[Cite as *State v. Morris*, 2009-Ohio-6033.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0110**
- vs -	:	
RYAN S. MORRIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 218.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Gordon S. Friedman, Friedman & Gilbert, 600 Standard Building, 1370 Ontario Street, Cleveland, OH 44113-1752 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Appellant, Ryan S. Morris, appeals his conviction, following a jury trial, in the Trumbull County Court of Common Pleas of felonious assault, rape, having weapons while under disability, and assault on a peace officer. For the reasons that follow, we affirm.

{¶2} **Factual and Procedural Background**

{¶3} An evening that began with a party and a game of dice ended with the apartment being cleared by the brandishing of a gun and a rape. These events resulted

in a five-count indictment by which Mr. Morris was charged with felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2) and (D), with a firearm specification, in violation of R.C. 2941.145; rape by fellatio, a felony of the first degree, in violation of R.C. 2907.02(A)(2) and (B), with a firearm specification; rape by vaginal intercourse, a felony of the first degree, in violation of R.C. 2907.02(A)(2) and (B), with a firearm specification; having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(3) and (B); and assault on a peace officer, a felony of the fourth degree, in violation of R.C. 2903.13(A) and (C)(3).

{¶4} The victim, "A.M.", and her friend, Korin Shimko, drove together to a party of about ten people hosted by Josh Phillips, a friend of Ms. Shimko.

{¶5} While Ms. M was in the living room, several of the male guests were in the kitchen playing dice. She heard someone say, "you took my $40.00," and then about four people, including Mr. Morris, who she had never met before that evening, started fighting in the kitchen. She went in the kitchen to try to break up the fight, and once the fight broke up and everyone left the kitchen, Mr. Morris, bloodied from the fight, got up, pulled out a pistol, and held it in the air. As Mr. Morris attempted to cock the gun, it fell apart. The other partygoers fled the apartment, leaving only Ms. M and Mr. Morris in the apartment. Indeed, Josh Phillips called 911 from the parking lot of the apartment, and stated he just had a gun pulled on him and the person who pulled the gun was still in his apartment**.** Sergeant Manny Nites was dispatched to the scene, and met Mr. Phillips outside. Mr. Phillips pointed out his apartment and detailed how the black male became irate because he lost money in the game and then brandished a gun.

{¶6} Mr. Morris then grabbed Ms. M by her hair and threw her in the corner of the kitchen by the water cooler. At this point the descriptions of the events of the evening given by Ms. M and Mr. Morris diverge.

{¶7} Ms. M told the jury that Mr. Morris came back to her. He turned her around and "poked" his gun in her neck and head several times. She begged him not to shoot her because, she said, she had children at home. He said, "F__ you, bitch, I got kids too. You think I really give a f__?"

{¶8} Mr. Morris then pulled her up by her hair, threw her against the sink, and "continued to hit [her] with the gun." He then put the gun in her mouth. After about a minute, he took the gun out of her mouth. She was afraid for her life, and attempted to calm him down by asking him if she could get a drink of water. After she drank a cup of water, Mr. Morris pulled her to the couch in the living room. He sat down and pulled her over to him. He still had the gun in his hand and said, "Well, are we going to f__ or what?" He then pulled her down the hallway to the back bedroom.

{¶9} While Mr. Morris was pointing the gun at Ms. M, he told her to remove her clothes. Fearing for her life, she complied. He pulled her up on the bed and forced her to give him oral sex and then vaginal intercourse. She then heard Warren police officers come in the living room through the sliding glass doors, so she ran out of the bedroom completely naked and past the officers screaming, "he raped me."

{¶10} Sgt. Manny Nites and Lt. Eric Merkle of the Warren police also told the jury that a naked woman ran down the hallway, crying and visibly upset, claiming that she had been raped, while Mr. Morris' relative, Joi Morris, told the jury that she saw Ms.

M standing on the balcony of the apartment in her underwear before the police took Mr. Morris out of the apartment.

{¶11} Sgt. Nites transported the victim to St. Joseph's Hospital where a rape kit was performed and she was treated for bruises to her neck, thighs, and knee.

{¶12} Mr. Morris told the jury that while playing dice at the party, someone became upset that he was winning and started a fight. During the fight a gun fell "out somewhere." He grabbed it, he cocked it, and everyone left the apartment, except the victim. After he cocked the gun, a part of the gun fell off and he just put the gun in his pocket.

{¶13} Mr. Morris denied engaging in oral or vaginal sex with the victim, and told the jury that she was simply "grinding" on him with her underwear still on. When they heard the police, she "walked" out of the room with her underwear still on, and he took the gun out of his pocket and hid it under the mattress. During an interview at the jail, Mr. Morris denied having a gun that night.

{¶14} The jury also heard that Mr. Morris was convicted of possession of marijuana in 2005 and falsification in 2004.

{¶15} Ms. M's friend, Korin Shimko, gave a recorded statement to the Warren police shortly after the events of the evening, but at trial, her testimony changed to the point that the trial court declared her to be a hostile witness.

{¶16} She confirms the altercation in the kitchen. She also confirms that Mr. Morris cocked the gun, that he got up, that he was trying to get the gun to work when it fell apart; that he pointed the gun at the area of the kitchen floor where the victim was lying**;** that he walked to the doorway of the dining room and pointed his gun in her

direction and at everyone in the dining room; and that he said, “I’ll kill all of you.” But at trial she claimed that Mr. Morris acted in “self-defense”, while also confirming that she told the detectives that she “thought he was going to shoot me swear to god.” Both Ms. M and Ms. Shimko picked Mr. Morris out of a photo array.

{¶17} Sgt. Nites entered the apartment first, followed by Lt. Merkle. Sgt. Nites pointed to the back bedroom, not wanting to advise the suspect of their location. Lt. Merkle went into the kitchen to get a better view into the bedroom, and saw the suspect jump onto the bed. The officers then entered the bedroom.

{¶18} After handcuffing Mr. Morris**,** Sgt. Nites searched the immediate area, lifting the mattress on which Mr. Morris had been lying to find a semi-automatic handgun and its magazine, which was not attached to the gun, under the mattress and on the box spring. At that moment, without being questioned, Mr. Morris blurted out, “it was consensual.”

{¶19} Sgt. Nites located the slide or top part of the gun, by which the gun is cocked, and the spring for the handgun on the floor in the dining room.

{¶20} The jury heard conflicting testimony regarding Mr. Morris’ use of the gun prior to the guests running out of the apartment.

{¶21} Ms. M testified that after she went into the kitchen to break up the fight, Mr. Morris got up, pulled out a pistol, and held it up in the air. As everyone was running out of the kitchen, Mr. Morris grabbed her by the hair and threw her in the corner of the kitchen. On cross-examination, she testified she did not see him point the gun or cock it. She also said she did not see the gun until he turned her around in the kitchen and started to poke her with it.

{¶22} Ms. Shimko testified that when the fight started, she was in the dining room. Mr. Morris pulled out a gun while he was in the kitchen. She said he cocked his gun and got up. She said he pointed the gun at Ms. M while she was on the kitchen floor. Mr. Morris walked to the doorway of the dining room and was trying to get the gun to work. He pointed the gun at her while he was standing in the doorway. While he was pointing his gun, the clip fell off the gun and that was when everyone left. She was afraid due to Mr. Morris having pointed a gun at her. She testified she heard Mr. Morris say, "I'll kill all of you." In her police statement she said he pointed the gun at everyone in the dining room. Also, in her statement she said she thought he was going to shoot her. Although Ms. Shimko testified Mr. Morris cocked the gun in self-defense, she admitted that in her police statement, she never told the police he was acting in self-defense.

{¶23} In his 911 call, Mr. Phillips said he just had a gun pulled on him. He told Sergeant Nites on scene that the game ended when a black male became irate because he had lost some money in the game. Mr. Phillips said the male pulled out a gun, a fight took place, and then he and the others ran out of the apartment.

{¶24} In his police interview later that night, Mr. Morris said he did not see or have any gun that night. However, at trial he testified he was winning money and then three of the players got mad and jumped him. Mr. Morris said, "a gun fall out somewhere" and he grabbed it. He cocked the gun and the clip fell on the floor and everyone ran out of the apartment except for Ms. M. He said he cocked the gun to scare the guests. He then put the gun in his pocket. While he was in the bedroom with

Ms. M and he heard the police outside, he took the gun out of his back pocket and put it under the mattress.

{¶25} Avery Qualls, another guest, testified that when Mr. Morris started to win, the other players became angry and someone hit Mr. Morris and then everyone else, including Mr. Qualls, jumped Mr. Morris. He said Mr. Phillips helped Mr. Morris get up and then Mr. Morris picked up a gun from the floor, waived it in the air, and said, "Please back up." Then everyone ran out of the apartment. On cross-examination, Mr. Qualls said he lied to the police about what really happened because he had jumped Mr. Morris and did not want to get in trouble. He said he told the police that Mr. Morris came to the party with a gun and that he, Mr. Qualls, won $40 and that Mr. Morris grabbed his money from him. He told police that Mr. Morris pointed his gun at everyone and said, "you better back up."

{¶26} The charges against Mr. Morris did not end with the events at the apartment. While Officers Brian Cononico and Eric Laprocina were driving Mr. Morris from the Trumbull County Jail to St. Joseph's Hospital for DNA swabbing, Mr. Morris became belligerent. He called the officers obscene names and threatened them. He spat at the officers and told them he had hepatitis. His spit landed on Officer Cononico's leg.

{¶27} After Mr. Morris was swabbed in the hospital, the nurse gave his penile swabs to Sgt. Nites to be secured. Officers Cononico and Laprocina transported Mr. Morris back to the jail. He continued calling the officers obscene names and told them he had hepatitis. Mr. Morris again spat at both officers. His spit landed on Officer Cononico's head and on Officer Laprocina's shoulder.

{¶28} Detective Sergeant Michael Merritt, crime scene investigator, processed the scene for evidence. He collected a .25-caliber FIE Titan semi-automatic handgun, which was in three pieces. The handle and magazine were on a mattress in the bedroom. The slide and spring were on the dining room floor. He also collected two live rounds for this gun that were five feet from the slide and spring.

{¶29} Jonathon Gardner, firearms examiner at BCI, testified he put the gun together, and on test-firing found the handgun fired normally and had no defects. He said it would be easy for anyone with knowledge of the gun to put the parts together. It took him 15 seconds or less to put the gun together and make it operable.

{¶30} Brenda Gerardi, forensic scientist at BCI, testified that Mr. Morris' penile swabs contained Ms. M's DNA. The DNA on the trigger and handle areas of the gun contained a mixture of Ms. M and Mr. Morris' DNA. Further, Mr. Morris' DNA was found on the magazine of the handgun.

{¶31} The jury returned a verdict of guilty on count one, felonious assault with a firearm specification; guilty on count two, rape by fellatio, but not guilty of the firearm specification; not guilty on count three, rape by vaginal intercourse; guilty on count four, having weapons while under disability; and guilty on count five, assault on a peace officer.

{¶32} On count one, felonious assault, the court sentenced Mr. Morris to two years in prison and three years on the firearm specification. On count two, rape, the court sentenced him to six years in prison. On count four, having weapons while under disability, the court sentenced him to one year in prison. Finally, on count five, assault

on a peace officer, the court sentenced him to one year. The court ordered that all terms were to be served consecutively for a total of 13 years in prison.

{¶33} Mr. Morris appeals his conviction asserting six assignments of error. Because his first and third assigned errors are related, we shall consider them together. They allege:

{¶34} "[1.] The jury verdicts finding the Defendant-Appellant guilty are not supported by the weight of the evidence.

{¶35} "[3.] The trial court erred to the prejudice of the Defendant-Appellant in overruling his motions for a directed verdict made in line with Ohio Rule of Criminal Procedure 29."

{¶36} **Sufficiency of the Evidence/Manifest Weight of the Evidence**

{¶37} Under his first assigned error, Mr. Morris contends the jury's guilty verdicts as to having a firearm while under disability, the firearm specification to the felonious assault charge, rape by fellatio, and assault on a peace officer are against the manifest weight of the evidence. Under his third assigned error, he argues the evidence was not sufficient to support his conviction of felonious assault, having a firearm while under disability, the firearm specification, and assault on a peace officer.

{¶38} There is a fundamental distinction between a challenge to the sufficiency of the evidence and a challenge to the weight of the evidence. The legal concepts of sufficiency of the evidence and weight of the evidence are quantitatively and qualitatively different from each other. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

{¶39} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence most favorably to the state, the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins,* supra, at 390 (Cook, J., concurring).

{¶40} In contrast, a court reviewing the manifest weight observes 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. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15.

{¶41} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶42} An appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. The factfinder is free to believe all, part, or none of the testimony of each witness appearing

before it. *State v. Brown,* 11th Dist. No. 2002-T-0077, 2003-Ohio-7183, at ¶53. Moreover, if the evidence admits to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. Id.

{¶43} **Felonious Assault**

{¶44} Mr. Morris argues that the evidence was insufficient to support his conviction of felonious assault pursuant to R.C. 2903.11(A)(2). That section provides that no person shall "knowingly *** cause or attempt to cause physical harm to another *** by means of a deadly weapon ***."

{¶45} Mr. Morris cites *State v. Brooks* (1989), 44 Ohio St.3d 185, for the proposition that the act of pointing a deadly weapon at another, without additional evidence regarding the actor's intention, is insufficient evidence to convict a defendant of felonious assault.

{¶46} However, Mr. Morris ignores the record evidence of his intent in using the firearm. Ms. M testified that after the fight was over and the other participants left the kitchen, Mr. Morris pulled out a gun. Ms. Shimko said he walked to the doorway leading into the dining room and pointed his gun at everyone and said, "I'll kill all of you." Mr. Morris testified when he cocked his gun, everyone, except for the victim, ran out of the apartment. This evidence was sufficient to convict Mr. Morris of felonious assault.

{¶47} We also observe that Mr. Morris used his gun to repeatedly strike Ms. M. Such conduct was also sufficient to convict him of felonious assault. Mr. Morris was charged and convicted of felonious assault in violation of R.C. 2903.11(A)(2), which prohibits a person from knowingly causing or attempting to cause physical harm with a deadly weapon. Deadly weapon is defined as "any instrument, device, or thing capable

of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A).

{¶48} A jury is entitled to infer the deadly nature of an instrument from the facts and circumstances of its use. *State v. Johnson*, 8th Dist. No. 90449, 2008-Ohio-4451, at ¶14; *State v. McKnight* (Feb. 5, 1996), 5th Dist. No. 1995CA00241, 1996 Ohio App. LEXIS 704, *3. The test of a deadly weapon is whether it is capable of inflicting death, and the actual use of the weapon does not require the same means for which it was designed. *State v. Branche*, 10th Dist. No. 01AP-523, 2002-Ohio-1441, 2002 Ohio App. LEXIS 1414, *15, citing *State v. Marshall* (1978), 61 Ohio App.2d 84, 86. Thus, it has been held that a toy gun is capable of inflicting death because of its possible use as a bludgeon. *State v. Hicks* (1984), 14 Ohio App.3d 25, 26. Further, an inoperable gun can still be considered a deadly weapon if it can be used as a bludgeon. Id.; *Johnson*, supra, at ¶14; *State v. Edwards* (Oct. 29, 1992), 8th Dist. No. 61215, 1992 Ohio App. LEXIS 5519, *5.

{¶49} We therefore hold the trial court did not err in determining there was sufficient evidence on the felonious assault charge.

{¶50} **Having Weapons Under Disability and the Firearm Specification**

{¶51} Mr. Morris argues the evidence was insufficient to support his conviction for having a firearm while under disability and for the firearm specification to the felonious assault charge because appellant's gun did not meet the statutory definition of "firearm" at R.C. 2923.11(B). He also contends his conviction was against the manifest weight of the evidence. Under both arguments, he contends that because the gun's magazine and slide fell off, it was not a firearm as defined by R.C. 2923.11. Therefore,

we must review the definition of "firearm," and determine whether there was sufficient evidence presented to support his conviction of having a firearm under disability and the firearm specification. R.C. 2923.11 defines "firearm" as follows:

{¶52} "(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.*

{¶53} "(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*." (Emphasis added.)

{¶54} Thus, under R.C. 2923.11, for an individual to be found guilty of a firearm disability charge or firearm specification, "the 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*." (Emphasis added.) *State v. Gaines* (1989), 46 Ohio St.3d 65, syllabus. See, also, *State v. Church* (June 25, 1999), 11th Dist. No. 97-L-248, 1999 Ohio App. LEXIS 2936, *9. "Notably, the General Assembly in R.C. 2923.11(B)(2) set forth that the trier of fact may rely upon circumstantial evidence in determining whether the firearm was operable. *** Thus, it is apparent that the General Assembly intended that the state 'can rely upon all of the surrounding facts and circumstances in establishing whether a firearm was used in the commission of a felony.'" *Thompkins*, supra, at 384-385, quoting *State v. Murphy* (1990), 49 Ohio St.3d 206, 208.

{¶55} In this case, Ms. Shimko testified that Mr. Morris had a gun. He walked to the doorway of the dining room and pointed the gun at Ms. Shimko and everyone else in the dining room, and said, "I'll kill all of you." He cocked his gun and the magazine fell off the gun. We also note that the slide, by which the gun is cocked, was found in the dining room, and that two live rounds for this gun were found five feet from the slide.

{¶56} This court considered a set of facts similar to those at issue here in *State v. Martin*, 11th Dist. No. 2002-T-0111, 2004-Ohio-3330, in which this court held:

{¶57} "In the case at bar, Ms. Clifford testified that one of the men had a gun when he entered the store. After he entered the store, the gun's chamber fell out scattering bullets on the floor. Moreover, Washington provided corroborative testimony that Brown entered the store with the gun and once inside the store 'the bullets fell out.' Such testimony provides circumstantial evidence that, at the initiation of the robbery, the gun was intact and arguably capable of expelling or propelling a projectile by the action of an explosive or combustible propellant. Absent is any evidence contradicting the operability of the gun prior to the chamber falling out.

{¶58} "It is irrelevant that the gun may have become inoperable as the robbery proceeded. The prosecution needed only to establish that the gun was operable for a single moment during the commission of the robbery. Because the prosecution presented circumstantial evidence that the gun was apparently intact and operable at the initial moment of the robbery, such evidence was sufficient to establish a firearm specification pursuant to R.C. 2941.145(A). Thus, *** appellant's conviction for complicity to a firearm specification was supported by sufficient evidence." *Martin* at ¶26-27.

{¶59} Likewise, here, the state presented evidence that Mr. Morris' gun was apparently intact and operable when he pointed the gun at the guests and threatened to kill them. Such evidence was sufficient to prove the weapon was a firearm.

{¶60} We also observe that Jonathan Gardner, BCI firearms examiner, testified that it would have been easy for anyone with knowledge of the gun to put it back together. It took him 15 seconds or less to make the gun fully functional. We therefore also hold that even if the gun became inoperable as the crime proceeded, the state presented sufficient evidence for the jury to conclude the gun could readily have been rendered operable. For this additional reason, the court did not err in sending the firearm disability charge and specification to the jury.

{¶61} In an effort to challenge the weight of the evidence, Mr. Morris argues that "despite his attempt to make [the gun] operable, [it] could not be made operable that night." However, the record is devoid of any evidence in support of this argument. Mr. Morris did not testify he made any such attempt nor did anyone testify the gun could not be made operable. Moreover, although Ms. Shimko testified the magazine fell off the gun, the jury was entitled to find the gun was operable when he pulled it out, aimed it at Ms. Shimko and the other guests in the dining room, and threatened to kill them. Moreover, the jury was entitled to give credit to Mr. Gardner's testimony that the gun could easily have been rendered operable.

{¶62} Mr. Morris argues that even if operability could be inferred from the evidence, the weight of the evidence supported his contention at trial that he used the gun in self-defense. However, according to Ms. Shimko's statement to the police, Mr. Morris started the fight. Further, she said he walked to the dining room and pointed the

gun at her and the other guests in the dining room and said he would kill everyone *after* the altercation in the kitchen had concluded. We note the slide was found in the dining room, not the kitchen where the altercation occurred. Moreover, in her police statement, Ms. Shimko never said Mr. Morris used the gun in self-defense. Josh Phillips reported the game ended when Mr. Morris became irate because he lost money in the game. Mr. Phillips said Mr. Morris took out a gun and pulled it on him, and he and the other guests ran out of the apartment. Further, while Mr. Qualls testified Mr. Morris used the gun in self-defense, he never mentioned this to police. To the contrary, he told the police that when he, Mr. Qualls, won $40, Mr. Morris grabbed his money and pulled out a gun. He also told police that Mr. Morris pointed the gun at everyone and that they left the party because they were scared to death of Mr. Morris. When asked on cross-examination why he cocked the gun after the altercation was over, Mr. Morris testified, "The purpose was maybe whatever would have happened after that." Finally, Mr. Morris does not claim he was acting in self-defense when he committed felonious assault against Ms. M by hitting her with his gun and shoving his gun in her mouth.

{¶63} The elements of self-defense are set forth in *State v. Williford* (1990), 49 Ohio St.3d 247. To establish self-defense as an affirmative defense, a defendant must establish the following by a preponderance of the evidence: (1) that he "'was not at fault in creating the situation giving rise to the affray;'" (2) that he had "'a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of *** force;'" and (3) that he "'must not have violated any duty to retreat or avoid danger.'" Id. at 249, quoting *State v. Robbins* (1979), 58 Ohio St.2d 74, at paragraph two of the syllabus. "These elements are

cumulative, and if the defendant fails to prove any one of these elements by a preponderance of the evidence, he has failed to prove that he acted in self-defense." *State v. Ruland* (May 3, 1991), 11th Dist. No. 90-A-1515, 1991 Ohio App. LEXIS 1996, *5.

{¶64} As the trier of fact, the jury was entitled to believe all, part, or none of the testimony of each witness, and it was therefore entitled to reject the testimony regarding self-defense, as it obviously did.

{¶65} Based upon our review of the record, the jury did not lose its way in entering its guilty verdict on the weapons under a disability charge and the firearm specification.

{¶66} **Assault on a Peace Officer**

{¶67} Mr. Morris challenges the sufficiency and weight of the evidence supporting his conviction of assault on a peace officer. R.C. 2903.13 prohibits anyone from knowingly causing or attempting to cause physical harm to another. If the victim of the offense is a peace officer, assault is a felony of the fourth degree.

{¶68} Officer Cononico testified that during the trip to the hospital, Mr. Morris told the officers he had hepatitis. He then spat on Officer Cononico and the spit landed on his leg. During the return trip to the jail, Mr. Morris spat on Officer Cononico's head and Officer Laprocina's left shoulder, again telling them he had hepatitis.

{¶69} Mr. Morris refers to the Centers for Disease Control website for the proposition that hepatitis is not transmitted by saliva. However, no such information is in the record, and we therefore cannot consider it. App.R. 16(A)(7).

{¶70} Mr. Morris argues that because he never actually told the officers his spitting was done with the intent to infect them, the evidence was insufficient to support a finding of intent to cause or attempt to cause harm. However, from his words and actions, the jury could infer such intent.

{¶71} We note that in *State v. Price*, 162 Ohio App.3d 677, 2005-Ohio-4150, police officers were dispatched to the home of the defendant where he spat at one of the officers. The defendant was infected with HIV and hepatitis and he knew of his conditions. While the officer was not infected with these diseases, the court noted he had to deal with the concern of possibly being infected with them. The court affirmed the defendant's convictions for both felonious assault and attempted felonious assault.

{¶72} We note that at trial Mr. Morris never denied he had hepatitis or that he told the officers he had hepatitis while spitting on them. The evidence was sufficient to demonstrate he knowingly caused or attempted to cause physical harm to Officer Cononico. Moreover, based on our review of the record, his conviction of assault on a peace officer was not against the manifest weight of the evidence.

{¶73} Mr. Morris also asserts that the admission of the dash cam video was prejudicial. As this argument is not part of an assignment of error, it is not properly before us. App.R. 16(A). In any event, the admission of evidence lies within the broad discretion of the trial court, and a reviewing court will not disturb evidentiary decisions in the absence of an abuse of discretion that has resulted in prejudice. *State v. Noling*, 98 Ohio St.3d 44, 52, 2002-Ohio-7044. "Abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. While appellant's

conduct on the video is belligerent and crude, it accurately depicts his commission of the crime charged in the indictment, and we cannot say the court's decision to admit the evidence was unreasonable, arbitrary, or unconscionable. We therefore hold the trial court did not abuse its discretion in admitting this evidence.

{¶74} **Rape**

{¶75} Mr. Morris argues his conviction of rape by fellatio was not supported by the weight of the evidence; he does not challenge the sufficiency of the evidence. While he attempts to use Ms. Shimko's testimony to discredit Ms. M, we note that Ms. Shimko testified that she has known the victim for ten years and that she is "truthful." Further, the evidence regarding Ms. M's DNA on Mr. Morris' penis corroborates her testimony that he forced her to perform oral sex on him at gunpoint. Further, Ms. M's DNA on the gun brandished by Mr. Morris corroborates her testimony that he repeatedly hit her with it and stuck it in her mouth. In addition, the police photographs showing the bruises on the victim's neck, thighs, and knee corroborate her testimony. The police also corroborated her testimony that she ran out of the bedroom completely naked. By the same token, the jury was entitled to consider that the police testimony refuted Mr. Morris' testimony that the victim "walked" out of the room wearing her underwear and also refuted Joi Morris' claim that she observed the victim on the balcony in her underwear as Mr. Morris was being removed from the apartment. The jury could also consider that, despite Mr. Morris' DNA being on his gun, he told the police the next morning that he did not have a gun that night. The jury was also entitled to consider Mr. Morris' prior conviction of falsification in evaluating his credibility.

{¶76} Next, Mr. Morris points out certain inconsistencies in Ms. M's testimony regarding whether she or Mr. Morris took off her clothes; whether she previously knew Mr. Qualls; and whether Ms. M heard Mr. Morris cock his gun. While we agree Ms. M's trial testimony on these points was not identical to her police statement, the jury was entitled to consider the discrepancies to be inconsequential, particularly in light of the record evidence corroborating her testimony and refuting Mr. Morris' version of events. We cannot conclude the jury lost its way and created a manifest miscarriage of justice in finding that Mr. Morris raped Ms. M by forcing her to perform oral sex on him.

{¶77} Mr. Morris' first and third assignments of error are not well taken.

{¶78} For his second assignment of error, he contends:

{¶79} "The conviction for a violation of Ohio Rev. Code 2923.13 ('Having a weapon while under disability') violates the Defendant-Appellant's constitutional rights."

{¶80} **Constitutionality of Weapons Disability Statute**

{¶81} Mr. Morris argues that R.C. 2923.13(A)(3), having weapons while under disability, is overbroad and therefore unconstitutional. However, he has failed to reference any such argument in the record as required by App.R. 16. "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue ***, and therefore need not be heard for the first time on appeal." *Awan,* supra, syllabus. Further, based on our review of the record, this case does not rise to the level of plain error. However, even if Mr. Morris had not waived the argument, it would lack merit.

{¶82} As a preliminary matter, we note that statutes enjoy a strong presumption of constitutionality. "An enactment of the General Assembly is presumed to be

constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at paragraph one of the syllabus. "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the constitution." *Xenia v. Schmidt* (1920), 101 Ohio St. 437, at paragraph two of the syllabus. Accordingly, we begin our analysis with the strong presumption that R.C. 2923.13(A)(3) is constitutional.

{¶83} R.C. 2923.13(A)(3) prohibits any person from having a firearm when "[t]he person is under indictment for or has been convicted of any offense involving the illegal possession [of] *** any drug of abuse ***." Mr. Morris argues that because this statute applies to any drug abuse offense, including his conviction of possession of marijuana, a minor misdemeanor, the statute is overbroad.

{¶84} Mr. Morris fails to draw our attention to any authority holding this statute to be unconstitutional. His reliance on *District of Columbia v. Heller* (2008), 128 S.Ct. 2783, is misplaced because the Supreme Court in that case struck down an ordinance which banned the possession of all handguns in the District; it did not limit the prohibition to convicted criminals or the mentally ill. The Court held: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *** *We identify these presumptively*

lawful regulatory measures only as examples; our list does not purport to be exhaustive." (Emphasis added.) Id. at 2816-2817, fn. 26. Thus, contrary to Mr. Morris' argument, the Court in *Heller* did not limit the prohibition on the possession of firearms to felons.

{¶85} We note that several Ohio appellate districts have held R.C. 2923.13(A)(3) to be constitutional. See *State v. Johnson* (Mar. 21, 1979), 1st Dist. No. C-780305, 1979 Ohio App. LEXIS 9910; *State v. White* (Mar. 28, 1997), 3d Dist. No. 9-96-66, 1997 Ohio App. LEXIS 1598. In holding that R.C. 2923.13 does not result in an equal protection violation, the court in *Johnson*, supra, held:

{¶86} "The purpose of R.C. 2923.13 is to prohibit the possession of any firearm or dangerous ordnance by persons who are reasonably classified as bad risks; included in this class are *persons indicted or convicted of drug offenses*. We find a rational connection between the inherent danger of firearms and the antisocial behavior of those who have a record of violating the law." (Emphasis added.) Id. at *4.

{¶87} Finally, Mr. Morris argues that the firearm specification constitutes duplicative punishment because he was also convicted of felonious assault. However, Ohio appellate districts have held this statute does not violate the Double Jeopardy Clause. In *State v. Andrews* (Sep. 13, 1990), 8th Dist. No. 56983, 1990 Ohio App. LEXIS 3992, the Eighth District held:

{¶88} "'Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger* [*v. United States* (1932), 284 U.S. 299], a court's

task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'

{¶89} "*Missouri v. Hunter* (1983), 459 U.S. 359, 368-369.

{¶90} "We once again conclude that '*** R.C. 2929.71 [the former firearm specification statute] does not create a separate offense and does not force a defendant to face multiple punishments for the same offense.' [*State v.*] *Price* (1985), 24 Ohio App.3d 186,] at 189. The legislature obviously intended to permit imposition of a single more severe sentence on a person with a prior felony conviction of violence who chooses to carry a firearm despite his disability. This result does not violate the United States or Ohio Constitutions. *Price*, supra." *Andrews*, supra, at *4. Accord *State v. Stillwell*, 11th Dist. No. 2006-L-010, 2007-Ohio-3190.

{¶91} Mr. Morris' second assigned error lacks merit.

{¶92} For his fourth assignment of error, he alleges:

{¶93} "The trial court erred to the prejudice of the Defendant-Appellant by excluding from evidence the DNA and its analysis from [Ms. M's] underwear."

{¶94} **The Rape Shield Law**

{¶95} Mr. Morris argues the trial court violated his due process rights by excluding evidence of a dried semen stain on Ms. M's panties from an unknown male that was discovered by BCI. Prior to trial the state made a motion in limine to prohibit testimony regarding the stain. Mr. Morris objected to the state's motion because Ms. M told the police that she had not had sex for some three weeks prior to the rape. Mr. Morris argued that evidence of the stain should have been admitted to impeach her "veracity."

{¶96} The trial court found that, because Mr. Morris did not intend to use the evidence for any of the purposes allowed in R.C. 2907.02(D), Ohio's rape shield law, but instead intended to use the evidence solely to impeach Ms. M's credibility, the evidence was inadmissible. The court found the rape shield law prohibited evidence regarding the origin of semen in the victim's underwear that did not belong to Mr. Morris.

{¶97} "The evidentiary determination of a trial court under R.C. 2907.02(D) should not be disturbed on appeal absent a showing of an abuse of discretion ***." *State v. Egli*, 11th Dist. No. 2007-P-0052, 2008-Ohio-2507, at ¶52, citing *State v. Hardy* (Oct. 10, 1997), 11th Dist. No. 96-P-0129, 1997 Ohio App. LEXIS 4588, *14-*15.

{¶98} R.C. 2907.02(D) provides:

{¶99} "Evidence of specific instances of the victim's sexual activity *** shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

{¶100} "'[T]he purpose of the rape shield law [is] to protect the victim from harassment and to discourage the tendency in rape cases to try the victim rather than the defendant.'" *Egli,* supra, at ¶54, citing *State v. Archibald*, 11th Dist. Nos. 2006-L-047 and 2006-L-207, 2007-Ohio-4966, at ¶52.

{¶101} Mr. Morris concedes on appeal that he did not want to use evidence of the stain for any of the three permitted uses in the statute. Instead, he wanted to use it solely to impeach the victim's credibility with respect to her comment to police that she had not had sex with anyone prior to the rape for three weeks. We note that

impeachment is not one of the permitted uses of evidence of sexual activity. We also observe that Ms. M did not testify at trial concerning her last sexual encounter.

{¶102} The Supreme Court of Ohio considered nearly the same issue in *State v. Ferguson* (1983), 5 Ohio St.3d 160. In that case Mr. Ferguson was charged with rape. The victim testified she had not had sex for ten days before the rape, but her hospital records showed she claimed to have had sex two days before the rape. Mr. Ferguson sought to inquire about the victim's prior sexual activity solely to challenge her credibility. In affirming the trial court's decision to exclude the testimony, the Supreme Court held:

{¶103} "We are unpersuaded that appellee's confrontation rights mandate that he be allowed to delve into matters so tenuously connected with the truth of the victim's testimony especially in light of the aforestated state interests to exclude that line of cross-examination. Further, the key fact at issue at trial was whether the victim consented to sexual activity with appellee, not whether she had sexual intercourse two or ten days earlier. Hence, we hold that R.C. 2907.02(D) will render inadmissible evidence of the rape victim's sexual activity with one other than the accused where the evidence: does not involve the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender; is offered simply to impeach the credibility of the victim; and is not material to a fact at issue in the case." Id. at 165.

{¶104} It is undisputed that Ms. M did not have sex with anyone other than Mr. Morris that night. Moreover, her DNA was found on his penis. Further, when the officers entered the bedroom, he volunteered, "it was consensual." Therefore, the issue in this case was whether the victim consented to sexual activity with Mr. Morris, not

whether she had sexual intercourse three weeks earlier or some other time with someone else.

{¶105} We observe there is no evidence in this case concerning when the stain was made. At the hearing on the state's motion, the state represented without objection that BCI reported that semen stains can be detected weeks or even years after it had been placed on clothing. Thus, the presence of the stain was not necessarily inconsistent with the victim's statement.

{¶106} We therefore hold the trial court did not abuse its discretion in excluding evidence of the dried semen stain in the victim's underwear since there was no issue concerning the origin of semen, pregnancy, or disease, or the victim's past sexual activity with Mr. Morris; it was offered simply to impeach Ms. M's credibility; and it was not material to a fact at issue in the case.

{¶107} Mr. Morris' fourth assigned error lacks merit.

{¶108} For his fifth assignment of error, he asserts:

{¶109} "The trial court erred to the prejudice of the Defendant-Appellant when it denied his Motion to Sever Count 5 (Assault on a peace officer) from the remaining four charges."

{¶110} **Prejudicial Joinder**

{¶111} In *State v. Torres* (1981), 66 Ohio St.2d 340, the Supreme Court held that for a defendant to prevail on a claim that the trial court erred in denying his motion to sever, he has the burden of demonstrating: (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a

fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial. Id. at syllabus.

{¶112} First, we note Mr. Morris failed to renew his motion to sever at the conclusion of the state's case and again at the close of the evidence. He concedes in his brief that by not renewing his motion, he waived the issue on appeal. "Where a motion to sever is not renewed either after the close of the state's evidence or at the conclusion of all the evidence, it is waived." *State v. Amore*, 9th Dist. No. 008281, 2004-Ohio-958, at ¶20. As such, Mr. Morris has waived this objection and we do not discern plain error.

{¶113} However, even if the argument had not been waived, it would lack merit. Crim.R. 8(A) provides: "(A) Joinder of Offenses. Two or more offenses may be charged in the same indictment *** if the offenses charged *** are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of conduct."

{¶114} "Joinder is to be liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials and diminish inconvenience to the witnesses." *State v. Schaim* (1992), 65 Ohio St.3d 51, 58. In order to have obtained a severance, the appellant would have had to demonstrate that joinder was prejudicial under Crim.R. 14. That Rule provides: "If it appears that a defendant *** is prejudiced by a joinder of offenses *** in an indictment *** the court shall order an election or separate trial of counts, *** or provide such other relief as justice requires."

{¶115} "'The state may negate the defendant's claim of prejudice by demonstrating either of the following: (1) that the evidence to be introduced relative to one offense would be admissible in the trial on the other, severed offense, pursuant to Evid.R. 404(B); or (2) that, regardless of the admissibility of such evidence, the evidence relating to each charge is simple and direct.'" *State v. Stoutamire*, 11th Dist. No. 2007-T-0089, 2008-Ohio-2916, at ¶50, quoting *State v. Quinones*, 11th Dist. No. 2003-L-015, 2005-Ohio-6576, at ¶39. Here, the state demonstrated both alternatives. The trip to and from the hospital occurred shortly after Mr. Morris' rape and was undertaken to obtain evidence concerning his rape of the victim. Moreover, during the trip, Mr. Morris told the officers that he "didn't rape no bitch." As a result, evidence of this trip and Mr. Morris' comments would have been admissible in the rape case. In addition, based on our review of the record, the evidence relating to each charge was simple and direct. Thus, even if Mr. Morris had not waived the argument, his fifth assignment of error would lack merit.

{¶116} Mr. Morris' fifth assigned error lacks merit.

{¶117} For his sixth and final assignment of error, Mr. Morris asserts:

{¶118} "The Defendant-Appellant was denied his constitutional rights to the effective assistance of counsel."

{¶119} **Ineffective Assistance of Counsel**

{¶120} Mr. Morris argues that because his trial counsel failed to present certain evidence and to renew his motion to sever count five, assault on a peace officer, his counsel was ineffective. We do not agree.

{¶121} The standard of review for ineffective assistance of counsel is whether the representation of trial counsel fell below an objective standard of reasonableness and whether the defendant was prejudiced as a result of the deficient performance. The defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668. The Supreme Court in *Strickland* held:

{¶122} "*** In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. ***

{¶123} "Judicial scrutiny of counsel's performance must be highly deferential. *** A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 688-689.

{¶124} First, Mr. Morris argues his trial counsel was ineffective in failing to ask the BCI technician, Brenda Gerardi, questions concerning the seminal stain found on Ms. M's panties. However, the trial court had already prohibited any evidence of the origin of semen on the victim's underwear that did not belong to Mr. Morris without prior approval of the court. Moreover, under our analysis of appellant's fourth assigned error, we held that the trial court did not abuse its discretion in excluding this evidence. We therefore hold trial counsel was not ineffective in not pursuing this line of questioning.

{¶125} Mr. Morris claims the issue was not barred by the trial court's ruling because it was only a ruling in limine and the trial court, in his view, allowed his counsel

to "open the door" by asking Ms. Gerardi if the state submitted the victim's underwear to BCI. We do not agree. First, Mr. Morris misconstrues the concept of opening the door. This applies where adverse counsel pursues a line of questioning on a topic counsel wishes to pursue but legally cannot. Here, the state did not open the door. Moreover, there is no indication in the record that the court would have permitted further questioning on this topic beyond the preliminary question as to what evidence was submitted to BCI. Mr. Morris has failed to show his trial counsel committed any error or that he was prejudiced in this regard.

{¶126} Next, Mr. Morris claims his counsel was ineffective because he failed to renew his motion to sever count five, assault on a peace officer. However, even if the motion had been renewed, it would not have been well taken for the reasons set forth in our analysis under appellant's fifth assigned error. This court addressed this issue in *State v. Brunelle-Apley*, 11th Dist. No. 2008-L-014, 2008-Ohio-6412, in which we held:

{¶127} "*** Were Mr. Brunelle's counsel to renew the motion at the conclusion of the state's case, the court would have denied it, because it had already considered the merits of the motion prior to trial and had found severance to be unwarranted in this case. The state of the case had not appreciably changed between that ruling and the trial, and therefore a renewed motion for severance at the end of the state's case would have been futile." Id. at ¶101.

{¶128} Mr. Morris has failed to demonstrate any appreciable change that occurred between the trial court's ruling and the trial that would have warranted renewal of his motion.

{¶129} Mr. Morris' sixth assignment of error lacks merit.

{¶130} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part and dissents in part, with Concurring/ Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, and dissents in part, with Concurring/ Dissenting Opinion.

{¶131} I concur with the balance of the majority's well-reasoned opinion, but would reverse regarding appellant's convictions for the firearm specification to his felonious assault conviction, and for having a firearm while under disability. I believe each of these convictions is against the manifest weight of the evidence.

{¶132} As the majority points out, pursuant to R.C. 2923.11(B)(1), a "firearm" includes an inoperable weapon which may be rendered operable "readily." As the majority further points out, the state need only prove that a firearm was operable or could be rendered so, "readily," during a portion of a crime, for a firearm specification to attach, and/or to support a charge of having a firearm while under disability. In this case, however, I think the quality of the evidence presented was insufficient to show that the firearm in question was ever operable. Ms. Shimko testified appellant pointed the gun at the people gathered in the dining room, cocked it – and it fell apart. The state's only evidence that this gun ever was, or could be made, operable was the

testimony of Mr. Gardner, the BCI weapons expert, that he put the gun back together in fifteen to twenty seconds. However, nothing in the record indicates that appellant had sufficient expertise with the operation of guns to accomplish the same feat.

{¶133} I respectfully concur in part, and dissent in part.