[Cite as *State v. Irby*, 2015-Ohio-5467.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-T-0018**
- vs -	:	
JEFFREY LADONTAY IRBY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CR 829.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092. (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jeffrey Ladontay Irby, appeals his conviction, following a jury trial, in the Trumbull County Court of Common Pleas, of felonious assault on a police officer and related felonies. The principal issue before the court is whether appellant's conviction was against the manifest weight of the evidence. For the reasons that follow, we affirm.

{¶2} Appellant was charged in a six-count indictment with felonious assault on a police officer, a felony of the first degree, with a firearm specification and a specification that he discharged a firearm at a police officer while committing felonious assault (Count 1); resisting arrest, a felony of the fourth degree (Count 2); having weapons while under disability, a felony of the third degree (Count 3); improperly handling firearms in a motor vehicle, a felony of the fourth degree (Count 4); tampering with evidence, a felony of the third degree (Count 5); and carrying a concealed weapon, a felony of the fourth degree (Count 6). Appellant pled not guilty and the case was tried to a jury.

{¶3} Officer Dennis Dripps of the Hubbard Police Department testified that on October 14, 2014, at about 11:30 a.m., he was driving behind a white Monte Carlo on W. Liberty St. in Hubbard. A check of the car's license plate revealed the plate was expired and the driver's license of the car's registered owner was suspended.

{¶4} Off. Dripps said there were two males in the car, a white male in the driver's seat and a black male in the front passenger seat. The officer activated his overhead lights and pulled them over. The driver pulled into the Circle K parking lot, but did not pull in far enough to allow Off. Dripps to park behind him. As the officer yelled at the driver to pull the car up, the passenger flung the passenger door open. Off. Dripps began to exit his cruiser, yelling at the passenger to remain in the car. The passenger looked back at Off. Dripps and then took off running behind the Circle K into the backyards on Hager St., with Off. Dripps in pursuit. Off. Dripps radioed dispatch that he was chasing a black male wearing a black hoodie and tan pants. Off. Dripps remained about 20 to 30 feet behind the male during the entire pursuit.

{¶5} The house directly behind the Circle K is located at 34 Hager St. The passenger jumped over the two fences in the backyard of that property. As the officer cleared the second fence, the male removed a black semiautomatic pistol from the lining of his pants. While the male was still running, he aimed his gun back in the officer's direction and fired three to eight shots at him in succession. Off. Dripps said he saw the male's face as he was shooting his pistol at him.

{¶6} Several witnesses in the area heard the gunfire. Officer Ted Thirion of the Hubbard Police Department testified that at the time of this incident, he was providing traffic control on W. Liberty St. across the street from the Circle K. He said he saw Off. Dripps pull over the Monte Carlo and both vehicles went into the Circle K. He said a black male exited the Monte Carlo from the passenger door. Off. Dripps yelled at him to get back into the car, but the male fled.

{¶7} As Off. Thirion walked over to the Monte Carlo, the driver, a white male, exited the driver's side. The officer told him to get his hands up and he complied. Officer Thirion said that as he was handcuffing the driver, he heard three to four gunshots. The officer checked the car and found no one else in it.

{¶8} James Taafe, Hubbard Police Chief, said that at about 11:30 a.m., he was in his office when he heard one of his officers report over the police radio that he was involved in a foot chase. He did not hear where the pursuit was taking place so he decided to find it. He drove through the parking lot and saw Lou Carsone, Hubbard's Safety Director, standing in the parking lot. The chief drove up to Mr. Carsone and told him to get in because one of their officers was in a foot chase. Mr. Carsone said he just heard four gunshots coming from the direction of Circle K, which was across the street from the police station.

{¶9} Virginia Egart, who resides at 30 Hager St., testified that at the time of this incident, she was going out to lunch. As she stepped out the back door of her house, she saw a black male run through her next door neighbor's yard, which is located at 34 Hager St., and a policeman was "right behind him." She said they both went out of her sight behind the garage next door and she then heard four gunshots.

{¶10} Sergeant Howard Haynie of the Hubbard Police Department testified he was at the station when he heard over the radio that Officer Dripps was making a traffic stop. He headed to his cruiser in the parking lot. As he approached his car, he heard four gunshots in rapid succession.

{¶11} Off. Dripps testified that immediately after the suspect shot at him, he drew his pistol and took cover behind a tree. He raised his service weapon and had the suspect in his sights, but decided not to fire because a residence was behind him. Off. Dripps saw the male running down Hagar St., but lost sight of him.

{¶12} Chief Taafe and Safety Director Carsone testified they exited the police station parking lot onto W. Liberty St. They saw one of their marked cruisers in the Circle K parking lot parked behind the Monte Carlo and Off. Thieron standing outside that car. Chief Taafe and Mr. Carsone approached Off. Thieron and he told them that Off. Dripps ran after the suspect behind Circle K.

{¶13} Chief Taafe drove onto Hager St. looking for the suspect. He then turned around and started back. He called the 911 Center asking nearby police agencies to respond. Almost immediately, several Hubbard officers and units from five surrounding agencies converged on the scene. Chief Taafe set up a perimeter comprised of a two-block square in both directions centered on Hager St.

{¶14} As Chief Taafe and Mr. Carsone were driving on Hager St., they saw Off. Dripps on foot. He gave them the suspect's description and location when he last saw him, which was on Hager St.

{¶15} At that juncture, Chief Taafe heard radio traffic that the suspect was running toward their location. The chief and safety director then exited their vehicle and drew their guns. Within seconds, they saw a black male about 50 yards away from them coming from the direction of 125 Hager St. Chief Taafe said the suspect was running very fast and "with real purpose" as if someone was chasing him. He kept looking back over his shoulder.

{¶16} The chief and Mr. Carsone ran toward the suspect to cut him off. Chief Taafe yelled at him, instructing him to stop, put his hands up, and get on the ground; however, the suspect did not immediately comply. He kept running for a time and eventually slowed down to a walk. It took several seconds of the officers yelling at him to stop, with their guns drawn on him, before he finally got on the ground on his stomach.

{¶17} The chief put his knee on his back and holstered his weapon. He then handcuffed the suspect and patted him down. The chief felt a gun in the suspect's right front pocket. The chief said that when the suspect was running, the gun was in his pocket and thus concealed. The chief removed the gun from his pocket and handed it to Officer Paterniti. It was a black .40-caliber Taurus semiautomatic handgun. Off. Paterniti removed the magazine and ejected a live round from the chamber.

{¶18} Meanwhile, when Off. Dripps heard Chief Taafe in the distance, yelling, "get down," Off. Dripps ran to that location. Off. Dripps said that when Chief Taafe removed the gun from the suspect, Off. Dripps saw it was the same type of gun used to

shoot at him. As the suspect was being picked up, Off. Dripps recognized him as the male who had fired at him, but noticed he had taken off some of his clothes. He was only wearing a white t-shirt and tan pants.

{¶19} Jason Findley of 120 Hager St. said he was in his living room when he heard four gunshots. He said he walked to his back door and saw a black male running through his driveway with a black semiautomatic handgun in his hand. The male ran down the driveway toward Hager St. and then ran across the street toward 125 Hager St. Jason had his sister Natalie Dundon call 911 to report the incident.

{¶20} Meanwhile, Sgt. Haynie drove to the location where appellant was apprehended and drove his cruiser as close as he could so he could get him in his vehicle for transport to the jail

{¶21} As Sgt. Haynie arrived, appellant was being handcuffed. Sgt. Haynie took him to the Hubbard City Jail for booking. His first task was to identify appellant. Although appellant gave him identifying information, all of it was false. He gave Sgt. Haynie two false social security numbers. He also gave him a false name. Appellant said he was Ladontay Irby, who turned out to be appellant's uncle. Appellant also gave the sergeant a false date of birth.

{¶22} After giving Sgt. Haynie the runaround for about a half hour, appellant finally gave the sergeant his true name, Jeffrey Ladontay Irby, and said he was from Indiana. He was then processed and transported to the Trumbull County Jail.

{¶23} Detective David Oaks of the Hubbard Police Department testified that after appellant was arrested, he went to the Circle K parking lot with Off. Dripps so they could retrace the path of Off. Dripps' pursuit of appellant to locate evidence. At the second

fence at 34 Hager St, Off. Dripps located a pair of sunglasses on the side of the fence, which, he said, came off of appellant's face as he jumped the fence.

{¶24} At 125 Hagar St, the house from which appellant was seen running shortly before he was apprehended, Off. Dripps and Det. Oaks saw a truck cap on the ground in the backyard. When they looked under it, they saw several items, including two gloves that were rolled up in a ball, a black hoodie, and one live .40-caliber cartridge.

{¶25} John Nutter of 125 Hager St. said that at the time of this incident he was not home. He said that when he came home, the police had put caution tape around his truck cap, which he kept in the back yard. He said that under the cap was a black hoodie and a pair of gloves, none of which belonged to him. He said he does not know appellant and did not give him permission to come onto his property and put these items under his truck cap.

{¶26} Detective Oaks said that several rounds were found in the gun removed from appellant. He said that based on the caliber, manufacturer, make, model, style of ammunition, type of metal, and markings, the live round found under the truck cap was the same as the rounds found in appellant's gun.

{¶27} Det. Oaks said that, fully loaded, this gun takes 11 rounds, ten in the clip and one in the chamber. When the gun was taken from appellant, six rounds were in the gun (five rounds in the clip and one in the chamber). In addition, one loose round was found with the clothing under the trunk cap. Thus, seven rounds were recovered. The witnesses testified that four shots were fired. As a result, all 11 rounds were accounted for. The gun was test-fired and found to be operable.

{¶28} Det. Oaks submitted the sunglasses and gloves to BCI for DNA analysis.

{¶29} Det. Oaks took a buccal swab from inside appellant's cheek and submitted it to BCI. Appellant's hands were also swabbed for gunshot-residue testing.

{¶30} Det. Oaks testified that appellant was convicted in Indiana of burglary, possession of cocaine, and resisting law enforcement.

{¶31} Jennifer Colecchia, forensic scientist with B.C.I. in the DNA section, testified that making a DNA comparison is a five-step process, which involves: (1) collection of DNA samples from submitted evidence and placement in test tubes; (2) extraction of DNA from cells; (3) quantification, where the scientist determines the amount of DNA available; (4) amplification, a chemical Xeroxing process that allows the scientist to make millions of copies of the target areas on the DNA being analyzed to produce a profile; and (5) comparison of the DNA obtained from evidence to a known standard.

{¶32} Ms. Colecchia said that a team of scientists works on each case submitted for DNA analysis. She performed the final step in the process, which involved the preparation of the DNA profiles made from the submitted evidence and the comparison of those profiles to appellant's buccal swab. She said that each scientist involved in these steps makes notes and a report of his or her work and provides them to Ms. Colecchia to be included in her final DNA report.

{¶33} Ms. Colecchia said that David Ross, a forensic biologist, swabbed the interior of both gloves and put each swab in a separate test tube. He also swabbed the sunglasses and placed the swabs in vials. He then forwarded the swabs for DNA extraction.

{¶34} Ms. Colecchia said that Marissa Keeley, a DNA extraction scientist at BCI, performed DNA extraction on the swabs. In this process chemicals are added to the test tubes, which break down the cellular material so the DNA can be extracted from it.

{¶35} After the quantification and amplification processes were completed, this data was collected onto BCI's computer system. From this data, Ms. Colecchia developed separate profiles from the swabs taken from each item submitted. She also developed a separate DNA profile from the buccal swab taken from appellant.

{¶36} For the swab taken from inside one of the gloves, she determined it was not suitable for comparison purposes because it had been touched by so many people it was impossible to isolate any DNA to develop a separate profile for it. However, she was able to develop a DNA profile from the swab taken from inside the second glove. Ms. Colecchia also developed a DNA profile from appellant's buccal swab and determined that appellant was a contributor of the DNA on this glove. She said the expected frequency of occurrence, or how often she would expect to find this DNA profile from the glove, is one in every 4,129 individuals.

{¶37} Ms Colecchia was also able to develop a DNA profile from the sunglasses. She said the DNA taken from the sunglasses was consistent with appellant and that the expected frequency of occurrence, or how often she would expect to find this DNA profile from the sunglasses, is one in 2.8 sextillion individuals.

{¶38} Donna Schwesinger, gunshot residue analyst at BCI, testified that an analysis of a gunshot residue sample taken from appellant's hands showed that gunshot residue was not detected on appellant, but gunshot residue was detected on one of the gloves found under the truck cap.

{¶39} The jury returned a verdict finding appellant guilty of all six counts in the indictment and the two specifications to felonious assault in Count 1.

{¶40} The court sentenced appellant to 11 years in prison on Count 1. As to the first specification in Count 1 (the firearm specification), the court sentenced appellant to three years. As to the second specification in that count (discharging a firearm at a police officer while committing felonious assault), the court sentenced appellant to seven years. The court merged the two specifications and ordered those prison terms to be served consecutively with the underlying offense. The court found that Count 2 and Count 3 (resisting arrest and weapons-disability) merged with Count 1.

{¶41} The court sentenced appellant to 18 months each for improper handling of a firearm in a motor vehicle in Count 4 and carrying a concealed weapon in Count 6, these terms to be served concurrently to each other, but consecutively to Count 1.

{¶42} The court sentenced appellant to three years for tampering with evidence in Count 5, to be served concurrently to Counts 4 and 6 and consecutively to Count 1, for a total of 22 and one-half years in prison.

{¶43} Appellant appeals his conviction, asserting five assignments of error. For his first, he contends:

{¶44} "The appellant's convictions are against the manifest weight of the evidence."

{¶45} A court reviewing the manifest weight observes the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *State v. Thompkins*, 78 Ohio St.3d 380. 387 (1997). The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the

judgment must be reversed and a new trial ordered. *Id*. The discretionary power to grant a new trial should only be exercised in the exceptional case in which the evidence weighs heavily against the conviction. *Id*. Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan*, 22 Ohio St.3d 120, 123 (1986). The role of the reviewing court is to engage in a limited weighing of the evidence in determining whether the state properly carried its burden of persuasion. *Thompkins, supra,* at 390. If the evidence is susceptible to more than one interpretation, an appellate court must interpret it in a manner consistent with the verdict. *State v. Banks*, 11th Dist. Ashtabula No. 2003-A-0118, 2005-Ohio-5286, ¶33.

{¶46} Contrary to appellant's argument, other evidence corroborated Officer Dripps' identification testimony. Chief Taafe and Safety Director Carsone testified they intercepted appellant running through the same neighborhood where shots were fired within minutes of the shooting and he was armed with a loaded handgun. They testified appellant did not appear surprised to see them and no evidence was presented that there was any legitimate reason for him to be running on Hager St. with a gun. Further, Off. Dripps said that when the shooter fled the Circle K, he was wearing a black hoodie and tan pants. When he was apprehended, he was wearing a t-shirt; however, a black hoodie and a pair of gloves were hidden under a truck cap on John Nutter's property at 125 Hager St. and one of those gloves contained appellant's DNA. Further, a bullet hidden under the truck cap was the same as the bullets found in appellant's gun. He thus hid this incriminating evidence while running away from Off. Dripps.

{¶47} Appellant argues that Off. Dripps lacked credibility because he changed his testimony to say that he was 30 *yards* behind appellant when he was chasing him.

However, the record shows Off. Dripps repeatedly testified he was between 20 and 30 *feet* behind appellant. Even on cross-examination, he said he was "20 or 30 feet" behind appellant. While it is true that at one point during his *direct* examination, he said he was 30 yards behind appellant, this was the only time he so testified and he never said his testimony that he was 20 to 30 feet behind appellant was a mistake. The isolated "30 yard" reference was obviously understood to be a misspeak because appellant's counsel did not even cross-examine Officer Dripps regarding this apparent inconsistency. Further, Virginia Egart said that Off. Dripps was "right behind appellant."

{¶48} In any event, Officer Dripps said he got a "good look" at appellant. He said he saw appellant's face when he exited the Monte Carlo and looked back at the officer, who was just a few feet from him, before he started running. Off. Dripps said he also got a good look at appellant when he was shooting at him and when he was running after appellant on Hager St. Officer Dripps said he had "no doubt" that appellant was the male who shot at him.

{¶49} Further, appellant argues Off. Dripps lacked credibility because he was not specific about the exact number of times he was shot at. Off. Dripps said he was shot at between three and eight times. However, he said it was hard for him to be more specific because appellant fired multiple shots at him in rapid succession. In any event, at least four other witnesses said they heard four gunshots fired - Virginia Egart, Jason Findley, Safety Director Lou Carsone, and Sergeant Haynie.

{¶50} Moreover, Det. Oaks testified that appellant's firearm (which was found on him within minutes after he shot at Off. Dripps), if fully loaded, contains ten rounds in the magazine and one in the chamber. The gun had six rounds in it and one was found

under the truck cap, for a total of seven, which supported the witnesses' testimony that four rounds were fired.

{¶51} Next, appellant argues the prosecuting attorney engaged in "questionable trial tactics" because Off. Dripps testified that he served 15 months in Iraq and 13 months in Afghanistan. However, this testimony was offered to support his testimony that he knew he was being shot at by appellant. In order to prove felonious assault, the state was required to prove that appellant attempted to harm Off. Dripps with a gun. He said that he had been shot at during active combat in the military and there is a "distinct sound" when a round is fired in your direction. He said you can hear the round as it "whizzes" by you and this is exactly what he heard when appellant was firing his gun at him.

{¶52} Appellant also argues that witnesses improperly testified they heard gunshots fired, as opposed to some other sound like fireworks. Appellant references only the testimony of Natalie Dundon in support so his argument is limited to her. She testified the sound she heard was "definitely" gunshots being fired. She said she knew the difference between gunshots and fireworks because she grew up around hunters and was familiar with the sound of gunshots.

{¶53} Next, appellant complains that the prosecutor improperly told witnesses they must tell the truth. Appellant references only Virginia Egart, so, again, his argument is limited to her. She testified on redirect examination, in response to the prosecutor's question, that during their telephone interview, the prosecutor told her the only thing she had to do was to tell the truth as to what she saw. We fail to see anything even remotely improper with this admonition.

{¶54} Finally, appellant argues that "expert witnesses" provided opinions that were not stated with a reasonable degree of scientific certainty. Appellant references only the testimony of Jennifer Colecchia, forensic scientist in BCI's DNA section. However, she testified her testimony was based on her training, experience, and education "to a reasonable degree of scientific certainty."

{¶55} Based on the foregoing, this is not the exceptional case in which the evidence weighs heavily against the conviction such that the verdict was against the manifest weight of the evidence. The jury, as the trier of fact, was entitled to believe the officers, lay witnesses, and expert witnesses, which it obviously did. In doing so, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice that appellant is entitled to a new trial.

{¶56} Appellant's first assignment of error is overruled.

{¶57} For his second assigned error, appellant alleges:

{¶58} "The appellant's conviction for improperly handling firearms in a motor vehicle is not supported by sufficient evidence."

{¶59} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991). "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). Whether the evidence is legally sufficient to sustain a verdict is a question of law, which we review de novo. *Id*. at 386.

{¶60} Further, circumstantial evidence and direct evidence inherently possess the same probative value, even when used to prove essential elements of an offense. *Jenks*, *supra.*

{¶61} The only conviction appellant challenges as not being supported by sufficient evidence is Count 4, improperly handling firearms in a motor vehicle. R.C. 2923.16(B) provides that "no person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle."

{¶62} While there was no direct evidence that appellant had a firearm in the Monte Carlo in such a manner that it was accessible to him without leaving the car, the circumstantial evidence supports such finding. *Immediately* upon stopping, appellant flung the passenger door open and bolted from the car. After engaging Officer Dripps in a foot pursuit, shooting at him four times, and running down Hager St., he was apprehended by Chief Taafe and Mr. Carsone. Upon frisking appellant, Chief Taafe found the loaded firearm in appellant's pants pocket. There was no evidence appellant obtained the gun after leaving the car. From this evidence, the jury could reasonably infer that appellant had the gun and that it was accessible to him before he fled the vehicle.

{¶63} Appellant's second assignment of error is overruled.

{¶64} For his third assigned error, appellant alleges:

{¶65} "The trial court erred by permitting the DNA evidence, including both testimony and documents into evidence, in violation of the appellant's rights pursuant to the Confrontation Clause of the United States Constitution."

{¶66} The admission or exclusion of relevant evidence is within the trial court's discretion. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000). Absent an abuse of discretion, as well as a showing of prejudice, an appellate court will not disturb the ruling of the trial court as to the admissibility of evidence. *State v. Martin*, 19 Ohio St.3d 122, 129 (1985).

{¶67} Appellant argues that because Jennifer Colecchia testified regarding not only the steps she performed in the DNA analysis of appellant's gloves and sunglasses, but also concerning the steps performed by other scientists in the DNA section who did not testify, the trial court's admission of her testimony violated the Confrontation Clause. In support, he cites *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In *Melendez-Diaz*, police found a white substance in a vehicle, later confirmed to be cocaine. The chemist who performed those tests did not testify at trial, but instead the state submitted "certificates of analysis" that outlined his analysis of the evidence. The Supreme Court held, in a plurality decision, that the admission of the certificates without expert testimony violated the petitioner's Sixth Amendment right to confront the witnesses against him.

{¶68} *Melendez-Diaz* is distinguishable from the case before us because, here, the state did not only rely on Ms. Colecchia's report. Rather, she testified concerning the entire analysis performed by BCI, including the steps she performed as well as those performed by the other scientists involved in the DNA analysis of appellant's gloves and sunglasses.

{¶69} Appellant does not cite any Ohio case law authority extending *Melendez-Diaz* to the facts of the instant case. To the contrary, the Ohio Appellate Districts that have addressed this issue have reached the opposite conclusion.

{¶70} In *State v. Keck*, 4th Dist. Washington No. 09CA50, 2011-Ohio-1643, affirmed by the Ohio Supreme Court at 137 Ohio St.3d 550, 2013-Ohio-5160, six people (the defendant and five victims) submitted DNA swabs to compare with DNA found at the defendant's home. BCI Agent Mark Losko took those swabs, and Agent Kristen Slaper then compared DNA profiles of the six individuals to DNA evidence recovered from the defendant's home. Although Agent Slaper testified at trial, Losko did not. The defendant argued on appeal he was denied his right to confront witnesses under the Confrontation Clause of the Federal Constitution. The Fourth District held that *Melendez-Diaz* did not require the reversal of the defendant's conviction. In support, the Fourth District in *Keck* cited a case from a California federal district court, which held that *Melendez-Diaz* did not prevent one lab analyst from basing an opinion on work done by another analyst who did not appear at trial. *Larkin v. Yates*, 09-2034-DSF, 2009 U.S. Dist. LEXIS 60106 (C.D. Ca.Jul. 9, 2009). The Fourth District in *Keck* stated:

> **{¶71}** We are cognizant that during Slaper's testimony, she explained that Losko took the samples, ran them "through a series of scientific steps and a profile, a piece of paper readout, printout" was generated at the end. Losko did no actual "analysis" himself, Slaper explained; rather, "he just simply prints it out and hands it to the casework analyst." To that end, we note that the federal Fourth Circuit Court of Appeals has found no Confrontation Clause violation when raw data generated from a machine is introduced into evidence at trial even though the technician who operated that machine is not in court to testify. *United States v. Washington*, 498 F.3d 225, 229 (4th Dist.2007).
>
> **{¶72}** We find the analysis in the cases cited above persuasive, and also reinforce our belief that *Melendez-Diaz* is distinguishable and that appellant's confrontation rights were not violated by allowing Slaper to give an expert opinion based, in part, on earlier DNA profiles that Losko had given to her. Slaper established a nexus between appellant and the incriminating DNA evidence taken from bedding. Slaper appeared at trial and was subjected to defense counsel's thorough cross-examination. *Keck* at ¶28-29.

{¶73} Further, in *State v. Middlebrooks*, 6th Dist. Lucas No. L-08-1196, 2010-Ohio-2377, the defendant argued that his Sixth Amendment right to confront witnesses was violated when a forensic scientist testified regarding the contents of a lab report that was authored in part by another scientist who did not testify at trial. The witness testified regarding the results of her own work and the work of the scientist who did not testify. The appellate court held there was no plain error because the jury was aware the witness (who made the DNA match) was not the one who initially detected semen from the rape kit and thus could choose to assign whatever weight it chose to the evidence. *Id.* at ¶21. The Sixth District stated:

> **{¶74}** Akbar [BCI forensic scientist] testified that it was common practice to split up their cases and that all of the scientists rely on each other's findings. For example, one forensic scientist may be the one to examine the evidence while a completely different scientist tests the evidence for DNA. Akbar testified regarding the procedures, process, logistics, and results of the DNA testing offered as evidence against appellant, focusing on the work she herself performed in getting the DNA match. The jury was well-aware that Akbar was not the one who initially detected semen from the rape kit and could therefore choose to assign whatever weight it chose to the evidence. *Id*.

{¶75} Similarly, here, Ms. Colecchia testified that the scientists in the DNA section work on each case. She said that each of them performs one of the different steps in the DNA analysis and she relied on their work in arriving at her conclusions. She testified concerning the procedures and results of the DNA testing offered as evidence against appellant, focusing on the work she performed in developing the DNA profiles taken from the submitted evidence, developing a separate DNA profile of appellant, and in comparing them. She was cross-examined at length. The jury was aware that Ms. Colecchia did not extract or handle the DNA submitted by Detective Oaks and could assign whatever weight it chose in evaluating her testimony.

{¶76} Appellant also argues that the documents submitted in support of Ms. Colecchia's testimony were not admissible without the witnesses there to testify. However, the only such documents were photographs of the gloves and sunglasses, which indicate Mr. Ross swabbed them for DNA. Since Ms. Colecchia was available to be cross-examined, she was subject to cross-examination regarding these documents.

{¶77} The trial court did not abuse its discretion in allowing Ms. Colecchia to testify.

{¶78} Appellant's third assignment of error is overruled.

{¶79} For his fourth and final assignment of error, appellant contends:

{¶80} "The trial court committed reversible error, in violation of the appellant's constitutional rights, by failing to permit the appellant to plead guilty to the charge of having weapons while under a disability."

{¶81} On January 6, 2015, *the day before trial*, appellant filed a motion to sever the weapons-disability count or, in the alternative, to allow him to waive a jury trial and have the court decide that count. Then, on the morning of trial, when the court asked appellant's counsel if he had anything to add to that motion, counsel stated: "My client has offered to plead to that count, he's offered to have that count severed and have it tried directly to the court and I just believe it's prejudicial." The prosecutor orally opposed the motion and the court overruled it, stating it would provide an appropriate limiting instruction regarding appellant's prior convictions.

{¶82} The only written motion before the court was a motion to sever the weapons-disability count and to have the court decide that charge. Nowhere in appellant's written motion did he indicate he wanted to plead guilty.

{¶83} However, appellant's motion to sever was untimely. "A motion to sever is considered a pre-trial motion." *State v. Bell*, 3d Dist. Seneca No. 13-12-39, 2013-Ohio-1299, ¶29, citing Crim.R. 12(C)(5). "Accordingly, such a motion is subject to the time limitation contained in Crim.R. 12(D), which provides that '[a]ll pretrial motions * * * shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier.'" *Bell, supra*. However, the court may extend the time for pretrial motions in the "interest of justice." Crim.R. 12(D). Courts have affirmed denials of motions to sever where the defendant failed to file them in a timely fashion. *State v. Montgomery*, 2d Dist. Montgomery No. 22193, 2009-Ohio-1415, ¶17 (affirming denial of motion to sever where it was filed outside the time constraints of Crim.R. 12(D)).

{¶84} Appellant was arraigned on October 24, 2014, and trial was set for January 7, 2015. Thus, he was required to file his motion to sever by December 1, 2014. Because he did not file it until January 6, 2015, and offered no reasons why the time for filing his motion should be extended, the trial court did not abuse its discretion in denying his motion.

{¶85} Moreover, appellant failed to demonstrate his entitlement to severance of the weapons-disability charge.

{¶86} Crim.R. 8 governs the joinder of offenses and Crim.R. 14 governs severance or bifurcation of offenses. Crim.R. 8(A) provides, in pertinent part: "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 criminal conduct."

{¶87} Crim.R. 14, regarding relief from prejudicial misjoinder, provides, in pertinent part: "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 * * *."

{¶88} Joinder of defendants and offenses is favored in the law for many reasons. *State v. Thomas*, 61 Ohio St.2d 223, 225 (1980). Joinder conserves judicial resources, lessens the expense of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of inconsistent results in successive trials. *Id*.

{¶89} To prevail on a motion to sever, a defendant has the burden to demonstrate: (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. *State v. Schaim*, 65 Ohio St.3d 51, 59 (1992). Further, "[a] defendant who asserts that joinder is improper has the burden of making an affirmative showing that his rights will be prejudiced thereby." *State v. Roberts*, 62 Ohio St.2d 170, 175 (1980). Prejudice is not demonstrated if the offense in question would have been admissible as "other acts" evidence under Evid.R. 404(B) or if the evidence of each crime joined at trial is simple and direct. *Schaim, supra.* Further, "[t]he decision to bifurcate a trial pursuant to Crim.R. 8 and Crim.R. 14 is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of error and resulting prejudice." *State v. Weller*, 3d Dist. Paulding No. 11-90-14, 1991 Ohio App. LEXIS 3535, *4 (Jul. 29, 1991).

{¶90} Here, the weapons-disability charge was part of the *same act* of appellant's shooting his gun at Off. Dripps. Thus, the interests of judicial economy would not have been promoted by requiring a separate trial on the weapons charge. Further, the evidence of the weapons charge was simple and direct such that the jury could easily have separated it from the other crimes.

{¶91} Because appellant's motion to sever was untimely and further because he failed to demonstrate his entitlement to a severance, the trial court did not abuse its discretion in denying appellant's motion to sever.

{¶92} Further, while appellant argues that he unequivocally agreed to plead guilty, that is not correct. In his written motion, he never even suggested he would plead guilty. To the contrary, he simply asked the court for an order severing the weapons-disability count so he could try that charge to the bench. At the hearing on the motion to sever, appellant's counsel - for the first time - said that appellant "has offered to plead to that count," but, *in the same sentence,* defense counsel also said his client "offered to have that count severed and have it tried directly to the court." Thus, appellant's purported offer to plead guilty was hardly unequivocal.

{¶93} In any event, appellant's counsel also argued at the hearing that the weapons-disability charge was a "vehicle to get a prior conviction in front of the jury" and that, "I just believe it's prejudicial." Because appellant's counsel suggested his client was willing to plead guilty to the weapons charge and explained such plea would prevent the state from presenting evidence of appellant's prior convictions, the trial court was obligated to ask appellant if he intended to plead guilty to the weapons charge. By not doing so, the trial court abused its discretion.

{¶94} This case is analogous to *Old Chief v. United State*s, 519 U.S. 172 (1997). In *Old Chief*, the defendant, who was facing multiple charges, including a weapons-disability charge, offered to stipulate to the fact of a prior qualifying conviction with respect to the weapons charge. The Supreme Court held that under Evidence Rule 403, the trial court abused its discretion, in balancing probative value against the danger of unfair prejudice, by rejecting the defendant's offer and admitting the full record of the prior conviction. *Id*. at 191. This was because the details of the prior offense risked tainting the verdict and the sole purpose of the state's introduction of such evidence was to prove the element of the prior conviction. *Id.*

{¶95} Here, while appellant did not offer to stipulate to his prior conviction, by offering to plead guilty, if that was his intention, he not only conceded the fact of his prior conviction but also agreed to plead guilty to the weapons charge, making the rationale behind *Old Chief* apply with even greater force here.

{¶96} That being said, in *Old Chief*, the Supreme Court noted that a trial court's failure to accept a defendant's stipulation to a prior conviction may be harmless error. *Id*. at 192, fn. 11. Error is harmless when the remaining evidence of guilt is overwhelming. *State v. Morris,* 141 Ohio St.3d 399, 2014-Ohio-5052, ¶29.

{¶97} Here, the evidence of appellant's guilt other than the record of his prior convictions was overwhelming and, thus, any error resulting from the trial court's failure to ask appellant if he wanted to plead guilty to the weapons charge was harmless beyond a reasonable doubt.

{¶98} Appellant's fourth assignment of error is overruled.

{¶99} For the reasons stated in this opinion, the assignments of error are overruled. It is the order and judgment of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶100} I concur in the judgment of this court to affirm defendant-appellant, Jeffrey Ladontay Irby's, convictions. I do so, however, for the following reasons.

{¶101} With respect to the third assignment of error, I concur with the majority that the *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.E.2d 314 (2009), case does not apply to the present case and that the in-court testimony of Jennifer Colecchia satisfied the Sixth Amendment's confrontation clause. This conclusion is bolstered by several United States and Ohio Supreme Court decisions subsequent to *Melendez-Diaz*.

{¶102} In *Melendez-Diaz*, the prosecution had submitted affidavits to prove that the substance seized from the defendant was cocaine. The Supreme Court held that the "affidavits were testimonial statements, and the analysts [who prepared the affidavits] were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to '"be confronted with"' the analysts at trial." *Id.* at 311. *Melendez-Diaz* is readily distinguishable as the

prosecution in the present case did not rely on affidavits, but on the in-court testimony of Colecchia, a forensic DNA analyst.

{¶103} In *Bullcoming v. New Mexico*, __ U.S. __, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), the Supreme Court was confronted with a situation where one forensic analyst prepared and certified a report determining the defendant's blood-alcohol concentration, but another analyst, who was not involved in the analysis of the defendant's blood, introduced the report at trial. Again, the Supreme Court found the admission of the evidence to be a violation of the confrontation clause.

> The question presented is whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification--made for the purpose of proving a particular fact--through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. We hold that surrogate testimony of that order does not meet the constitutional requirement. The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.

Id. at 2710.

{¶104} The situation in *Bullcoming* is more pertinent to the present case, in that Irby complained that Colecchia "was permitted to testify * * * to tasks performed by others," and that, through Colecchia, "documents were introduced which had been prepared by those other than the witness." Appellant's brief at 10.

{¶105} In *Williams v. Illinois*, __ U.S. __, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), the defendant was tried for rape. At trial, a forensic analyst for the prosecution testified that a DNA profile of the defendant's blood produced by a state crime laboratory matched the DNA profile obtained from vaginal swabs of the victim but which was produced by an independent laboratory (Cellmark). No one from the independent laboratory testified at trial. The Supreme Court framed the issue as whether the confrontation clause "bar[s] an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify." *Id.* at 2227.

{¶106} The Supreme Court in *Williams* found no violation and offered a dual-basis for its holding. In the first instance, the Court ruled that "[o]ut-of-court statements that are related by [an] expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside of the Confrontation Clause." *Id.* at 2228.

{¶107} The Supreme Court explained that its holding was consistent with *Melendez-Diaz* and *Bullcoming*:

> In those cases, the forensic reports were introduced into evidence, and there is no question that this was done for the purpose of proving the truth of what they asserted: in *Bullcoming* that the defendant's blood alcohol level exceeded the legal limit and in *Melendez-Diaz* that the substance in question contained cocaine. Nothing comparable happened here. In this case, the Cellmark report was not introduced into evidence. An expert witness referred to the report not to prove the truth of the matter asserted in the

> report, *i.e.,* that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood. Thus, * * * the report was not to be considered for its truth but only for the "distinctive and limited purpose" of seeing whether it matched something else. * * * The relevance of the match was then established by independent circumstantial evidence showing that the Cellmark report was based on a forensic sample taken from the scene of the crime.

Id. at 2240-2241.

{¶108} Alternatively, the *Williams* court held that, "[e]ven if the report produced by Cellmark had been admitted into evidence, there would have been no Confrontation Clause violation," given the non-testimonial nature of the report. *Id.* at 2228. Again, the Court distinguished the situation in *Williams* from its prior decisions:

> In *Melendez-Diaz* and *Bullcoming*, the Court held that the particular forensic reports at issue qualified as testimonial statements, but the Court did not hold that all forensic reports fall into the same category. Introduction of the reports in those cases ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial.

Id. at 2243.

{¶109} The *Williams* Court was sensitive to the peculiar nature of the purposes and procedures involved in DNA profiling. The Court noted that "the technicians who

prepared the reports [in *Melendez-Diaz* and *Bullcoming*] must have realized that their contents (which reported an elevated blood-alcohol level and the presence of an illegal drug) would be incriminating." *Id.* A DNA profile, however, is "not prepared for the primary purpose of accusing a targeted individual." *Id.*

> When lab technicians are asked to work on the production of a DNA profile, they often have no idea what the consequences of their work will be. In some cases, a DNA profile may provide powerful incriminating evidence against a person who is identified either before or after the profile is completed. But in others, the primary effect of the profile is to exonerate a suspect who has been charged or is under investigation. The technicians who prepare a DNA profile generally have no way of knowing whether it will turn out to be incriminating or exonerating--or both.
>
> It is also significant that in many labs, numerous technicians work on each DNA profile. * * * When the work of a lab is divided up in such a way, it is likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures.
>
> * * *
>
> In short, the use at trial of a DNA report prepared by a modern, accredited laboratory "bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate."

(Citation omitted.) *Id.* at 2244.

{¶110} The applicability of *Williams* to the present case is patent.[1] Colecchia performed the analysis that identified Irby's DNA matched the DNA found on one of the gloves and the sunglasses recovered from the crime scene, although her analysis was based on samples taken and profiles developed by other non-testifying members of the crime lab. For the purposes of the confrontation clause, her testimony is essential. It is Colecchia, testifying as an expert, who analyzes the raw data, compares the profiles against the reference standards, and makes the determination as to whether there is a match. The testimony of the other technicians is not necessary, as they merely provided the data on which Colecchia based her opinions, and, furthermore, the DNA profiles, standing alone, are non-testimonial.

{¶111} Colecchia's testimony illustrates the nature of her role in the procedure as compared to the other technicians:

> We do have almost like a team that works on each individual case. So when the items of evidence are first brought to BCI, they're examined by a forensic biologist who collects the samples and puts them into tubes. They're then passed on to a DNA extractor who extracts the DNA from the samples. And then it goes to a person who actually runs the DNA extraction, they run it through our different instrumentation to produce a profile. And then I come into play and I actually print out all of the data from those samples and I make the comparisons. * * * And I try to interpret and determine if there's a suitable profile present for interpretation because there's not always enough DNA on an item to produce a profile. I try to

1. It must be noted that *Williams*, like *Melendez-Diaz* and *Bullcoming*, was a plurality opinion.

> determine how many people might have been contributing to a mixture, meaning multiple people may have been present in that DNA profile. And I just try to compare the evidence that we have from these forensic samples to our known reference standards.

{¶112} Colecchia's testimony, in light of the United States Supreme Court's decision in *Williams*, clearly demonstrates that there has been no confrontation clause violation.[2]

{¶113} With respect to the fourth assignment of error, I concur with the majority's conclusion that Irby's motion to sever was untimely and lacked merit. I disagree, however, that Irby's equivocal offer to plead to having weapons under a disability was sufficiently analogous to the defendant's offer to stipulate to prior convictions in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), so that the trial court's failure to pursue the plea offer constituted an abuse of discretion.

{¶114} The *Old Chief* decision was premised on a violation of Federal Rule of Evidence 403 (excluding relevant evidence for prejudice): "the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available." *Id.* at 191. In the present case, Irby made no objection to the admission of the prior convictions based on Ohio Rule of Evidence 403.

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2. It is also worth noting that the Ohio Supreme Court considered the *Melendez-Diaz*, *Bullcoming*, and *Williams* line of cases in *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930. In *Maxwell*, Dr. Dolinak performed an autopsy on the victim and prepared a report. At trial, Dr. Felo testified based on his review of Dr. Dolinak's report, which was admitted into evidence. The Ohio Supreme Court found no confrontation clause violation. Rather, it held that Dr. Felo was testifying as an expert whose opinions and conclusions were based on, but did not mimic, Dr. Dolinak's report. *Id.* at ¶ 53. The report itself was non-testimonial in nature and admissible as a business record under Evidence Rule 803(6). *Id.* at ¶ 63.

{¶115} In contrast to the applicability of the evidentiary rules, "[a] criminal defendant does not have a constitutional right to enter a guilty plea or to have it accepted by the court." *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.*, 130 Ohio St. 3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶ 27. "It is well-established that the decision whether or not to accept a plea bargain is within the sound discretion of the trial court." *State v. Tate*, 9th Dist. Summit No. 21943, 2005-Ohio-2156, ¶ 13.

{¶116} In the absence of an offer to stipulate, the trial court had no alternative to the admission of the prior convictions in order to prove the weapons under a disability charge. Given the equivocal circumstances of Irby's offer to plea, duly noted by the majority, I find no abuse of discretion in the trial court's decision not to pursue the offer.

{¶117} For these reasons, I concur in this court's judgment.