

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0069
SHAWNA L. BURKETT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0228.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Jill K. Fankhauser, 231 South Chestnut Street, P.O. Box 489, Ravenna, OH 44266 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Shawna L. Burkett, appeals from her conviction and sentence following a bench trial on one count of burglary with a firearm specification and one count of possession of criminal tools. For the following reasons, we affirm the judgment of the Portage County Court of Common Pleas.

{¶2} The matter proceeded to a bench trial on August 13, 2009. At trial, Mr. Darlin Liston testified that he noticed two individuals approach the home of his neighbor, Mr. Norman Cable, and knock on the door. Upon investigation, Mr. Liston noticed Mr.

Cable's basement window was broken, and a "nail bar" was lying amongst the broken glass. Mr. Liston testified that he returned home and tried to telephone Mr. Cable, who was attending a meeting in Cuyahoga Falls. Mr. Liston then called the police. Mr. Liston returned to his neighbor's home and testified that he saw two people—a man, later identified as Rick Haas, and a woman, later identified as Shawna Burkett—inside his neighbor's sunroom.

{¶3} Officer Yoker of the Brimfield Police Department was the first to respond. Officer Yoker testified that he saw Haas and Burkett in the breezeway. He instructed both of them to surrender. Complying, Haas and Burkett lay on the ground until back-up arrived. While lying on the ground, Haas informed Officer Yoker that he had a loaded gun, a semi-automatic Beretta .32 caliber handgun, in his front pocket.

{¶4} Mr. Cable also testified. Mr. Cable stated that he and his wife had lived in his home since 1993. Mr. Cable indicated that he is semi-retired, but worked part-time in three different positions in local government—a part-time firefighter and EMT and he engaged in part-time environmental work for the village of Mogadore. With regard to his work schedule, Mr. Cable stated that he will "sign up for shifts which are usually seldom more than a few days together at a time." He described his work schedule as "highly variable." Mr. Cable testified that, on this particular day, he was attending a meeting, which would have started at 9:00 a.m. and ended at 10:30 a.m. Mr. Cable stated that he would have returned to his home by late morning.

{¶5} At trial, Haas and Burkett were represented by the same counsel. At the conclusion of the evidence, the trial court found Burkett guilty of burglary, with a firearm specification, and of possessing criminal tools. The trial court sentenced Burkett to one

year in prison for the firearm specification, which was to run consecutive to the five-year term for burglary, and a concurrent term of one year in prison for possessing criminal tools.

{¶6} Burkett filed a timely notice of appeal and, as her first assignment of error, alleges:

{¶7} “The trial court erred in finding Ms. Burkett guilty of a gun specification when the indictment fails to allege that she committed the offense.”

{¶8} Burkett and her husband were charged in a joint indictment. The indictment contained a specification to count one, stating:

{¶9} “The Grand Jurors further find and specify that Rick Haas had a firearm on or about his person or under his control while committing the offense.

{¶10} “Said Act being a Firearm Specification. Contrary to and in violation of Section 2929.14(D) and Section 2929.141 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.”

{¶11} R.C. 2941.141(A) states, “[i]mposition of a one-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

{¶12} “SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person’s or the prosecuting attorney’s name when

appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense.)”

{¶13} We conclude that the indictment in this case was deficient, as it is not clear that the Grand Jury intended to charge Burkett with the firearm specification as to count one. The state failed to adhere to the plain language of R.C. 2941.141. Burkett, however, did not object to the indictment below and raises this issue for the first time on appeal. The Supreme Court of Ohio, in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, at ¶46, has recently held:

{¶14} “[F]ailure to timely object to a defect in an indictment constitutes a waiver of the error. Crim.R. 12(C)(2) (objections to defect in indictment must be raised before trial). Any claim of error in the indictment in such a case is limited to a plain-error review on appeal. *State v. Frazier* (1995), 73 Ohio St.3d 323; Crim.R. 52(B).”

{¶15} In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶16-17, the Supreme Court of Ohio held there are three limits placed on reviewing courts for correcting plain error:

{¶16} “First, there must be an error, *i.e.*, a deviation from the legal rule. *** Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. *** Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court’s error must have affected the outcome of the trial.’ *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Courts are to notice plain error ‘only to prevent a manifest

miscarriage of justice.’ *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶17} “The burden of demonstrating plain error is on the party asserting it. See, e.g., *State v. Jester* (1987), 32 Ohio St.3d 147, 150. A reversal is warranted if the party can prove that the outcome ‘would have been different absent the error.’ *State v. Hill* (2001), 92 Ohio St.3d 191, 203.” (Emphasis sic.)

{¶18} The error in the indictment did not rise to plain error. As noted above, Haas and Burkett burglarized the home of Mr. Cable. As discussed in Burkett’s second assignment of error, although Burkett did not possess a firearm on her person, she is subject to the firearm specification. See *State v. Chapman* (1986), 21 Ohio St.3d 41. Finally, the record demonstrates that counsel for Burkett defended her with the understanding she was subject to the firearm specification. Therefore, modification of the indictment would not have affected the result.

{¶19} Finding no plain error, Burkett’s first assignment of error is without merit.

{¶20} Burkett’s second assignment of error states:

{¶21} “The trial court erred in failing to grant Ms. Burkett’s motion for judgment of acquittal as the evidence presented was not sufficient to support a conviction and/or the trial court’s verdict was against the manifest weight of the evidence.”

{¶22} Under her second assignment of error, Burkett challenges both the legal sufficiency of the evidence to sustain her conviction as well as the manifest weight of the evidence. We first address Burkett’s claim that the trial court erred in overruling the Crim.R. 29 motion for judgment of acquittal.

{¶23} When measuring the sufficiency of the evidence, an appellate court must consider whether the state set forth adequate evidence to sustain the jury’s verdict as a matter of law. *Kent v. Kinsey*, 11th Dist. No. 2003-P-0056, 2004-Ohio-4699, at ¶11. A verdict is supported by sufficient evidence when, after viewing the evidence most strongly in favor of the prosecution, there is substantial evidence upon which a jury could reasonably conclude that the state proved all elements of the offense beyond a reasonable doubt. *State v. Schaffer* (1998), 127 Ohio App.3d 501, 503, citing *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at *14-15.

{¶24} Burkett was convicted under R.C. 2911.12(A)(2), which provides:

{¶25} “(A) No person, by force, stealth, or deception, shall do any of the following:

{¶26} “***

{¶27} “(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]”

{¶28} Burkett maintains that her conviction for second-degree burglary was against the sufficiency of the evidence as the state failed to present evidence that an individual was “likely to be present” in the occupied structure. Instead, Burkett argues that the evidence is aligned with burglary, a felony of the third degree, in violation of R.C. 2911.12(A)(3), which provides:

{¶29} “Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense[.]”

{¶30} Therefore, “in order to be convicted of second degree burglary of a residence, the state must prove that it was objectively likely that someone could be present at the time of the break-in. As set forth in R.C. 2911.12(A)(2), the term ‘likely to be present’ “connotes something more than a mere possibility, (***). A person is likely to be present when a consideration of all the circumstances would seem to justify a logical expectation that a person could be present.”” *State v. Mitchell*, 183 Ohio App.3d 254, 2009-Ohio-3393, at ¶18. (Citations omitted.)

{¶31} The Supreme Court of Ohio, in *State v. Kilby* (1977), 50 Ohio St.2d 21, paragraph one of the syllabus, has stated:

{¶32} “Where the state proves that an occupied structure is a permanent dwelling house which is regularly inhabited, that the occupying family was in and out on the day in question, and that such house was burglarized when the family was temporarily absent, the state has presented sufficient evidence to support a charge of [burglary under R.C. 2911.12(A)(2)].”¹

1. {a} We note that the defendant in *Kilby* was found guilty of aggravated burglary as defined in R.C. 2911.11. At that time, R.C. 2911.11 stated, in pertinent part:

{b} “(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in Section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in Section 2913.01 of the Revised Code, or any felony, when any of the following apply:

{c} ****

{d} “(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any *person is present or likely to be present.*” (Emphasis added.)

{e} We further note that the text of 2911.11(A)(3) was deleted pursuant to 1995 Ohio SB2.

{¶33} Upon review of the record, we find that Burkett's conviction for burglary, a felony of the second degree, is supported by ample evidence. The trial court heard testimony from Mr. Cable that he and his wife had lived in this residence since 1993. Mr. Cable further testified that he was semi-retired with a "highly variable" schedule. Mr. Cable noted that he "sign[s] up for shifts which are usually seldom more than a few days together at a time." Further, Mr. Cable may have to leave his residence to respond to an emergency call. This testimony was bolstered by Mr. Liston who also testified that Mr. Cable's work schedule varies. Mr. Liston testified that "[Mr. Cable] works different times *** so no, I'm not familiar with exactly what day they work and what times they work and what times they came home."

{¶34} On the day in question, Mr. Cable testified that his wife left at approximately 7:20 a.m., while he left his residence at 8:20 a.m. As part of his environmental job, Mr. Cable is required to attend public meetings. Mr. Cable testified that he was attending a meeting, which started at 9:00 a.m. and "would have been over around 10:30 am." On this particular day, Mr. Cable noted that he would have returned to his residence "late morning."

{¶35} Burkett argues that the trial court "conceded that Burkett and Haas knew that the occupants were not likely to be present." We reiterate that whether a person "is present or likely to be present" is not based on a subjective standard. Rather, the issue is whether it was objectively likely that a person was to be present.

{¶36} We find that the state presented sufficient evidence to allow a rational trier of fact to infer that the offense, as indicted, had been committed. Based on the foregoing, this argument is without merit.

{¶37} Second, Burkett argues that her conviction for the firearm specification was not supported by sufficient evidence as the state failed to prove beyond a reasonable doubt that the firearm was operable.

{¶38} Firearm, as defined in R.C. 2923.11(B)(1), 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.”

{¶39} Burkett argues that the state failed to present evidence that the firearm recovered from Haas was operable. “Laboratory testing results are not the only admissible evidence that can be considered in determining whether or not a firearm was operable. Proof of operability may also be established by circumstantial evidence, which may include the actions of the individual with control over the firearm. *** Also, a trial court evaluates the evidence of a firearm’s operability by examining the totality of the circumstances. *** The State need not introduce empirical evidence that the gun is operable; rather, it may establish operability through the testimony of lay witnesses who had an opportunity to observe the weapon and the surrounding circumstances. *** Furthermore, under R.C. 2923.11(B)(2), in determining whether or not a firearm is operable, the trier of fact may rely upon circumstantial evidence, including the representations and actions of the individual exercising control over the firearm. ***.” *State v. Cook*, 10th Dist. Nos. 09AP-316 & 09AP-317, 2010-Ohio-2726, at ¶60. (Internal citations omitted.)

{¶40} At trial, the state presented evidence that Haas had a loaded weapon in his front pocket during the commission of the burglary. The weapon was identified as a

semi-automatic Beretta .32 caliber handgun. The arresting officer testified that Haas informed him of the weapon in his front pocket when apprehended. Further, Brimfield Police Chief Blough testified that upon removing the loaded weapon from Haas' front pocket, he "made it safe"; i.e., he "removed the bullet from the chamber and also the magazine." The Beretta semi-automatic handgun, magazine, and bullets were admitted into evidence. See *Cook*, supra, at ¶62. (Loaded weapons were recovered as a result of a traffic stop. "Because operability may be established by circumstantial evidence, at least one Ohio court has held that the recovery of a loaded weapon that is submitted into evidence with the bullets is sufficient to reasonably infer operability. See *State v. Berger* (Feb. 19, 1998), 8th Dist. No. 71618, 1998 Ohio App. LEXIS 596.") We, therefore, find that the state presented sufficient evidence to allow a rational trier of fact to infer that the firearm was operable.

{¶41} Burkett further states that there was "no allegation that [she] possessed a weapon" or that she "knew [Haas] possessed this weapon."

{¶42} The Supreme Court of Ohio, in *State v. Chapman*, 21 Ohio St.3d 41, paragraph one of the syllabus, determined that an individual indicted for and convicted of violating R.C. 2911.01, aggravated robbery, and of a firearm specification under R.C. 2941.141, was subject to sentencing enhancement, pursuant to former R.C. 2929.71, regardless of whether the individual was the principal offender or an *unarmed accomplice*. (Emphasis added.) R.C. 2923.03(F), the complicity statute, states: "Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

{¶43} As provided for in R.C. 2923.03(F), Burkett was charged as a principal under R.C. 2911.12(A)(2), burglary, and R.C. 2941.141, a firearm specification. Although Burkett was unarmed, she is subject to the firearm specification, and, further, it is irrelevant whether Burkett knew Haas possessed a firearm.

{¶44} In the instant case, Haas admitted to having a loaded firearm on his person upon arrival of the arresting officer. And, as previously stated, the firearm was loaded. Therefore, the conviction for the firearm specification was supported by sufficient evidence.

{¶45} Under her second assignment of error, Burkett also alleges the evidence was against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, the Supreme Court of Ohio has adopted the following language as a guide:

{¶46} “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. 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. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶47} Under this argument, Burkett merely states that “the greater amount of the believable evidence is that the occupants were not likely to be present during the commission of the offense.” This argument is without merit.

{¶48} The trial court heard the testimony of Mr. Cable, the owner of the home burglarized. Burkett argues that Mr. Cable, when asked by the responding officer whether he was expected to be home during the day of said incident, answered in the negative. While there was conflicting testimony as to when Mr. Cable would return to his residence on the day of the burglary, the trial court was free to believe that he would have returned home “late morning.” The weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses’ credibility, the trial court, as the trier of fact, had the opportunity to observe the witnesses’ demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, in this matter, the trial court was “clearly in a much better position to evaluate the credibility of witnesses than [this] court.” *Id.* at *6.

{¶49} We defer to the judgment of the trial court and find that its verdict did not create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶50} Burkett’s second assignment of error is without merit.

{¶51} As her third and fourth assignments of error are interrelated, we address them in a consolidated analysis. Burkett’s third and fourth assignments of error state:

{¶52} “[3.] The trial court failed to protect the appellant’s Sixth Amendment right to counsel by failing to ensure that the representation was free from conflicts of interest.

{¶53} “[4.] Ms. Burkett was denied her constitutional right as guaranteed by the United States and Ohio Constitutions to effective assistance of counsel when her

attorney failed to provide Ms. Burkett with the conflict free representation to which she was entitled.”

{¶54} Under her third and fourth assignments of error, Burkett maintains that her trial counsel was ineffective when he proceeded to “represent both criminal defendants in the same case on the same issues where conflicts of interest were present ***.” Burkett further alleges that the trial court failed to conduct a meaningful inquiry into the facts of the case to determine whether an actual conflict of interest existed arising from dual representation of her and Haas.

{¶55} The duty to inquire, as set forth by the Supreme Court of Ohio, in *State v. Gillard* (1992), 64 Ohio St.3d 304, has been explained as follows:

{¶56} “When reviewing a claim of conflict of interest, this court must resolve two distinct issues. The first issue is whether the trial court had a duty to investigate the potential conflict of interest. *** If the answer to that inquiry is affirmative and the trial court did not make such an inquiry, then the case must be remanded to the trial court for its inquiry as to whether an actual conflict of interest existed. *** If the answer to that inquiry is negative, then this court must determine whether an actual conflict of interest adversely affected the attorney’s performance. ****” *State v. Walker* (1998), 130 Ohio App.3d 247, 251. (Internal citations omitted).

{¶57} In the instant case, a pretrial motion hearing was held, during which the prosecutor requested the trial court speak to the parties regarding a potential conflict. At that hearing, the trial court addressed Burkett, stating, “there is potentially a conflict of interest in having the Attorney represent you as well as Mr. Haas, you understand that?” Burkett answered in the affirmative.

{¶58} Thereafter, both Burkett and Haas filed an “affidavit waiving conflict of interest” with the trial court. In said affidavit, Burkett averred that she had been “informed of any potential conflict of interest if she and her husband are represented by the same attorney”; that she “waive[d] any said conflict of interest so that she and her husband shall” be represented by the same attorney; and that she made her decision “knowingly, intelligently, and without any force, threat or deception.”

{¶59} In addition, before the bench trial, Burkett and Haas’ attorney put on the record that before he agreed to represent them, he “explained to them the potential conflict of interest [and] what a conflict of interest is[.]” Thereafter, the trial court, with counsel and codefendants present, engaged in an inquiry as to the potential conflict. The trial court questioned both Burkett and Haas as to whether they understood that a potential conflict existed, whether they knowingly waived that potential conflict, whether their attorney went over the potential for conflict, and whether they willingly waived the conflict.

{¶60} We further note that Burkett’s and Haas’ defense theories were aligned. A review of the record reveals that their defense was not to escape culpability, but to argue that the crime should not have been indicted as a felony of the second degree based on the facts and circumstances of the case. *State v. Manross* (1988), 40 Ohio St.3d 180, 182. (“There is no conflict where the two defenses did not result in one assigning blame to the other ***.”)

{¶61} Based on the facts and circumstances of the instant case, we conclude that the trial court did not err, as it conducted a meaningful inquiry into the existence of a conflict of interest arising from dual representation of Burkett and Haas.

{¶62} Although Burkett claims she was denied effective assistance of counsel, she did not establish that an actual conflict of interest was present. In her brief, Burkett merely states that she was denied effective assistance of counsel when her “trial counsel proceeded to represent both criminal defendants in the same case on the same issue.”

{¶63} “In order to establish a violation of his Sixth Amendment right to effective assistance of counsel, a defendant who raised no objection to joint representation at trial must demonstrate that an actual conflict of interest adversely affected his lawyer’s performance. *** Until he does so, he has not established the constitutional predicate for his claim of ineffective assistance of counsel. *** A reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. The mere possibility of a conflict of interest is insufficient to impugn a criminal conviction. Further, a presumption of ineffective assistance of counsel in every instance of multiple representation would preclude multiple representation even in cases where a common defense gives strength against a common attack. ***.” *Manross*, supra, at 182. (Internal citations omitted.)

{¶64} As Burkett does not demonstrate that an actual conflict of interest adversely affected her lawyer’s performance, her Sixth Amendment right to counsel was not violated. Burkett’s argument is without merit.

{¶65} Burkett’s third and fourth assignments of error are without merit.

{¶66} As her fifth assignment of error, Burkett alleges:

{¶67} “The trial court erred to the detriment of Ms. Burkett when it imposed sentence upon her without reviewing or considering R.C. 2929.11 and 2929.12.”

{¶68} Under this assigned error, Burkett maintains only the trial court erred by failing to consider R.C. 2929.11 or R.C. 2929.12 either at the sentencing hearing or in its judgment entry.

{¶69} After the *State v. Foster* decision, “[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus.

{¶70} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶71} “First, [appellate courts] must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard.” *Id.*

{¶72} R.C. 2929.12 provides a list of factors that the trial court “shall consider” when imposing a felony sentence. While the trial court is required to consider the R.C. 2929.12 factors, “the court is not required to ‘use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors (of R.C. 2929.12.)’” *State v. Webb*, 11th Dist. No. 2003-L-078, 2004-Ohio-4198, at ¶10, quoting *State v. Arnett* (2000), 88 Ohio St.3d 208, 215. In *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, at ¶28, this

court acknowledged its adoption of the pronouncement of the Supreme Court of Ohio in *State v. Adams* (1988), 37 Ohio St.3d 295. The Supreme Court of Ohio in *Adams* held: “[a] silent record raises the presumption that a trial court considered the factors contained in R.C. 2929.12.” *Adams*, supra, paragraph three of the syllabus. This court recognized that Ohio Appellate Districts have adopted the holding in *Adams*, prior to and after the Supreme Court of Ohio’s decision in *Foster*, supra. *Greitzer*, supra, at ¶29.

{¶73} The record reveals that the trial court considered the seriousness of the offense, stating that this crime “was a cold calculated crime.” This statement reflects the overriding purpose of felony sentencing, which is “to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11. Further, Burkett’s sentence is within the statutory range, as a prison term range for a second-degree felony is two, three, four, five, six, seven, or eight years. R.C. 2929.14(A)(2). We cannot say that the trial court abused its discretion in the sentencing of Burkett.

{¶74} Burkett’s fifth assignment of error is without merit.

{¶75} As her sixth assignment of error, Burkett alleges:

{¶76} “The cumulative effect of the error committed by the trial court and by Ms. Burkett’s trial counsel combined to deny Ms. Burkett due process and fair trial as guaranteed by the United States and Ohio Constitutions.”

{¶77} Burkett claims that the errors committed by the trial court were of such magnitude that, when combined, they warrant reversal of her conviction. We disagree. Burkett’s final argument is not well-taken, as we found her first, second, third, fourth, and fifth assignments of error without merit.

{¶78} For the foregoing reasons, we affirm the judgment of the Portage County Court of Common Pleas.

MARY JANE TRAPP, P.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.

{¶79} I concur with the majority's disposition of Ms. Burkett's second through fifth assignments of error. I respectfully dissent from its disposition of her first assignment of error, whereby she argues the indictment was defective regarding the firearm specification. The majority agrees with her that the indictment was defective, since it is impossible to tell whether the grand jury intended to charge her with a firearm specification, but concludes that this error does not rise to the level of "plain error." I disagree with this conclusion. The majority premises its argument on *Chapman*, supra. The *Chapman* Court stated, at the syllabus:

{¶80} "An individual *indicted* for and convicted of R.C. 2911.01, aggravated robbery, and R.C. 2941.141, a firearm specification, is subject to a mandatory three-year term of actual incarceration under R.C. 2929.71, regardless of whether he was the principal offender or an unarmed accomplice. (*State v. Moore* (1985), 16 Ohio St.3d 30, followed.)" (Emphasis added.)

{¶81} The *Chapman* Court premised this conclusion on the complicity statute, R.C. 2923.03. *Chapman* at 42. Nevertheless, the court required that the unarmed accomplice be properly indicted on the firearm specification.

{¶82} The situation presented by this case is entirely different, since Ms. Burkett was *not* properly indicted on the firearm specification. Consequently, *Chapman* seems inapplicable, and Ms. Burkett should not be held liable for the firearm specification under a complicity theory. For this reason, I would reverse her conviction for the specification, and vacate that portion of her sentence stemming from it.