**[Cite as *State v. Webb*, 2010-Ohio-6122.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| v. | : | No. 10AP-289<br>(C.P.C. No. 09CR08-5199) |
| Demetrius E. Webb, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

---

D E C I S I O N

Rendered on December 14, 2010

---

*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*Keith O'Korn*, for appellant.

---

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

**{¶1}** Defendant-appellant, Demetrius E. Webb ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas convicting him, following a bench trial, of having weapons while under disability. For the following reasons, we affirm.

**{¶2}** By indictment filed August 28, 2009, appellant was charged with one count of carrying a concealed weapon in violation of R.C. 2923.12, one count of improperly handling firearms in a motor vehicle in violation of R.C. 2923.16, one count of tampering with evidence in violation of R.C. 2921.12, and one count of having weapons while under disability in violation of R.C. 2923.13. All charges arose from an incident on August 11, 2009. Appellant pleaded not guilty to the charges.

**{¶3}** On December 8, 2009, before the jury was sworn, defense counsel informed the trial court that appellant would waive a jury trial as to the charge of having weapons while under disability. Following a brief discussion, appellant executed a written waiver of jury trial on that charge. The court read the waiver to appellant in open court. Thereafter, the court engaged in a brief colloquy with appellant regarding the waiver, after which appellant filed the waiver with the clerk of courts. Trial thereafter proceeded before a jury on the remaining counts.

**{¶4}** At trial, appellee, state of Ohio ("appellee"), presented the following evidence. In the early morning hours of August 11, 2009, Officer Kareem Kashmiry ("Kashmiry") responded to the area of Dresden Street and Belcher Drive on a report of shots fired. As Kashmiry drove down Belcher, a speeding vehicle nearly broadsided his cruiser. Kashmiry activated his beacons and chased the vehicle. The vehicle continued down Belcher before abruptly stopping behind an apartment complex on Dresden.

**{¶5}** The passenger, whom Kashmiry identified as appellant, exited the vehicle carrying what Kashmiry thought was an AK-47 assault rifle. Kashmiry exited his cruiser, drew his weapon, and ordered appellant to stop. Appellant ran behind a nearby

dumpster. When Kashmiry caught up to appellant, appellant threw the rifle to the ground and said "I don't have nothing." (Tr. 31.) Kashmiry then arrested appellant.

**{¶6}** Kashmiry testified that three bystanders, two men and one woman, were nearby at the time he apprehended appellant. Kashmiry insisted that it was appellant – and not one of these other individuals – who had thrown the rifle on the ground. Kashmiry averred that at one point, the male bystander attempted to retrieve the rifle from the ground; however, Kashmiry ordered him not to do so. According to Kashmiry, the man never touched the rifle.

**{¶7}** Several other officers, including Officers Daniel Pickrell ("Pickrell") and Adam Barton ("Barton"), arrived at the scene. Pickrell placed appellant and the driver of the vehicle, Joseph Ward ("Ward"), in his cruiser. Kashmiry retrieved the rifle, along with the trigger mechanism, which was detached, from behind the dumpster and placed both in the trunk of his cruiser. Barton retrieved the rifle and the trigger mechanism from the trunk; he unloaded the rifle for safety purposes. According to Barton, the rifle contained 22 rounds of ammunition – 21 rounds in the magazine and one in the chamber. At trial, both Kashmiry and Barton identified State's Exhibit A – a Russian SKS assault rifle, which resembles an AK-47 – as the rifle recovered at the scene.

**{¶8}** Following appellant's arrest, Kashmiry completed the necessary paperwork to have the rifle tested for operability. At trial, Kashmiry identified State's Exhibit B – the request for laboratory examination – and noted that the request included, among other things, both the description and serial number of the rifle. Kashmiry noted that the request identified the rifle's serial number as RH609602.

**{¶9}** Kelby Ducat ("Ducat"), a firearms examiner employed by the Columbus Police Department, testified that he tested State's Exhibit A for operability after reattaching the trigger mechanism. Ducat characterized the rifle as "easily found operable," meaning that he easily slid the trigger mechanism into the rifle without the use of any tools. (Tr. 96.) Indeed, Ducat testified that he "slid [the trigger mechanism] forward right behind the magazine clip, and it just snaps into place." (Tr. 98.) Ducat fully explained the process by which he reattached the trigger mechanism. Ducat testified that he test-fired the rifle twice and found it operable.

**{¶10}** Following appellee's presentation of evidence on the first three counts in the indictment, the court noted that appellant had elected to waive jury and be tried to the court on the having weapons while under disability count. Appellee then presented the testimony of appellant's parole officer, Roger Wicks ("Wicks"), outside the presence of the jury. Wicks averred that on August 11, 2009, appellant was under supervision of the Adult Parole Authority on a three-year term of post-release control stemming from a 2007 case out of Licking County in which appellant was convicted of complicity to commit burglary and witness intimidation.

**{¶11}** After appellee rested its case, defense counsel moved for judgment of acquittal pursuant to Crim.R. 29. Appellee conceded that it had not met its burden of proof on the carrying a concealed weapon charge; accordingly, the trial court sustained appellant's motion and dismissed that charge. The trial court overruled appellant's motion as to the improper handling and tampering with evidence charges.

**{¶12}** Thereafter, appellant presented his case. Appellant, testifying on his own behalf, provided a much different version of the events of August 11, 2009. According to

appellant, he and some others were standing in the parking lot of a friend's apartment when "all hell broke loose." (Tr. 139.) Appellant explained that Ward drove into the parking lot with a police cruiser in pursuit. At that point, appellant fled the area because he was on parole and was "not supposed to have any run-ins with the cops." (Tr. 139-40.) Kashmiry ordered appellant to stop and get on the ground with his hands behind his back. Kashmiry asked appellant his name and whether he had any outstanding warrants or was on parole. Appellant admitted he was on parole. Kashmiry told appellant he was going to jail, aggressively led him over to a dumpster in the parking lot, and showed him a rifle that was on the ground. According to appellant, Kashmiry told him that "I [appellant] had that gun and it's mine because I'm nothing but a felon." (Tr. 141.) Appellant averred that he refused Kashmiry's repeated attempts to coerce him into admitting that the rifle was his. Appellant did not see anyone attempt to pick up the rifle.

**{¶13}** Appellant further testified that when Pickrell arrived on the scene, he tapped Kashmiry on the shoulder to let him know other people were watching him. As Pickrell escorted appellant to the cruiser, appellant asked if he seen appellant with the rifle. Pickrell responded that he had not, but that Kashmiry was "stuck on the fact that you had one." (Tr. 144.) Appellant told Pickrell that Kashmiry accused him of having the rifle only after appellant admitted he was on parole. According to appellant, while the police were completing their paperwork, Kashmiry repeatedly stated that if appellant admitted to having the rifle, the police would just file a report and let him go home. When appellant refused, the officers transported him to jail.

**{¶14}** On cross-examination, appellant clarified that his post-control release condition of having no contact with the police meant that he could not be involved in a

"situation" or "get into trouble" with the police. (Tr. 150.) Appellant admitted that having a firearm would qualify as a "situation" for purposes of his parole. (Tr. 153.) Appellant denied that he was a passenger in Ward's vehicle or that he had ever possessed the rifle. Appellant testified that he ran from the police only because he "didn't want any dealings with them." (Tr. 151.)

**{¶15}** Appellant presented no additional witnesses or exhibits and rested his case. Following closing arguments and the trial court's recitation of jury instructions, the case was submitted to the jury.

**{¶16}** During its deliberations, the jury submitted several questions to the court, and, after several hours of deliberation, indicated that it had been unable to reach a verdict on the improper handling and tampering with evidence charges. The court instructed the jury further, and it continued to deliberate. Subsequently, however, the jury again indicated to the court that it could not reach a unanimous verdict on either charge. The court concluded that there was no probability that the jury would agree on those charges and declared a mistrial on those counts. Appellee ultimately decided not to retry appellant on those two counts.

**{¶17}** As noted previously, appellant waived his right to a jury trial on the charge of having weapons while under disability. After considering the evidence related to that charge, the trial court found appellant guilty.

**{¶18}** Appellant filed a timely appeal from his conviction and raises the following five assignments of error:

ASSIGNMENT OF ERROR # 1

THE TRIAL COURT LACKED JURISDICTION TO TRY THE APPELLANT WITHOUT A JURY, AS THE TRIAL COURT FAILED TO STRICTLY COMPLY WITH R.C. § 2945.05, AND THE APPELLANT DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO A JURY TRIAL.

ASSIGNMENT OF ERROR #2

APPELLANT'S WUD CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION, AND THE WUD CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR #3

APPELLANT'S WUD CONVICTION WAS INCONSISTENT WITH THE HUNG JURY ON THE IMPROPER HANDLING OF A FIREARM COUNT, THEREBY VIOLATING FEDERAL AND OHIO DOUBLE JEOPARDY PROTECTIONS AND PRINCIPLES OF RES JUDICATA.

ASSIGNMENT OF ERROR #4

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT ERRED BY CONDUCTING A HYBRID TRIAL AND CONVICTING THE APPELLANT OF A WUD CHARGE IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE U.S. CONSTITUTION, CONSTITUTIONAL PRINCIPLES OF COLLATERAL ESTOPPEL, AND OHIO'S STATUTORY AND COMMON LAW AND CRIMINAL RULES.[1]

[1] Appellant's fifth assignment of error is raised in appellant's supplemental brief, which was filed, with leave of court, on October 21, 2010.

**{¶19}** Appellant's first assignment of error argues that the trial court lacked jurisdiction to try him on the having weapons while under disability charge because his waiver of a jury trial was not knowingly, intelligently, and voluntarily made, and the trial court failed to strictly comply with the requirements of R.C. 2945.05. We disagree.

**{¶20}** The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a trial by jury. See *Columbus v. Boyland* (1979), 58 Ohio St.2d 490, fn. 1. Pursuant to Crim.R. 23(A), a criminal defendant may knowingly, voluntarily, and intelligently waive this right. *State v. Bays*, 87 Ohio St.3d 15, 19, 1999-Ohio-216, citing *State v. Ruppert* (1978), 54 Ohio St.2d 263, 271.

**{¶21}** R.C. 2945.05 and Crim.R. 23(A) require that a jury waiver be made in writing and be signed by the defendant, and the requirements must appear of record for the trial court to have jurisdiction to try the defendant without a jury. See *State v. Riley* (1994), 98 Ohio App.3d 801. A written waiver of jury trial is required to ensure that the defendant's waiver is intelligent, knowing, and voluntary. See *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶52.

**{¶22}** R.C. 2945.05 provides:

> In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I……., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

> Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

**{¶23}** The Supreme Court of Ohio has determined that R.C. 2945.05 requires that five conditions be met in order for a waiver to be validly entered. The waiver must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court. *State v. Lomax,* 114 Ohio St.3d 350, 2007-Ohio-4277, ¶9 ("*Lomax II*"). A trial court must strictly comply with the five requirements of R.C. 2945.05. *State v. Pless*, 74 Ohio St.3d 333, 337, 1996-Ohio-102. "In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant." Id.

**{¶24}** Appellant first contends his written jury waiver is invalid because the language used therein does not substantially comply with the waiver language set forth in R.C. 2945.05. Appellant specifically argues that his written waiver incorrectly states that his right to a unanimous verdict is guaranteed by the United States Constitution.

**{¶25}** The waiver in the instant case states as follows:

> I, Demetrius Webb, Defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury, and elect Count Four to be tried by a judge of this court.
>
> I fully understand that under the laws of the United States and of Ohio that I have an absolute constitutional right to a trial by jury of 12 members of the community; that my counsel and I may participate in selection of the 12 jurors; that any verdict rendered by a jury must be unanimous – all 12 must agree; and that the judge alone will decide guilt or innocence if I waive a jury. I understand I cannot re-try my case to a jury if convicted by a judge. Finally, I understand that my wavier of jury trial also applies to any findings of fact that the judge may make relative to my sentencing, if I am convicted.

**{¶26}** We note initially that appellant cites no cases requiring that the language in the jury waiver mirror the language set forth in R.C. 2945.05. To the contrary, Ohio courts have declined to find that the language of the waiver must be a verbatim recitation of R.C. 2945.05. *State v. Townsend,* 3d Dist. No. 9-03-40, 2003-Ohio-6992; *State v. Brown,* 6th Dist. No. WD-09-058, 2010-Ohio-1698; *State v. Tosco,* 3d Dist. No. 9-08-21, 2009-Ohio-408.

**{¶27}** The *Townsend* court noted that R.C. 2945.05 provides that the waiver language should be "in substance" that which is suggested by the statute and that the statute does not mandate or require any particular language. "There is no requirement that language identical to that suggested by R.C. 2945.05 appear on the waiver." Id. at ¶16. Substantial compliance with the suggested waiver language of R.C. 2945.05 is satisfactory. Id.

**{¶28}** In *Tosco,* the waiver signed by the defendant was identical in all respects to the language set forth in R.C. 2945.05, except that the waiver omitted the word "constitutional" before the words "right to trial by jury." The court noted the importance of the word "constitutional," as it set forth the source of the right to a trial by jury. However, the court found that the omission of one word from the language of the statute did not render the waiver invalid. Id. at ¶19.

**{¶29}** In *Brown,* the jury waiver included an additional reference to the defendant's right to a jury trial under the United States Constitution. The court found that the specific reference to the United States Constitution did not invalidate the waiver. Id. at ¶95.

**{¶30}** Moreover, appellant presents no evidence demonstrating that the inclusion of the challenged language somehow prevented him from fully understanding the nature

of the right he was waiving, thereby making his waiver unintelligent. In addition, given that the trial court was not required to advise appellant of the unanimity requirement at all, *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, ¶68, it is immaterial whether the waiver identified the source of the unanimity requirement as federal law rather than state law.

**{¶31}** Appellant further argues that the trial court's colloquy with him did not satisfy the "open court" requirement set forth in R.C. 2945.05. Appellant contends that the trial court failed to determine whether the waiver was knowingly, intelligently, and voluntarily made.

**{¶32}** The trial court read the entire content of the jury waiver form to appellant in open court. The court questioned appellant as to whether the signature on the waiver was his, and appellant responded, "[y]es, sir." (Tr. 8.) The court then asked appellant if he had any questions with respect to the waiver, and appellant replied, "[n]o sir." (Tr. 8.)

**{¶33}** This colloquy satisfied the minimum requirements of R.C. 2945.05 and *Lomax II.* The *Lomax II* court expressly held that "a trial court does not need to engage in an extended colloquy with the defendant in order to comply with the statutory requirement that a jury waiver be made in open court." Id. at ¶42. The court further stated that R.C. 2945.05 does "not mandate magic words, or a prolonged colloquy." Id. at ¶48. Rather, there must only be "some evidence in the record of the proceedings that the defendant acknowledged the waiver to the trial court while in the presence of counsel, if any." Id. at ¶42. The term "acknowledge," as used in *Lomax II*, means " '[t]o own, avow, or admit; to confess; to recognize one's act, and assume the responsibility therefor.' " *State v. Sanders,* 10th Dist. No. 09AP-983, 2010-Ohio-3433, ¶13, quoting *State v. Burnside,* 186

Ohio App.3d 733, 2010-Ohio-1235, ¶64, quoting Black's Law Dictionary (6th ed.rev.1990).

**{¶34}** In the instant case, appellant clearly acknowledged that he had waived his right to a jury trial by admitting that his signature appeared on the jury waiver form and by stating that he had no questions regarding the waiver. As noted above, *Lomax II* requires only that appellant acknowledge the waiver in open court, and appellant did so here. The circumstances herein are different than those in *Lomax II,* where the sole reference to the waiver was the trial court's statement that " '[s]ince there's going to be a jury waiver, does the State care to make an opening statement at this time?' " to which the defendant's counsel responded, " '[b]riefly.' " *Lomax II* at ¶45-46. Here, in the presence of appellant's counsel, the trial court read the written waiver aloud to appellant and then addressed appellant personally. Appellant responded affirmatively that he signed the jury waiver form and had no questions about the waiver. In *Sanders*, this court found that R.C. 2945.05 and *Lomax II* were satisfied when the trial court stated "it is my understanding that you have waived your right to a jury trial and would like to have the court decide this case," and the defendant responded, "[y]es." Id. at ¶13. Similarly, in *State v. Goods* (Mar. 30, 1999), 10th Dist. No. 98AP-925, this court found that the trial court satisfied R.C. 2945.05 in stating "[i]t's the court's understanding that you wish to waive the jury in this case; is that correct?" and the defendant replied "[y]es."

**{¶35}** Appellant relies upon the First District Court of Appeals' decision in *State v. Lomax,* 166 Ohio App.3d 555, 2006-Ohio-1373 ("*Lomax I*"), for the proposition that the "open court" requirement is satisfied only after the trial court specifically inquires whether appellant voluntarily signed the waiver and whether anyone forced him to waive his right

to a jury trial. However, as noted above, the Supreme Court of Ohio in *Lomax II* adopted a much more lenient standard. As noted above, the court held that there only need be "some evidence in the record of the proceedings that the defendant acknowledged the waiver to the trial court while in the presence of counsel, if any," *Lomax II* at ¶42, and that no "prolonged colloquy" is necessary, id. at ¶48.

**{¶36}** Finally, appellant argues that he did not knowingly and intelligently waive his right to a jury trial because it made no sense for him to do so since he intended to testify at trial. Appellant contends that, by testifying, he opened the door for appellee to admit his felony record for impeachment purposes, thereby negating the most common reason to waive a jury on a having weapons while under disability count, i.e., to prevent the jury from learning of his conviction that created the disability. At oral argument, appellant argued that the trial court should have engaged in an in-depth inquiry into appellant's motives for waiving a jury in light of his intention to testify. However, as noted above, "a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive it." *Bays* at 20. Further, as the Supreme Court of Ohio noted in *State v. Jells* (1990), 53 Ohio St.3d 22, "[w]hile it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so." Id. at 26. For these reasons, we find that appellant properly acknowledged his jury-trial waiver in open court consistent with the mandates of *Lomax II* and R.C. 2945.05. The first assignment of error is overruled.

**{¶37}** Appellant's second assignment of error challenges his conviction for having weapons while under disability as being against the sufficiency and manifest weight of the evidence. As noted by the Supreme Court of Ohio in *State v. Thompkins*, 78 Ohio St.3d

380, 1997-Ohio-52, paragraph two of the syllabus, "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different."

**{¶38}** We begin by addressing appellant's sufficiency arguments. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

**{¶39}** Appellant was convicted of having weapons while under disability in violation of R.C. 2923.13. That statute provides, in pertinent part, as follows:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

**{¶40}** Appellant first contends that appellee failed to prove that the rifle found near appellant was a "firearm" as defined in R.C. 2923.11(B)(1). More specifically, appellant

contends that the rifle recovered by Kashmiry was "indisputably inoperable" at the time it was recovered because the trigger mechanism was detached from the rifle.

**{¶41}** R.C. 2923.11(B)(1) defines "firearm," in relevant part, as follows:

> "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.

**{¶42}** In *State v. Stubblefield,* 8th Dist. No. 90687, 2008-Ohio-5348, the court rejected the defendant's claim that the state failed to present sufficient evidence to establish the operability of a gun because the evidence showed that when recovered, the gun lacked a firing pin and was incapable of being fired in that condition. In considering the defendant's argument, the court noted, at ¶9:

> The requirement that a gun be either operable or readily capable of being rendered operable is meant to distinguish irretrievably broken guns from guns that are either fully functioning or temporarily non-functioning. A gun that jams is only temporarily non-operational because the jam can be cleared-in such cases, the gun is capable of being readily rendered operable. See *State v. Easley,* Franklin App. No. 07AP-578, 2008-Ohio-468, ¶ 43; *State v. Griffin* (Feb. 28, 1996), Lorain App. No. 95CA006069. On the other hand, a gun with excessive rusting may be inoperable. While the rust might be cleaned in such a way as to render the gun operable, the removal of the rust might be so time-consuming that the gun could not be said to be capable of being "readily" operable. Ultimately, whether a gun can be readily rendered operatable is a question of fact. *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541, 1997-Ohio-52, paragraph one of the syllabus.

**{¶43}** The evidence in *Stubblefield* established that when the police recovered the gun, it did not contain a firing pin. A police officer testified that the gun was inoperable without the firing pin; however, he described how he placed a firing pin in the gun and

then successfully test-fired the gun. The officer further testified that a firing pin could be kept in one's pocket and be inserted into the gun "relatively easily." Id. at ¶10. The court noted that the defendant did not offer any evidence to refute the officer's testimony regarding the relative ease with which a firing pin could be inserted into a gun. The court concluded that "[w]ith the absence of any evidence to the contrary, we find the officer's testimony was legally sufficient to show that the gun could 'readily be rendered operable.' " Id.

**{¶44}** Similarly, in *State v. Jones,* 4th Dist. No. 09CA1, 2010-Ohio-865, the court rejected a defendant's claim of insufficient evidence as to a charge of having weapons while under disability. There, a police officer testified that during the search of the defendant's residence, he discovered a semi-automatic handgun. The officer described the gun has having been "field stripped," with the gun's frame in the defendant's bedroom and the remaining parts (the slide, barrel, and recoil spring) in an adjoining bedroom. Id. at ¶12. The officer further testified that once the weapon was reassembled, it was test fired and found to be properly operable. The court, finding the gist of the officer's testimony to be that "the disassembly of the firearm was no impediment to easy reassembly and, once reassembled, the weapon was readily operable," id. at ¶16, concluded that such evidence was sufficient to establish that the defendant possessed a "firearm" as defined in R.C. 2923.11(B)(1) while under disability.

**{¶45}** Here, the evidence offered by appellee, if believed, sufficiently established that the rifle recovered from the scene, which was admitted as State's Exhibit A, is a "firearm" as defined in R.C. 2923.11(B)(1). As noted above, Kashmiry testified that appellant exited the vehicle carrying an assault rifle, which appellant later threw to the

ground behind the dumpster. From this evidence, the trial court could reasonably have concluded that the trigger mechanism was intact at the time appellant exited the vehicle, meaning that the rifle was operable at the time appellant possessed it, but then became detached when appellant threw the rifle to the ground.

**{¶46}** Moreover, even if the trigger mechanism was already detached when appellant threw the rifle to the ground, Ducat characterized the rifle as "easily found operable," meaning that the trigger mechanism could easily be slid into the rifle without the use of any tools. Ducat further testified that he successfully test-fired the rifle twice after reattaching the trigger mechanism. We believe this testimony sufficiently established that even the disassembled rifle could "readily be rendered operable." Moreover, as in *Stubblefield,* appellant offered no evidence to rebut Ducat's testimony regarding the relative ease with which the trigger mechanism could be reinserted into the rifle. In the absence of any evidence to the contrary, we find Ducat's testimony to be legally sufficient to prove that the rifle was a "firearm" as defined in R.C. 2923.11(B)(1).

**{¶47}** Appellant also contends that appellee failed to prove that the rifle recovered from the scene was the same rifle Ducat test-fired for operability. Appellee concedes that the serial number Kashmiry wrote on the request for laboratory examination, State's Exhibit B, differed from the serial number on the actual rifle, State's Exhibit A, by one digit. Kashmiry testified that State's Exhibit B identified the serial number as RH609602. Both parties agree that the serial number on the rifle is RH609102. As noted by appellant, the jury questioned this discrepancy during its deliberations.

**{¶48}** As noted, this offense was tried to the bench. The trial court was obviously aware of the discrepancy in the serial numbers, having been alerted to such fact through

the introduction of State's Exhibits A and B and the aforementioned jury question. The court could have concluded that Kashmiry simply erred in writing the serial number on the laboratory request, and that such error did not undermine appellee's proof. Moreover, Kashmiry testified that he observed appellant throw the rifle to the ground, and both he and Barton identified State's Exhibit A as the rifle recovered from the scene. In addition, Ducat identified State's Exhibit A as the rifle he test-fired for operability. We agree with appellee that these identifications constituted sufficient evidence to prove that State's Exhibit A was the rifle appellant possessed. See *State v. Conley* (1971), 32 Ohio App.2d 54, 59 ("If an exhibit is directly identified by a witness as the object which is involved in the case, then that direct identification is sufficient.").

**{¶49}** Having found sufficient evidence to support appellant's conviction, we turn now to his manifest weight claim. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. As noted previously, a challenge to the weight of the evidence is analytically distinct from a challenge to the sufficiency of the evidence. Id. at paragraph two of the syllabus.

**{¶50}** In determining whether a conviction is against the manifest weight of the evidence, a reviewing court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trier of fact 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. Martin* (1983), 20 Ohio App.3d 172, 175. "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." Id.

**{¶51}** Appellant essentially challenges Kashmiry's credibility. Appellant notes that Kashmiry was alone when he apprehended appellant and that neither Pickrell nor Barton fully corroborated his rendition of the events. As an example, appellant notes that although Kashmiry testified that Pickrell arrived at the scene while appellant was handcuffed on the ground near the rifle, Pickrell testified that he never saw the rifle. Appellant also notes that although Kashmiry testified that a male bystander attempted to retrieve the rifle from the ground, Pickrell testified that he did not see this incident. Appellant further notes that Kashmiry said nothing about the trigger mechanism detaching from the rifle at the time appellant threw it behind the dumpster. Appellant argues that this omission was "crucial" because Kashmiry later testified that the trigger mechanism was detached. Appellant also notes that Kashmiry failed to include the incident with the male bystander in his written police report. In addition, appellant notes that Kashmiry initially misidentified the rifle as an AK-47, misidentified the rifle's serial number on the request for laboratory examination, and failed to retrieve DNA or fingerprint evidence from the rifle. Appellant contends that due to these inconsistencies in Kashmiry's testimony, the trial court should have believed appellant and disbelieved Kashmiry.

**{¶52}** After reviewing the record and weighing the evidence presented, we find no evidence that the trial court lost its way in resolving the conflicting testimony in the case. Appellant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The determination of weight and credibility of the evidence is for the

trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58. The trier of fact is free to believe or disbelieve all or any of a witness's testimony. *State v. Jackson,* 10th Dist. No. 01AP-973, 2002-Ohio-1257. See also *State v. Lakes* (1964), 120 Ohio App. 213, 217 ("It is the province of the [factfinder] to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness.").

**{¶53}** Here, appellee presented evidence that Kashmiry identified appellant as the individual who exited the vehicle carrying an assault rifle. Kashmiry testified that he had a good view of appellant because street lights illuminated the area and he stood face-to-face with appellant. Although Kashmiry admitted that he did not include in his police report the fact that the male bystander attempted to retrieve the gun from behind the dumpster, he explained that he does not typically include every detail of a crime in his written police report. He further testified that the events of August 11, 2009 stood out in his mind because he felt threatened by appellant and nearly shot him in response to that threat. Kashmiry also testified that he did not request DNA or fingerprint evidence for essentially two reasons: (1) he saw appellant holding the gun, and (2) fingerprints are not easily attainable from the surface of a gun.

**{¶54}** Although appellant presented a vastly different account of the events leading to his arrest, the trial court, as trier of fact, was responsible for evaluating the credibility of both Kashmiry and appellant and was free to disbelieve some or all of their

in-court statements. We note that in finding appellant guilty, the trial court stated that the case "[came] down to a credibility determination between one of Mr. Webb and one of Officer Kashmiry." (Tr. 235.) Although the court acknowledged some "shortcomings" with respect to Kashmiry's written police report, the court found that such "[did not] in * * * this Court's opinion, diminish his credible identification of the defendant. There's no doubt in his mind that Mr. Webb was the gentleman who exited the vehicle with the assault weapon." (Tr. 235.) Further, although the trial court did not specifically mention it as a basis for its guilty verdict, we note that appellant admitted that he was on parole for a previous conviction and that being caught with a gun would violate his parole. Thus, the trial court could have reasonably concluded that appellant had reason to lie about the events of August 11, 2009 and discounted appellant's credibility accordingly.

**{¶55}** In conclusion, we find the trial court's resolution of the conflicting testimony was reasonable in light of all the evidence presented at trial. The case was a bench trial conducted by an experienced trial judge who was well versed on the pertinent issues and the applicable law. Accordingly, we find that the trial court did not create a manifest miscarriage of justice in finding appellant guilty of having weapons while under disability. Appellant's second assignment of error is overruled.

**{¶56}** Appellant's third assignment of error contends that the jury's inability to reach a verdict on the improper handling count is inconsistent with the trial court's guilty verdict on the having weapons while under disability count, and that double jeopardy and res judicata (commonly referred to in this context as collateral estoppel) preclude his conviction for having weapons while under disability. Although the issue of potential inconsistent verdicts was briefly discussed while the jury was deliberating the improper

handling and tampering with evidence counts, the defense raised no objection, constitutional or otherwise, when the trial court announced its guilty verdict on the having weapons while under disability count. As such, appellant has waived all but plain error. Crim.R. 52(B). A party claiming plain error must show that the outcome of the proceeding would have been different absent the alleged error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17.

**{¶57}** Initially, we note that the jury's inability to reach a verdict on the improper handling count is not necessarily inconsistent with the trial court's guilty verdict on the having weapons while under disability count. A finding of guilt on the charge of improper handling required the jury to determine that appellant transported or had a loaded firearm inside the vehicle such that it was accessible to him without leaving the vehicle. R.C. 2923.16(B). As noted above, a finding of guilt on the charge of having weapons while under disability required the trial court to determine that appellant had or carried a firearm after having been convicted of any felony offense of violence. R.C. 2923.13(A)(2). Having or carrying the firearm outside the vehicle does not necessarily mean that appellant transported or had the firearm inside the vehicle. It could have been that Ward, the driver, had the rifle while it was inside the vehicle, and appellant did not gain control over it until immediately before he exited the vehicle.

**{¶58}** If this were the case, the issue for the jury would have been whether appellant grabbing the rifle and then immediately exiting the vehicle amounted to him transporting or having the rifle inside the vehicle. If resolving this difficult question was the source of the jury's deadlock on the improper handling count, it would do nothing to

undermine the trial court's conclusion that appellant "was the gentleman who exited the vehicle with the assault weapon." (Tr. 235.)

**{¶59}** However, assuming arguendo, that the jury's inability to reach a verdict on the improper handling count and the trial court's guilty verdict on the having weapons while under disability count are inconsistent, any inconsistency in the outcome of these separate counts does not invalidate appellant's conviction. In *State v. Lovejoy,* 79 Ohio St.3d 440, 1997-Ohio-371, the Supreme Court of Ohio held that "[t]he several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." Id. at paragraph one of the syllabus. This court held similarly in *State v. Trewartha,* 10th Dist. No. 04AP-963, 2005-Ohio-5697, ¶15:

> Consistency between verdicts on several counts of an indictment is unnecessary where the defendant is convicted on one or some counts and acquitted on others; the conviction generally will be upheld irrespective of its rational incompatibility with the acquittal. *State v. Adams* (1978), 53 Ohio St.2d 223, 7 O.O.3d 393, 374 N.E.2d 137, vacated in part on other grounds, 439 U.S. 811, 99 S.Ct. 69, 58 L.Ed.2d 103. Each count of a multicount indictment is deemed distinct and independent of all other counts, and thus inconsistent verdicts on different counts do not justify overturning a verdict of guilt. See *State v. Hicks* (1989), 43 Ohio St.3d 72, 78, 538 N.E.2d 1030; *State v. Brown* (1984), 12 Ohio St.3d 147, 12 OBR 186, 465 N.E.2d 889, paragraph one of the syllabus; *State v. Washington* (1998), 126 Ohio App.3d 264, 276, 710 N.E.2d 307.

**{¶60}** In addition, the *Lovejoy* court determined that "[w]hen a jury finds a defendant not guilty as to some counts and is hung on other counts, double jeopardy and collateral estoppel do not apply where the inconsistency in the responses arises out of

inconsistent responses to different counts, not out of inconsistent responses to the same count." Id. at paragraph two of the syllabus.

**{¶61}** In an effort to escape the well-established rules regarding inconsistent verdicts, and by implication, hung juries, appellant contends that the improper handling and having weapons while under disability counts were "effectively the same count." In support of his argument, appellant cites *State v. White,* 9th Dist. No. 24960, 2010-Ohio-2865. There, the court found that the verdict on one count of witness intimidation was inconsistent because the jury found the defendant guilty, but also found that the defendant had not committed one of the essential elements of that count. Here, as noted above, the indictment charged appellant with separate counts of improper handling and having weapons while under disability. *White,* therefore, is inapposite.

**{¶62}** Moreover, as there was sufficient evidence to sustain appellant's having weapons while under disability conviction, appellant was not prejudiced by the jury's inability to reach a verdict on the improper handling count.

**{¶63}** Applying the foregoing standards, we find no basis requiring reversal of appellant's conviction for having weapons while under disability. The third assignment of error is overruled.

**{¶64}** Appellant's fourth assignment of error contends that he was denied the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution. In *State v. Johnson* (May 30, 2000), 10th Dist. No. 99AP-753, this court set forth the applicable standard for addressing a claim of ineffective assistance of counsel:

> In order to prevail on an ineffective assistance of counsel claim, a defendant must meet the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Initially, defendant must show that counsel's performance was deficient. To meet that requirement, defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Defendant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. at 690 [104 S.Ct. 2052, 80 L.Ed.2d 674].
>
> Next, if defendant successfully proves that counsel's assistance was ineffective, the second prong of the *Strickland* test requires defendant to prove prejudice in order to prevail. Id. at 692 [104 S.Ct. 2052, 80 L.Ed.2d 674]. To meet that prong, defendant must show counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Id. at 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]. See, also, *State v. Underdown* (1997), 124 Ohio App.3d 675, 679, 707 N.E.2d 519. A defendant meets the standard with a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].

**{¶65}** A properly licensed attorney is presumed competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301. Moreover, there is a " 'strong presumption that counsel's conduct falls within the range of reasonable professional assistance.' " *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052, 2065. Additionally, the effective assistance of counsel does not guarantee a positive outcome. *State v. Longo* (1982), 4 Ohio App.3d 136, 139. "A failure to prevail at trial does not grant an appellant license to appeal the professional judgment and tactics of his trial attorney." *State v. Hart* (1988), 57 Ohio App.3d 4, 10.

**{¶66}** Appellant first asserts that trial counsel was ineffective in failing to call certain witnesses whom counsel claimed during opening statement would support appellant's misidentification defense. We disagree.

**{¶67}** In his opening statement, trial counsel stated that the jury would hear from Terrence Woodruff ("Woodruff") and other witnesses who would testify that they were at the scene and that appellant did not have the rifle. Prior to commencing appellant's portion of the case on Thursday morning, trial counsel informed the court that he had planned to call Woodruff and another witness, Teniqua Kimber ("Kimber"), to testify on behalf of appellant. Counsel explained that he had spoken with Kimber several times prior to adding her name to the witness list, and she indicated her eagerness to testify. Counsel further averred that he had informed Kimber on Tuesday that she was slated to testify on Thursday and that he had attempted to contact her several times on Wednesday to confirm her appearance; however, she failed to respond. Counsel indicated that after discussing the matter with appellant, appellant indicated that he did not want the court to issue subpoenas compelling appearances by either Kimber or Woodruff. Upon the trial court's questioning, appellant indicated that he understood he had a right to have the court issue subpoenas compelling these witnesses' testimony and that he was waiving that right. (Tr. 132.)

**{¶68}** Thus, it was appellant himself who decided not to pursue calling Woodruff or Kimber. While appellant may now regret his decision not to compel the testimony of these two witnesses, appellant cannot assert ineffectiveness of counsel for a decision he himself made. " '[A] party will not be permitted to take advantage of an error which he himself invited or induced.' " *State v. Bey,* 85 Ohio St.3d 487, 493, 1999-Ohio-283,

quoting *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph one of the syllabus.

**{¶69}** Regardless, we note that on direct appeal, appellant cannot demonstrate the substance of these witnesses' anticipated testimony. While appellant relies on trial counsel's comments during opening statement as to the expected testimonies of these witnesses, such comments are no substitute for sworn statements from the witnesses. Speculation as to a witness's intended testimony is insufficient to establish ineffective assistance of counsel. *State v. Wiley,* 10th Dist. No. 03AP-340, 2004-Ohio-1008, ¶30, citing *Bradley*.

**{¶70}** Appellant next contends that trial counsel was ineffective in advising appellant to waive his right to a jury trial on the having weapons while under disability charge.

**{¶71}** In *State v. Rippy*, 10th Dist. No. 08AP-248, 2008-Ohio-6680, this court held that a defendant may not claim that he was denied effective assistance of counsel if:

> [T]he record clearly demonstrates that appellant knowingly and voluntarily waived his right to a trial by jury, he signed the form in open court, which was duly filed and an extensive colloquy was conducted with the court sufficient to demonstrate his understanding of his rights and the waiver of the right to a trial by jury.

Id. at ¶17, quoting *State v. Aaron* (Nov. 30, 2000), 10th Dist. No. 00AP-268, quoting *State v. Gray* (Mar. 28, 2000), 10th Dist. No. 99AP-666. (Internal quotations omitted.) See also *State v. Silverman,* 10th Dist. No. 05AP-837, 2006-Ohio-3826 (defendant's signature on written jury waiver and verbal acknowledgement before trial court that he signed the jury waiver defeat ineffective assistance of counsel claim).

**{¶72}** As noted in our discussion of the first assignment of error, the trial court read into the record the entire content of the jury waiver form and confirmed that appellant signed it. Additionally, the trial court asked appellant if he had any questions regarding the waiver, and appellant responded in the negative. Thus, the record demonstrates that appellant's waiver of jury trial was a voluntary and deliberate choice and, as such, appellant may not assert that he was denied effective assistance of counsel. *Rippy*; *Silverman*.

**{¶73}** Appellant urges this court to adopt a blanket rule that advising a criminal defendant to waive a jury trial on a charge of having weapons while under disability constitutes per se ineffective assistance of counsel in cases when the defendant testifies before a jury on other counts in an indictment. Appellant contends that such advisement cannot constitute "sound trial strategy" because when a defendant testifies at trial, he or she opens the door for the state to admit his or her felony record for impeachment purposes, thereby negating the most common reason to waive a jury on a having weapons while under disability count, i.e., to prevent the jury from learning of a previous conviction.

**{¶74}** Initially, we note that the record in this case does not demonstrate what advice trial counsel provided appellant regarding the jury waiver. Discussions between counsel and appellant regarding whether or not to waive a jury trial on the having weapons while under disability count are not part of the record before us, and we will not speculate as to the substance of these discussions and/or how they may or may not have impacted appellant's decision-making process. Counsel may well have advised appellant not to waive jury if he elected to testify.

**{¶75}** Further, the circumstances of this case do not provide this court the impetus to adopt the broad rule urged by appellant. As noted above, just before the jury was sworn, trial counsel advised the court that appellant would waive a jury on the having weapons under disability charge. Counsel averred that "after speaking with Mr. Webb, it's my understanding that he does intend to testify; so I don't know if it really makes a difference because it would be potentially brought up anyway." (Tr. 2.) Counsel's use of the phrase "intends to testify" suggests that the decision about whether appellant was going to testify was not completely formulated. Thus, counsel could have advised appellant to waive jury as a hedge in case appellant changed his mind and decided not to take the stand. Plus, waiving the jury prevented appellee from mentioning the having weapons while under disability count in its opening statement. Waiver of jury is a matter of trial strategy, *Rippy* at ¶19, and reviewing courts may not use hindsight to second-guess that strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

**{¶76}** Finally, even if we were to assume that trial counsel advised appellant to waive a jury trial and that such advice was professionally unreasonable, appellant must demonstrate that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Appellant maintains that the jury's inability to reach a verdict on the improper handling charge clearly demonstrates that the jury would not have convicted him of having weapons while under disability. However, appellant's conclusion is pure speculation. Without supporting evidence, appellant's mere claim that the jury would not have convicted him falls far short of establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Moreover, as noted in our discussion of the third assignment of error, it would

not necessarily be inconsistent for the jury to hang on the improper handling count and find him guilty on the having weapons while under disability count. Whether appellant transported or had the gun in the vehicle is a separate question from whether he possessed the gun outside the vehicle. Indeed, we note that at the sentencing hearing, the trial court averred that it believed the jury would have convicted appellant of the having weapons while under disability count.

**{¶77}** Appellant next contends that trial counsel was ineffective in failing to expose the discrepancy between the serial numbers on the rifle and the request for laboratory examination. As noted in our discussion of the fourth assignment of error, this discrepancy did not undermine appellee's proof that the rifle was the one appellant possessed on August 11, 2009, as both Kashmiry and Barton identified the rifle as the one recovered from the scene. In addition, the jury questioned the discrepancy. Thus, the trial court was undoubtedly aware of the discrepancy and found appellant guilty despite it.

**{¶78}** Finally, appellant contends that trial counsel was ineffective in failing to convince the trial court to admit appellant's testimony that Pickrell told him the police could test the rifle for fingerprint and DNA evidence. Appellant maintains that Pickrell's out-of-court statement would have impeached Kashmiry's testimony that it was unlikely the rifle would have yielded such evidence.

**{¶79}** As noted by appellee, appellant's testimony would have had no impeachment value unless Pickrell's statement that fingerprints or DNA could be recovered from the gun was in fact true. Accordingly, appellant's testimony in this regard was inadmissible hearsay. *State v. Smith*, 10th Dist. No. 04AP-726, 2005-Ohio-1765,

¶34 (out-of-court statement "had no impeachment value whatsoever unless the jury first found it to be true" and thus the testimony "is the quintessential example of hearsay"). Further, contrary to appellant's assertion, Pickrell's out-of-court statement was not admissible under Evid.R. 801(D)(2). "Courts have generally held that statements by law enforcement officers are generally not admissible against the prosecution as an admission of a party-opponent." *State v. Stacy*, 12th Dist. No. CA2006-02-021, 2007-Ohio-6744, ¶14.

**{¶80}** Moreover, trial counsel was not ineffective in failing to ask Pickrell on cross-examination if he told appellant that the rifle would be tested for fingerprints and DNA. "[T]he scope of questioning is generally a matter left to the discretion of defense counsel." *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶116. Trial counsel could have legitimately decided that what mattered was that the gun was not tested, which was undisputed, and thus chose not to pursue this line of questioning with Pickrell.

**{¶81}** Finally, there is no reasonable probability that eliciting further testimony from either appellant or Pickrell about whether the police could have or should have tested the gun for fingerprints and DNA would have affected the outcome of the trial. Kashmiry testified that he saw appellant carrying the gun, and the trial court believed this testimony. Accordingly, no more evidence was required to tie appellant to the rifle.

**{¶82}** For the foregoing reasons, we conclude that appellant did not receive ineffective assistance of counsel in this case. Accordingly, we overrule the fourth assignment of error.

**{¶83}** Appellant's fifth and final assignment of error asserts that the trial court erred by conducting a hybrid bench/jury trial. In support of this assertion, appellant relies

on the Eighth District Court of Appeals' decision in *State v. Marzett,* 8th Dist. No. 93805, 2010-Ohio-4348 ("*Marzett I*"). There, the defendant was indicted on three counts: two counts of murder – one under R.C. 2903.02(A) and the other under R.C. 2903.02(B) – and one count of felonious assault. The R.C. 2903.02(A) murder count was tried to the jury, and the defendant waived his right to a jury trial on the other two counts. The jury acquitted the defendant, but the trial court found the defendant guilty. The defendant argued in his first assignment of error that the trial court improperly spoke to jurors after they had reached their not-guilty verdict, but before the trial court had announced its verdict on the jury-waived counts.

**{¶84}** Before addressing the merits of the defendant's argument, the court noted that, while "authority exists to bifurcate, upon a defendant's waiver, certain counts of an indictment from the jury's consideration, those matters all involved counts and specifications that require proof of the defendant's prior convictions, i.e., having weapons while under disability charge, repeat violent offender specifications, and notice of prior convictions." Id. at ¶22, citing *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147. The court went on to note that a "hybrid bench/jury trial on multiple counts (that did not implicate the prejudice of introducing an accused's criminal history) does not appear rooted in any legal authority, creates a potential for inconsistent verdicts, and is not one that is sanctioned by this court." *Marzett I* at ¶23, citing *Galloway v. State* (2002), 371 Md. 379; Crim.R. 23; and R.C. 2945.05. The court ultimately reversed, finding that the trial court's discussions with the jurors created an irregularity in the trial court's deliberative process. Id. at ¶45.

**{¶85}** *Marzett I* does not aid appellant in this case. First, since this case does not originate from this judicial district, it is not binding on this court. More importantly, it no longer stands for the proposition urged by appellant. The Eighth District subsequently vacated its decision in *Marzett I* and on reconsideration issued a new decision deleting the language criticizing the hybrid jury/bench trial. *State v. Marzett,* 8th Dist. No. 93805, 2010-Ohio-5428 ("*Marzett II*"). Compare *Marzett I* at ¶22-23, with *Marzett II* at ¶22.

**{¶86}** Moreover, in *State v. Bonner* (1994), 10th Dist. No. 93APA07-951, this court held that a trial court cannot reject a defendant's waiver of the right to a jury trial on some counts, even while pursuing a jury trial on other counts. Accordingly, the trial court did not err in conducting a hybrid bench/jury trial in this case. The fifth assignment of error is overruled.

**{¶87}** Having overruled appellant's five assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

McGRATH and CONNOR, JJ., concur.

_____