. Lackey would testify that he handled the gun. Although acknowledging that the chain had been broken, the court found chain of custody need not be perfect and counsel could have discovered Sgt. Lackey handled the firearm through the body camera video or by talking to Sgt. Lackey. Again, the jury was fully aware that this was an issue.

{¶55} The timeline of events is critical to a determination of the ultimate issue. It is clear from the timeline established at trial that Takach called 911 around the time Appellant pulled the weapon. Dispatch received the call at 23:49:29. Appellant reached Case's house sometime around midnight. Officers located the gun at 12:14 a.m. and had arrested Appellant just before this discovery. Essentially, less than one-half of an hour had elapsed between the incident at the bar and the recovery of the gun. At the time the gun was located, it was loaded, with a bullet in the chamber.

{¶56} Takach testified that while she saw a shape resembling a gun near Appellant's waistband, she never actually saw a gun. Mazik and Scott were less than ideal witnesses, but both corroborated Takach's suspicions and testified they did see the

gun. The gun found on the porch fit the description given by Scott and contained Appellant's DNA. Although Appellant correctly raises several concerns regarding testimony and certain evidence, the record does contain evidence which, if believed by the jury, supports each element of the charged crime of carrying a concealed weapon.

{¶57} While the state's case is supported by circumstantial, and not direct, evidence, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Prieto*, 7th Dist., 2016-Ohio-8480, 82 N.E.3d 450, ¶ 34 (7th Dist.), citing *In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 272-273, 574 N.E.2d 492 (1991), paragraph one of the syllabus. In fact, "[e]vidence supporting the verdict may be found solely through circumstantial evidence." *State v. Smith*, 7th Dist. Belmont No. 06 BE 22, 2008-Ohio-1670, ¶ 49.

{¶58} Based on the above, Appellant's first assignment of error is without merit and is overruled.

Tampering

{¶59} The elements of tampering with the evidence are found within R.C. 2921.12(A), which provides:

> No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

> (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation; * * *
>
> (B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

{¶60} The first issue, here, is whether Appellant knew or had reason to know that an official investigation was either in progress or likely to commence. Appellant argues that he had no reason to believe an investigation was forthcoming. Appellant focuses on Takach's admission that he would have had no reason to know she had called 911. Appellant also questions how he could have expected law enforcement to respond as quickly as they did.

{¶61} The state contends that every reasonable person would assume an investigation would quickly follow an altercation involving a gun, especially as there were witnesses to the incident.

{¶62} Appellant also raises the question of identity. He claims there is no evidence he was the person who hid the gun. Appellant urges that there was no time for him to have done so, due to the immediate response by the police and the length of time he spent driving to Case's house and speaking with him. Appellant notes that he was already walking off the porch when police arrived and no one saw him with the gun or making any movement to indicate he was in the process of hiding the gun.

{¶63} The state responds that the gun had Appellant's DNA on it and fit the description Scott gave to police. It was found on Case's porch as was Appellant. Hence,

it is reasonable to surmise Appellant hid the gun. Appellant was so quickly located he had very limited opportunity to load the gun after the incident occurred. Thus, the gun must have been loaded during the incident.

{¶64} According to the Ohio Supreme Court, as a matter of common sense, certain inferences can be drawn from the circumstances stemming from the incident at issue. *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, 90 N.E.3d 857, ¶ 116. The *Martin* Court found that "knowledge of a likely investigation may be inferred when the defendant commits a crime that is likely to be reported." *Id.* at ¶ 118. Here, Appellant pulled out a gun during a bar fight that included multiple punches thrown by multiple individuals, including Appellant.

{¶65} While Appellant may not have known about the 911 call, he knew that there were witnesses to the fight and to his act of pulling out the gun. A reasonable person would believe that, under those circumstances, police would undertake an investigation. See *State v. Murphy*, 2d Dist. Montgomery No. 29559, 2023-Ohio-3276. Appellant should reasonably have expected an investigation to commence. The law does not require specific knowledge that law enforcement is actively involved in an investigation at the time of the alleged tampering. The question is whether a reasonable person would expect an investigation to commence.

{¶66} As to whether Appellant hid the gun, the facts support this inference. Although Scott was incorrect as to the caliber of the weapon, she informed police that she believed the weapon, which she described as black and silver, was a Smith & Wesson. The gun located by police was a silver and black Smith & Wesson. More importantly, Appellant's DNA profile was included within a mixed DNA sample found on the gun, and

he was located by police while standing on the porch where the gun was discovered. Appellant was under a weapons disability at the time. Hence, he had a reason to rid himself of the weapon in anticipation of an investigation by law enforcement. Although not conclusive evidence, it is reasonable to infer that a person under a weapons disability does not want to be found by law enforcement carrying a gun.

{¶67} Based on this record, Appellant's convictions are not against the manifest weight of the evidence. Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶68} Appellant challenges only his conviction for concealed carry and tampering with the evidence. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Klatt, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.