[Cite as *State v. Smith*, 2009-Ohio-5517.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-03-064
	:	O P I N I O N
- vs -		10/19/2009
	:	
GABRIEL TYRONE SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2007-10-1758

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YOUNG, J.

{¶1} Defendant-appellant, Gabriel Tyrone Smith, appeals his conviction for felonious assault with a firearm specification and a repeat violent offender specification following a jury trial in the Butler County Court of Common Pleas.

{¶2} Appellant was indicted in November 2007 on one count of felonious assault in violation of R.C. 2903.11(A)(2) with two firearm specifications (brandishing a firearm and discharging a firearm from a vehicle) and a repeat violent offender specification, and one count of having weapons while under disability. The charges stemmed from his role in a

shootout that occurred in a Middletown, Ohio housing complex ("the projects," as referred to in the testimony of several witnesses) near Main and Lafayette Streets. The state alleged that in the early morning hours of September 19, 2007, appellant, along with Teray D. Marshall, Jr., Shadeed Barnett, and Terry Fuller, opened fire in the projects, riddling the neighborhood with bullets and injuring several people, including Demarco Conley (shot in the stomach), Jeremy McGuire (shot in the hand), Jerrel Wright, and Deontae Robinson (both shot in the leg). Demarco underwent numerous surgeries for his gunshot wound to the stomach and was still hospitalized at the time of the trial.

{¶3} On February 11-15, 2008, appellant was jointly tried with Teray D. Marshall, Jr., Shadeed Barnett, and Terry Fuller. Appellant did not testify; however, one witness testified on his behalf. Due to his serious, life-threatening injuries, Demarco was unable to physically testify at trial; a videotaped deposition of his testimony was instead played to the jury. Testimony at trial revealed the following facts:

{¶4} In the early morning hours of September 19, 2007, Demarco was at a bar with his girlfriend, Lori Glover, and his best friend, Jeremy McGuire. According to Demarco, present at the bar were appellant, Teray D. Marshall, Jr., and Terry Fuller. Lori and Jeremy saw appellant and Terry at the bar but did not see Teray or Shadeed Barnett (or were not sure if they were there). Terry was wearing orange. While at the bar, Demarco got into a fight with Brandon Smiley, a friend of Teray. After the fight, Lori drove to the projects with Demarco and Jeremy and dropped them off. It was Demarco's intention to recruit friends to go finish the fight with Brandon.

{¶5} An aerial view of the projects shows that it is comprised of three parallel streets: Cribbs Street to the north, Weaver Street to the south, and McGuire Street between the two; running perpendicular to these streets are Main Street to the east, and Vance Street to the west. Of importance to the case is a grassy area that is a joint backyard for apartment

buildings on McGuire and Weaver Streets.

{¶6} At the projects, Demarco and Jeremy met up with Demetrius Davis (Lori's brother), James Wilson, Jerrel Wright (Demarco's cousin), and Zeph Jennings. Demetrius and Zeph lived on Weaver Street, Jerrel on McGuire Street. As the group was getting together, Demetrius, James, Jeremy, and Zeph noticed a blue Ford Taurus with dark tinted windows on Weaver Street driving around the projects. According to Jeremy, as soon as he, Lori, and Demarco arrived at the projects, the Taurus "pulled up right behind" them on Weaver Street before driving off. Jeremy and Zeph did not see who was driving the Taurus. By contrast, Demetrius and James both testified that appellant was driving the Taurus. James further testified that his sister, Cierra Wilson, was a passenger in the Taurus. Cierra testified appellant was driving the Taurus in which she was a passenger.

{¶7} After dropping off Demarco and Jeremy, and as she was driving south on Main Street, Lori noticed that appellant was following her in a blue Taurus. Lori eventually pulled over and the two briefly conversed from their cars. Lori did not see anybody else in the Taurus. During their conversation, appellant received a phone call. Appellant told the caller "that's all you got to say. I'm on my way," then left and drove away towards the projects. Lori does not know who the caller was.

{¶8} Meanwhile, at the projects, Demarco and his friends were on McGuire Street where they ran into James' cousin who was crying because her boyfriend, Deontae Robinson, had beaten her up. Upon seeing Deontae walking down the street, James, along with Jeremy and Demarco, beat up Deontae. Either during the beating or immediately after, Demetrius observed a silver Nissan vehicle drive on McGuire Street before turning on Vance Street.[1] In the Nissan vehicle were Teray, Shadeed, and a third person wearing an orange

1. Demetrius testified observing a silver Nissan "Altima." However, the silver Nissan vehicle recovered after the shootout was a silver Nissan Maxima and was rented to Shadeed. The license plate number on the recovered vehicle was identical to the license plate number on the rental agreement signed by Shadeed. Nissan Altimas and Nissan Maximas are similar in appearance.

shirt. Shadeed was driving the car; Teray was in the front passenger seat.

{¶9} Soon after, gunfire erupted. Both Demetrius and James testified that Teray came around the corner from Vance Street and started shooting while walking down McGuire Street. Jerrel testified that the shooting started on McGuire Street near Vance Street; it then was coming from everywhere. By the look or the way it was shooting rapidly, Demetrius and James believed Teray was using an automatic weapon. By the sound of the gunfire, Jerrel believed automatic weapons were used. Before the shooting started, James heard Teray say "I see you all bitch ass n***s." Zeph similarly heard someone scream out of a car "I see you all n***s." Demarco heard someone yelling "there they go," followed by a "bunch" of automatic gunfire. Demarco did not know who started the gunfire, or where or why it started.

{¶10} As gunfire erupted, Demarco and his friends scattered and began to run. Demetrius ran towards Main Street with the intention to retreat into the woods to the east of Main Street. He was in the grassy area between McGuire and Weaver Streets when he saw the Taurus come around on Main Street and stop; the front passenger window rolled down; shots were fired from the car. Demetrius retreated and hid behind a shed until he heard the Taurus leave. He then ran across Main Street to safety. Shooting was still going on after he had crossed Main Street. Demetrius observed the Taurus driving south on Main Street. Demetrius never saw appellant holding or firing a weapon.

{¶11} Zeph ran through the grassy area towards Main Street. However, the Taurus came around and shots were fired from the car. Zeph retreated; as he was running away from Main Street, he saw Demarco. At that moment, someone in orange started shooting at Zeph who retreated to safety into a house.

{¶12} Jeremy was shot in his right hand before he ran. He does not know who shot him. After being shot, Jeremy ran through the grassy area, ran across Main Street diagonally, and fell behind bushes.

{¶13} Demarco ran and hid behind a shed in the grassy area near Main Street. Gunfire and yelling continued. As he was hiding, he saw Jeremy, his best friend, being chased and fired at by two people. Demarco believed the two shooters were Teray and Shadeed. Jeremy was sprinting towards Main Street. Although the two shooters had already run past him, Demarco came out of hiding and yelled to distract them. The shooters turned towards him and started shooting. Demarco was shot in the stomach in the grassy area near Main Street and fell to the ground. Someone then came to him and smacked him with a gun, stating "You're going to die bitch ass n***." Demarco recognized Teray's voice. Another individual with Teray told Teray "to come on because the police was coming." Demarco did not know if the second voice was Shadeed's voice. Demarco testified that at that point he was in and out of consciousness. This was confirmed by Officer Ken Minear who testified Demarco was unable to communicate as he was in and out of consciousness. Demarco testified that during the shootout "there was a lot of automatics going off;" more than two shooters were involved as there was too much gunfire to come solely from Teray and Shadeed.

{¶14} Jerrel ran through the grassy area. At that point, the shooting was coming from everywhere, including from the direction of Weaver Street. Upon seeing his cousin Demarco fall, Jerrel started running towards Demarco when someone came around shooting. Jerrel retreated and was running back to his house when he was shot in the leg. Jerrel did not see who shot him and could not identify any of the shooters; all he "saw" were bullets.

{¶15} James ran as soon as Teray started shooting, and retreated to the grassy area where he ended up near Jerrel. James also observed shots fired from the Taurus; at that time, the Taurus was on Main Street between McGuire and Weaver Streets. While he was in the grassy area, James observed Demarco get shot in that same grassy area near Main Street, fall to the ground, and being subsequently hit with a weapon by Teray. Shadeed, who

was then with Teray, told Teray: "Here come the police. Come on." Thereafter, Jerrel was shot by a shooter wearing an orange shirt. James was with him. After being shot, Jerrel pushed James into an apartment building. James does not know who shot Demarco. James never saw appellant holding or firing a weapon.

{¶16} As stated earlier, Cierra (James' sister), testified she was a passenger in the blue Taurus driven by appellant. Appellant picked her up after he left the bar (she was not at the bar). On their way to the projects, they picked up Terry who sat in the back passenger seat. When they arrived at the projects, a fight between a few people was taking place. She subsequently heard gunshots. According to Cierra, Terry fired a weapon out of the window of the Taurus before getting out of the car. Cierra never saw a weapon on appellant. During the shootout, the Taurus was fired upon. Appellant and Cierra then left the projects, going north on Main Street (away from Lafayette Street).

{¶17} During her testimony, Cierra freely admitted she did not want to testify; stated "since I have to say what I said previously, I said [appellant] picked up Terry Fuller," "If I was to say that it was Terry Fuller 100 percent, [Terry] was sitting behind me," "This is what I'm going to say," and several similar statements; did not know if she had truthfully testified during a prior proceeding; admitted telling appellant when he was incarcerated that she did not know anything; could not say "for a fact 100 percent that it was [Terry who got in the car];" and testified that "maybe nobody was shooting out, maybe people was just shooting at us."

{¶18} Holly Cummings, a resident on McGuire Street, was playing cards that morning when she heard gunfire and people yelling. Looking out her back window into the grassy area, she observed a man with a big weapon walking through the grassy area towards Main Street. The weapon was not a handgun. The man was not firing the weapon but was holding it up in sight.

{¶19} Lori Griffis, a resident on Weaver Street, was awakened by the shootout. Looking out her front door, she observed a blue Ford Taurus with dark tinted windows on Weaver Street with the back passenger door open. The Taurus was facing the west. Griffis heard two men arguing and yelling somewhere in the area, with one saying "You're going to do me like that n***;" shots were then fired from the Taurus through the open back passenger door into the grassy area. The Taurus then drove "real fast" past her house to the end of the street, drove back to its original location in reverse, and finally drove back past her house and turned onto Vance Street. Griffis never saw anyone exit the Taurus. Griffis testified that when the Taurus drove in reverse, she could hear gunfire coming from the grassy area; in fact, a couple of bullets hit her storage shed located in the grassy area.

{¶20} A police officer trained in weapons as a SWAT team member was on light duty that morning taking 911 calls. The officer testified they received over 30 calls regarding the shootout and that while talking to callers, he could hear gunfire, both automatic and semi-automatic.

{¶21} At the scene, the police recovered 26 shell casings from three different calibers, to wit: seven 9 mm shell casings at the corner of Weaver and Main Streets; five .40 caliber shell casings in the grassy area near Vance Street; and 14 7.62x39 shell casings in the grassy area and at the corner of Weaver and Main Streets. The recovered shell casings all appeared to be "fresh" casings. No shell casings were found at the corner of Vance and McGuire Streets. Several bullet strikes and/or holes were found on the ground, telephone poles, and buildings, including inside a residence on McGuire Street. The crime scene covered three blocks. The weapons used in the shootout were never recovered.

{¶22} The silver Nissan vehicle was recovered that day; it was parked on Vance Street and was rented to Shadeed. Although searched, nothing was recovered from the vehicle. The Taurus was found later that day on 17th Avenue. There was no damage to the

body of the car or the windows. There were no shell casings in the car; "the interior was very clean." The Taurus was not processed for gun powder residue; a detective testified powder residue tests are no longer considered reliable. A bullet was found lodged inside the top of a rear passenger door of the Taurus. Detective David Swartzel testified the bullet appeared to have been fired from the Taurus (and not at the Taurus).

{¶23} Appellant and Teray turned themselves in. Shadeed was arrested the day after the shootout. A search of his apartment yielded one .40 caliber bullet, two bullet proof vest carriers without their panels but each with a holster of a different size, and Shadeed's passport. Neither the holsters nor Shadeed were checked for gun powder residue.

{¶24} Chris Monturo of the Miami Valley Regional Crime Laboratory testified he examined the 26 shell casings recovered from the crime scene. According to Monturo, at least four weapons were involved in the shootout: three semi-automatic or automatic weapons and possibly one revolver. The .40 caliber shell casings all came from one gun; as did the 9 mm shell casings. Monturo testified a TEC-9 weapon uses 9 mm bullets. With regard to the 7.62x39 shell casings, Monturo testified two types of semi-automatic weapons can use those shells: AK-47 and SKS weapons; both weapons can be converted into automatic weapons; however, he could not tell whether the shell casings came from the same weapon. Monturo also could not tell whether the weapons used were semi-automatic or automatic weapons.

{¶25} Monturo further testified that a bullet recovered from inside a residence on McGuire Street was fired from an AK-47, AKS, or SKS semi-automatic weapon; a bullet recovered in the grassy area was fired from a Beretta Smith-Wesson or a Springfield XD semi-automatic pistol; and the bullet recovered in the Taurus was fired from a revolver.

{¶26} Following Monturo's testimony and over the objection of appellant, Shadeed, and Terry, the trial court admitted a photograph of Shadeed showing him with a weapon in a

holster. Middletown Detective Larry Fultz testified that on the photograph, Shadeed was "wearing a shoulder-type holster with what appears to be a Tech 9 [sic] with an extended magazine." The detective testified that the photograph was recovered during a search warrant "several years back;" the search warrant was not directed at Shadeed; he did not know when or where the photograph was taken, who took it, and whether it was taken at a Halloween or costume party; he did not know how old Shadeed was on the photograph; and he did not know if the weapon displayed on the photograph was a real weapon or an airsoft gun.

{¶27} On February 15, 2008, the jury found appellant guilty of felonious assault with one firearm specification (brandishing a firearm). The trial court determined that appellant was a repeat violent offender, and sentenced him to 21 years in prison. Appellant now appeals, raising ten assignments of error.

{¶28} Assignment of Error No. 1:

{¶29} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S 14TH AMENDMENT DUE PROCESS RIGHT TO PRESENT A DEFENSE IN BARRING THE TESTIMONY OF A DEFENSE WITNESS ON THE GROUND OF IMPOSITION OF A SANCTION FOR A PURPORTED DISCOVERY VIOLATION."

{¶30} Appellant argues the trial court erred by excluding the testimony of a defense witness, private investigator James C. Kristanoff, whose name was provided to the state one business day before trial.

{¶31} When a party fails to comply with a discovery provision, a trial court may pursuant to Crim.R. 16(E)(3) "order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or *** make such other order as it deems just under the circumstances." "Crim.R. 16(E)(3) gives wide authority to the trial court in fashioning a remedy for a discovery violation. 'It is

readily apparent that under this rule, the trial court is vested with a certain amount of discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. The court is not bound to exclude such material at trial although it may do so at its option.'" *State v. Kelly*, Butler App. No. CA2006-01-002, 2007-Ohio-124, ¶9, quoting *State v. Parson* (1983), 6 Ohio St.3d 442, 445. An abuse of discretion is more than an error of law or judgment and implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶129-130.

{¶32} Appellant argues the exclusion of his witness violates *Lakewood v. Papadelis* (1987), 32 Ohio St.3d 1, because the trial court imposed the most severe sanction possible for what was merely a negligent discovery production. Appellant urges us to find that the trial court's imposition of such a severe sanction was unwarranted in the case at bar.

{¶33} The Ohio Supreme Court ruled in *Lakewood* that "a trial court must inquire into the circumstances surrounding a violation of Crim.R. 16 prior to imposing sanctions pursuant to Crim.R. 16(E)(3). Factors to be considered by the trial court include the extent to which the prosecution will be surprised or prejudiced by the witness' testimony, the impact of witness preclusion on the evidence at trial and the outcome of the case, whether violation of the discovery was willful or in bad faith, and the effectiveness of less severe sanctions." Id. at 5. Although a trial court should impose the least drastic sanction possible that is consistent with the state's interest and the purpose of the rules of discovery, the rule "should not be construed to mean that the exclusion of testimony or evidence is never a permissible sanction in a criminal case. It is only when exclusion acts to completely deny defendant his or her constitutional right to present a defense that the sanction is impermissible." Id.; *Kelly*, 2007-Ohio-124 at ¶10.

{¶34} The record shows that the state provided appellant and his co-defendants with

initial discovery in November 2007, and supplemental discovery in January 2008. By order filed November 30, 2007, the trial court ordered appellant to provide the state with the names and addresses of witnesses appellant intended to call at trial, "within seven days after the defendant receives discovery or three days before trial, whichever is earlier." On February 7, 2008, appellant provided the state with the names of witnesses he intended to call; Kristanoff was not listed. The next day (a Friday), appellant filed supplemental discovery identifying Kristanoff as a witness. Appellant's jury trial began the following Monday on February 11, 2008. After two days of testimony, appellant's counsel sought to call Kristanoff as a witness. The prosecutor objected for failure to timely comply with discovery. The trial court inquired into the last minute witness disclosure by appellant, and determined it was unfair to the state to allow Kristanoff to testify. The trial court voiced concern that appellant's witness was disclosed for the first time Friday afternoon (when trial started Monday morning) since the case had been pending since September 2007.

{¶35} We cannot say the trial court abused its discretion by excluding Kristanoff as a witness for appellant. Although appellant was ordered by the trial court to provide the state with the names of his witnesses "within seven days after the defendant receives discovery or three days before trial, whichever is earlier," he did not identify Kristanoff as a witness until one business day before trial.

{¶36} During the inquiry, appellant explained that Kristanoff had examined the Taurus and its bullet indentation and that he would testify about some damage "that [Detective Swartzel] said he didn't see." Appellant argued he could not respond to the state's request for discovery until he was provided with laboratory reports. However, the prosecutor stated that such report was provided on January 16, 2008. The prosecutor further stated that when he asked Terry's attorney[2] on the first day of the trial about Kristanoff, the prosecutor

2. The record shows that Kristanoff was hired as an investigator by Terry's counsel.

was told "he's going to talk about the car. I said, what about the car? He said, just stuff." The prosecutor argued that were Kristanoff allowed to testify, the state would be unable to evaluate and respond to his testimony. The prosecutor stated that Kristanoff was not identified as a witness for Terry or the other two co-defendants.

{¶37} Appellant did not proffer what Kristanoff's testimony would be. Most likely, he would have testified that in light of the bullet indentation and damage to the Taurus, shots were fired at the Taurus, rather than from the Taurus. However, Cierra, a passenger in appellant's car, testified that shots were fired at the Taurus. Given the fact that Kristanoff was hired as an investigator by Terry, a fact known to appellant, nothing prevented appellant from identifying Kristanoff in an earlier discovery response, if only as a potential witness, while waiting for the laboratory reports. This would have notified the state of his existence and permit the state to prepare its case for Kristanoff's testimony should he be called. Appellant did not, and instead waited until one business day before trial to disclose Kristanoff's existence.

{¶38} In light of the foregoing, we find that the sanction imposed by the trial court is consistent with the state's interest and the purpose of the rules of discovery. The trial court's exclusion of Kristanoff as a defense witness was not an abuse of discretion. Appellant's first assignment of error is overruled.

{¶39} Assignment of Error No. 2:

{¶40} "THE JUDGMENT OF CONVICTION AND SENTENCE IMPOSED UPON APPELLANT SMITH FOR BEING A REPEAT VIOLENT OFFENDER VIOLATES HIS RIGHT TO DUE PROCESS OF LAW, UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND HIS RIGHT TO TRIAL BY JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AND THEIR COUNTER PARTS IN THE OHIO CONSTITUTION, ART. I. §§9, 16, IN THAT APPELLANT DID NOT WAIVE HIS RIGHT TO

TRIAL BY JURY OF THAT OFFENSE/SPECIFICATION AS REQUIRED BY R.C. 2945.05."

{¶41} Assignment of Error No. 3:

{¶42} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION BY ENTERING JUDGMENT OF CONVICTION AND SENTENCE UPON HIM FOR BEING A REPEAT VIOLENT OFFENDER IN THE ABSENCE OF LEGALLY SUFFICIENT EVIDENCE TO SUPPORT SUCH A CONVICTION AND SENTENCE."

{¶43} In his second assignment of error, appellant challenges the trial court's determination that he is a repeat violent offender ("RVO") under R.C. 2941.149. Appellant asserts that only a jury can determine whether an offender is a RVO, unless a written jury waiver is signed by the offender. In the case at bar, there is no written jury waiver, and appellant's attorney asked the trial court to make the RVO determination.

{¶44} R.C. 2941.149(B) provides that "[t]he *court shall* determine the issue of whether an offender is a repeat violent offender." (Emphasis added.) In *State v. Brumley*, Butler App. No. CA2004-05-114, 2005-Ohio-5768, we rejected a criminal defendant's claim that his sentence as a RVO violated his right to a trial by jury because it was based upon findings made by the trial court, rather than a jury:

{¶45} "[Brumley] was determined to be a repeat violent offender on the basis of this prior conviction, falling squarely within the jury exception stated in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 490, 120 S.Ct. 2348, *'Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' The subsequent *Blakely* decision did not modify or abrogate this exception. Because [Brumley's] status as a repeat violent offender is based solely on the fact of his prior conviction, the determination need not be made by a jury." Id. at ¶21. (Emphasis sic.)

{¶46} This court concluded that "[Brumley's] right to a jury trial was not violated by the trial court's determination that he is a repeat violent offender, based on the fact of his prior conviction, nor did the imposition of an additional sentence for the repeat violent offender specification violate this right." Id. at ¶26.

{¶47} In *State v. Hunter*, Slip Opinion No. 2009-Ohio-4147, the Ohio Supreme Court held that its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, did not eliminate the RVO specification as defined in R.C. 2929.01; trial courts are not precluded from imposing an enhanced penalty for a RVO specification; and a trial court does not engage in improper judicial factfinding in violation of a criminal defendant's right to a jury trial by designating an offender as a RVO. Id. at ¶27, 29, 34-35, 38, 40.

{¶48} In light of the foregoing, we find that because a criminal defendant's status as a RVO is based solely on the fact of his prior conviction, the determination need not be made by a jury and is properly made by a trial court. Appellant's right to a jury trial was therefore not violated by the trial court's determination that he is a RVO. Appellant's second assignment of error is overruled.

{¶49} In his third assignment of error, appellant argues the state presented insufficient evidence of a prior conviction to support his conviction under the RVO specification. At trial, in connection with the charge of having weapons while under disability, the state presented the testimony of Brad Burress, a Butler County prosecutor, and Exhibit 69, the 2005 conviction for felonious assault with a firearm specification of a Gabriel T. Smith. Burress identified the defendant in the 2005 conviction as being appellant. The trial court subsequently instructed the jury to consider the 2005 conviction only for the limited purpose to show that appellant was under a legal disability at the time of the shootout, and not to prove his character. On appeal, appellant asserts that in light of its jury instructions, the trial court could not consider appellant's 2005 conviction for purposes of the RVO specification.

We disagree.

{¶50} Effective August 3, 2006, and as relevant to the present case, R.C. 2929.01 defines a RVO[3] as a person about whom both of the following apply: (1) the person is being sentenced for committing any felony of the first or second degree that is an offense of violence; and (2) the person previously was convicted of or pled guilty to any felony of the first or second degree that is an offense of violence. R.C. 2929.01(CC)(1)(a), (2). A felonious assault in violation of R.C. 2903.11 is an offense of violence under R.C. 2901.01(A)(9)(a).

{¶51} At the outset, we note that appellant has not cited any case law, and we have found none, to support his assertion that because of its jury instructions, the trial court was prevented from relying on Burress' testimony to determine whether appellant was a RVO. We decline to limit a trial court's determination of whether an offender is a RVO based on jury instructions.

{¶52} In the present case, appellant was convicted of felonious assault in violation of R.C. 2903.11 (a second-degree felony), an offense of violence under R.C. 2901.01(A)(9)(a). In order to declare appellant a RVO, the trial court had to determine he had a prior conviction or pled guilty to a felony of the first or second degree that is an offense of violence. This fact was readily determined from Exhibit 69, the sentencing entry for appellant's 2005 conviction for felonious assault, and Burress' testimony identifying appellant as the named defendant in the 2005 sentencing entry. The sentencing entry indicates that appellant pled guilty and was convicted of felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree. See *Hunter*, 2009-Ohio-4147 (trial court did not violate defendant's constitutional rights by considering his indictment and sentencing entry for his prior conviction, which are "judicial record evidence" created in connection with his prior conviction).

3. The definition of a repeat violent offender under R.C. 2929.01 was revised and simplified effective August 3,

{¶53} In light of the foregoing, we find that the trial court did not err in determining appellant was a RVO on the basis of his prior conviction. Appellant's third assignment of error is overruled.

{¶54} Assignment of Error No. 4:

{¶55} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY ADMITTING PREJUDICIAL, INADMISSIBLE OTHER ACT EVIDENCE."

{¶56} Appellant first argues that Burress' testimony regarding appellant's 2005 felonious assault conviction was improperly allowed in violation of Evid.R. 404(B). We disagree.

{¶57} As noted earlier, the state presented the testimony of Burress in connection with appellant's charge of having weapons while under disability. Following Burress' testimony, the trial court instructed the jury to consider the 2005 conviction only for the limited purpose to show that appellant was under a legal disability at the time of the shootout, and not to prove his character. The trial court similarly instructed the jury in its written jury instructions. A presumption exists that a jury follows the instructions given to it by the trial court. *State v. Glover*, Franklin App. No. 07AP-832, 2008-Ohio-4255, ¶80. There is no evidence the jury failed to follow the trial court's jury instructions. The admission of Burress' testimony did not violate Evid.R. 404(B).

{¶58} Appellant also argues that Burress' detailed testimony regarding appellant's 2005 conviction was prejudicial. Over appellant's attorney's objections, Burress testified that the 2005 conviction involved other co-defendants whom he named; three people were injured (the nature and seriousness of the injuries were not described; nor were the victims named); and at the time of the Middletown shootout, appellant had been out of prison on this prior

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2006. R.C. 2929.01(DD) defined repeat violent offender until it was renumbered R.C. 2929.01(CC) effective

conviction nine to 12 days.

{¶59} A trial court has broad discretion in determining the admissibility of evidence at trial, and unless the trial court has abused its discretion and the defendant has been materially prejudiced thereby, an appellate court may not reverse. *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, certiorari denied (1968), 390 U.S. 1024, 88 S.Ct. 1409; *Hancock*, 2006-Ohio-160 (defining abuse of discretion in a criminal case).

{¶60} Evid.R. 403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Under Evid.R. 403(A), only evidence that is *unfairly* prejudicial is excludable. See *State v. Crotts*, 104 Ohio St.3d 432, 2004-Ohio-6550. As the Ohio Supreme Court stated, "Evid.R. 403 speaks in terms of unfair prejudice. Logically, all evidence presented by a prosecutor is prejudicial, but not all evidence unfairly prejudices a defendant. It is only the latter that Evid.R. 403 prohibits." *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶107.

{¶61} We find that Burress' testimony did not confuse the issues or mislead the jury nor was it unfairly prejudicial. In addition to submitting a copy of the 2005 judgment of conviction into evidence, the state also elicited details about the prior conviction. However, the state's use of the evidence was restrained. The state elicited very few details; did not question Burress at length about the specific details of the prior conviction (the nature and seriousness of the injuries were not described; nor were the victims named); and did not place undue emphasis on the details of appellant's prior conviction. We cannot say that Burress' testimony carried a high potential for inflaming the jury.

{¶62} The trial court, therefore, did not abuse its discretion by allowing Burress to testify as he did about appellant's 2005 felonious assault conviction. Appellant's fourth

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April 7, 2009.

assignment of error is overruled.

{¶63} Assignment of Error No. 5:

{¶64} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT'S RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO A FAIR TRIAL BY ADMITTING, OVER OBJECTION, A PHOTOGRAPH OF APPELLANT'S CO-DEFENDANT SHADEED BARNETT ARMED WITH A PARTICULARLY LETHAL-LOOKING ASSAULT GUN IN A HOLSTER UNDER A LONG COAT."

{¶65} Appellant challenges the admission into evidence and over his objection of a photograph of Shadeed showing Shadeed wearing a shoulder-type holster with what appears to be a TEC-9 weapon. Appellant asserts that the photograph unfairly prejudiced him by painting him as a violent and dangerous individual and improperly tainted him with guilt by association.

{¶66} As stated earlier, a trial court has broad discretion in determining the admissibility of evidence at trial. *Hymore*, 9 Ohio St.2d at 128; *State v. Maurer* (1984), 15 Ohio St.3d 239, certiorari denied (1985), 472 U.S. 1012, 105 S.Ct. 2714 (under Evid.R. 403, admission of photographs into evidence is within the sound discretion of the trial court); *Hancock*, 2006-Ohio-160 (defining abuse of discretion in a criminal case).

{¶67} In *State v. Barnett*, Butler App. No. CA2008-03-069, 2009-Ohio-2196, appeal not allowed, 122 Ohio St.3d 1507, 2009-Ohio-4233, we held that the trial court did not abuse its discretion by admitting the photograph as it did not unfairly prejudice Shadeed. Id. at ¶48. We found that given testimony at trial that a TEC-9 weapon uses 9 mm bullets and can be converted into an automatic weapon, and that 9 mm shell casings were recovered at the scene, the photograph was relevant and probative to the state's case in attempting to prove the automatic firearm specification against Shadeed. Id. at ¶45. The jury ultimately found Shadeed not guilty of the automatic firearm specification.

{¶68} Appellant first asserts that the prejudicial impact of the photograph "was more substantial in light of the fact that [Detective] Fultz stated that police commonly keep photos recovered in search warrant cases for 'intelligence,' to show '*associations*, drug conspiracy connections, use of weapons for future planning,' etc." However, the foregoing statement was made by Detective Fultz during a hearing conducted by the trial court outside the presence of the jury and before the photograph was admitted into evidence. During his testimony to the jury, Detective Fultz simply testified that on the photograph, Shadeed was "wearing a shoulder-type holster with what appears to be a Tech 9 [sic] with an extended magazine;" the photograph was recovered during a search warrant "several years back;" the detective did not know when or where the photograph was taken, who took it, and whether it was taken at a Halloween or costume party; he did not know how old Shadeed was on the photograph; and he did not know if the weapon displayed on the photograph was a real weapon or an airsoft gun. There was no testimony linking the photograph, Shadeed, or appellant and his co-defendants to gang-violence, gang-shootings, or gang activities. The photograph therefore did not paint appellant as a violent and dangerous individual.

{¶69} Appellant also asserts the photograph improperly tainted him with guilt by association. We disagree.

{¶70} Merely because alleged inflammatory evidence is admitted against one defendant, not directly involving another co-defendant, does not in and of itself show substantial prejudice in the latter's trial. See *United States v. Gallo* (C.A.6, 1985), 763 F.2d 1504. Further, a jury must be presumed capable of sorting out the evidence submitted at trial and considering the case of each defendant separately. See *United States v. Causey* (C.A.6, 1987), 834 F.2d 1277. In the case at bar, whether during trial or the prosecutor's closing arguments, the photograph was solely linked to Shadeed. Further, the trial court specifically instructed the jury to separately consider the evidence against each defendant:

{¶71} "You must decide separately the question of the guilt or innocence of each of the defendants. *** You must separately consider the evidence applicable to each defendant as though he were being separately tried and you must state your finding as to each defendant uninfluenced by your verdict as to any other defendant. *** You must consider each count and the evidence applicable to each count separately and you must state your finding as to each count uninfluenced by your verdict as to any other count." As stated earlier, a jury is presumed to follow instructions given by the trial court. *Glover*, 2008-Ohio-4355 at ¶80.

{¶72} There is no evidence the jury failed to follow the trial court's foregoing instructions. Absent any such evidence, appellant has failed to rebut the presumption that the jury followed the trial court's instructions to separately consider the evidence applicable to each defendant as though they were being separately tried. Id. Given the totality of the evidence against appellant (as discussed in his sixth and seventh assignments of error), we cannot say the jury concluded appellant was guilty by association based on the photograph of Shadeed with a weapon. Appellant's fifth assignment of error is overruled.

{¶73} Assignment of Error No. 6:

{¶74} "THE JUDGMENT(S) [SIC] OF CONVICTION ARE CONTRARY TO LAW AND TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THERE WAS INSUFFICIENT EVIDENCE ADDUCED TO ESTABLISH EACH AND EVERY ELEMENT OF EACH OFFENSE BEYOND A REASONABLE DOUBT."

{¶75} Assignment of Error No. 7:

{¶76} "THE JUDGMENT(S) [SIC] OF CONVICTION ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶77} Appellant argues that given the fact the jury found him not guilty of having

weapons while under disability, no one testified seeing him with a weapon or firing a weapon, and the lack of evidence connecting him with any criminal activity, including that appellant was in the Taurus when shots were fired from the car, his conviction for felonious assault even as an aider and abettor was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶78} "In reviewing a claim of insufficient evidence, '[t]he 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. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶70, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury's. See *State v. Holdbrook*, Butler App. No. CA2005-11-482, 2006-Ohio-5841.

{¶79} In order for a court of appeals to reverse a jury verdict on the basis it is against the manifest weight of the evidence, the appellate court must unanimously disagree with the trier of fact's resolution of any conflicting testimony. *State v. Thompkins*, 78 Ohio St.3d 380, 389, 1997-Ohio-52. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at 387. When reviewing the evidence, an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A determination that a conviction is not against the manifest weight of the evidence is also dispositive of a

sufficiency of the evidence argument. *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73.

{¶80} Circumstantial evidence and direct evidence have the same probative value, and in some instances, certain facts can only be established by circumstantial evidence. *State v. Mobus*, Butler App. No. CA2005-01-004, 2005-Ohio-6164, ¶51, citing *Jenks*, 61 Ohio St.3d at 272. A conviction based on circumstantial evidence is no less sound than one based on direct evidence. *Mobus* at ¶51.

{¶81} Appellant was convicted of felonious assault, in violation of R.C. 2903.11(A)(2), which states: "No person shall knowingly *** cause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance." The jury further found appellant "did have, or aided and abetted another who had a firearm on or about his person or control and either displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense." See R.C. 2941.145(A).[4]

{¶82} The terms "aid and abet" have been defined as "to assist or facilitate the commission of a crime, or to promote its accomplishment." *State v. Pesec*, Portage App. No. 2006-P-0084, 2007-Ohio-3846, ¶68. Evidence of aiding and abetting may be inferred from presence, companionship, and conduct before and after the offense is committed, and by overt acts of assistance such as driving a getaway car, serving as a lookout, or creating a diversion so that the principal can commit the offense. *State v. Hill*, Ashtabula App. No. 2005-A-0010, 2006-Ohio-1166, ¶26. Mere presence of an accused at the scene of the crime, however, is not sufficient proof, in and of itself, that the accused was an aider and

4. The trial court instructed the jury that before it could find appellant guilty of felonious assault, "you must find *** [appellant] did knowingly cause or attempt to cause, or aided and abetted another in causing or attempting to cause physical harm to another by means of a deadly weapon or dangerous ordnance." The trial court further instructed the jury that if it found appellant guilty of felonious assault, it would then separately decide if "[appellant], or a person whom [appellant] aided and abetted while committing felonious assault, had a firearm on or about the offender's person or under the offender's control while committing the offense and either displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm or used it to facilitate the offense."

abettor. *State v. Widner* (1982), 69 Ohio St.2d 267, 269. Aiding and abetting may be proven by both direct and circumstantial evidence. *Hill* at ¶26.

{¶83} In the early morning hours of September 19, 2007, Demarco was involved in a fight at the bar with a friend of Teray. According to Demarco, appellant and Teray were at the bar. Lori and Jeremy saw appellant at the bar as well. After the fight, Demarco drove to the projects to recruit friends to go finish the bar fight. According to Jeremy, as soon as he, Lori, and Demarco arrived at the projects, a blue Taurus "pulled up right behind" them on Weaver Street before driving away. As Demarco and his friends were getting together, Demetrius, James, and Zeph (as well as Jeremy) noticed the Taurus on Weaver Street driving around the projects. According to Demetrius and James, appellant was driving the Taurus. Cierra who was a passenger in the Taurus, testified that Terry was also a passenger before he fired shots from the Taurus and got out of the car.

{¶84} After dropping off Demarco and Jeremy at the projects, Lori noticed that appellant was following her in a blue Taurus. Lori eventually pulled over and the two briefly conversed from their cars. Lori did not see anybody else in the Taurus. During their conversation, appellant received a phone call. Appellant told the caller "that's all you got to say. I'm on my way," then left and drove away towards the projects.

{¶85} Meanwhile at the projects, either during or right after the beating of Deontae, Demetrius observed a Nissan vehicle drive on McGuire Street before turning on Vance Street. Shadeed was driving the car; Teray was a passenger. Soon after, gunfire erupted: Teray came around the corner from Vance Street and started shooting while walking down McGuire Street. Many witnesses believed automatic weapons were used. When gunfire erupted, Demarco and his friends scattered and tried to run to safety.

{¶86} Jerrell ran through the grassy area. At that point, the shooting was coming from everywhere, including from the direction of Weaver Street. Griffis, a resident on

Weaver Street awakened by the gunfire, observed a blue Taurus on Weaver Street with the back passenger door open. Shots were then fired from the Taurus through the open back passenger door into the grassy area. The Taurus then drove "real fast" past her house to the end of the street, drove back to its original location in reverse, and finally drove back past her house and turned onto Vance Street. Griffis never saw anyone exit the Taurus. Griffis testified that when the Taurus drove in reverse, she could hear gunfire coming from the grassy area.

{¶87} Demetrius and Zeph separately ran through the grassy area towards Main Street. They were prevented from crossing Main Street when the Taurus came around on Main Street and shots were fired from the car. According to Demetrius, shots were fired from the car after the front passenger window rolled down. Demarco was shot in the grassy area near Main Street and fell to the ground. Teray and Shadeed were both observed at the crime scene each with a weapon, and were both seen in the vicinity of Demarco when the latter was shot.

{¶88} While much of the evidence against appellant is circumstantial, after a careful and thorough review of the record, we cannot conclude the jury lost its way and created a manifest miscarriage of justice when it found appellant guilty of felonious assault with a firearm specification. Demarco was shot during a surprise night-time shootout involving multiple assailants and at least four weapons. As they scattered and tried to run to safety, Demarco and his friends all had different vantage points and time sequences. Appellant was seen driving the Taurus on Weaver Street and around the projects as Demarco and his friends were getting together. According to a few witnesses, appellant had one or two passengers. After gunfire erupted, shots were fired from the Taurus on Weaver Street and into the grassy area where Demarco and his friends were being chased by two shooters. During the shootout, Demetrius and Zeph were prevented from crossing Main Street when

the Taurus came around on Main Street, stopped, and shots were once again fired from the car.

{¶89} Although he was found not guilty of having weapons while under disability and discharging a firearm from a car (firearm specification), appellant was not a mere bystander driver in the wrong place at the wrong time; rather, he was an active participant in the shootout. Testimony at trial shows that shots were fired from the Taurus both on Weaver Street and Main Street, each time into the grassy area. These shots combined with the shots fired by Teray and Shadeed created a cross-shootout, making it difficult for Demarco and his friends to leave the scene of the shootout and run to safety. While all of his friends were able to run to safety, three of them unscathed, Demarco was not so lucky. He was shot in the grassy area near Main Street after he yelled at Shadeed and Teray who were chasing Jeremy, and Shadeed and Teray turned towards Demarco and started shooting.

{¶90} In light of the foregoing, we find that appellant's conviction for felonious assault with a firearm specification was not against the manifest weight of the evidence, and was therefore supported by sufficient evidence. See *Smith*, 2009-Ohio-197 at ¶73. Appellant's sixth and seventh assignments of error are overruled.

{¶91} Assignment of Error No. 8:

{¶92} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT SMITH'S 14TH AMENDMENT RIGHT TO DUE PROCESS OF LAW BY OVERRULING HIS MOTION FOR SEPARATE TRIALS FROM THE OTHER DEFENDANTS."

{¶93} Appellant argues that the trial court erred by denying his pretrial motion to sever his trial from that of his three co-defendants. Appellant asserts he was grossly prejudiced by the joint trial; further, "[i]t is evident he was convicted on a theory of guilt by association."

{¶94} Crim.R. 14 permits a trial court to grant separate trials if joinder has a

prejudicial effect on the accused. See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266. However, the accused bears the burden of proving that prejudice. See *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340; *State v. Wright*, Warren App. No. CA2008-03-039, 2008-Ohio-6765 (defendant must demonstrate that the denial of the motion was prejudicial, thereby affecting his right to a fair trial).

{¶95} Appellant moved to sever his trial from that of his co-defendants in December 2007. On January 16, 2008, the trial court conducted a hearing to address several defense motions. During that hearing, appellant's attorney orally moved to withdraw his Crim.R. 14 motion for separate trials. There is no judgment entry in the record before us reflecting appellant's oral motion to withdraw his Crim.R. 14 motion. By entry filed on January 30, 2008, the trial court denied appellant's Crim.R. 14 motion as follows: "This cause came to be heard upon the motion of the Defendants. After a full hearing on this matter, the Defendant's Motion for Separate Trials is hereby DENIED." The caption of the entry lists all four co-defendants. The record shows that during the January 30 hearing, Shadeed orally moved to withdraw his motion for separate trials; Teray orally moved for separate trials; and based on his previously filed motion for separate trials, Terry argued for separate trials.

{¶96} Assuming the trial court did deny his motion for separate trials on January 30, 2008, appellant failed to renew his motion at the close of the state's case, or at the conclusion of all the evidence. "Where a defendant fails to renew his motion at the close of the state's case or at the conclusion of all the evidence, *** the defendant waives all but plain error on appeal. Errors otherwise waived may be considered by an appellate court under the doctrine of plain error if the error affects a substantial right. Notice of plain error pursuant to Crim.R. 52(B) must be taken with the utmost caution, only under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Wright*, 2008-Ohio-6765, ¶10. (Internal citations omitted.)

{¶97} In the case at bar, the evidence presented was not so complex that the jury could not differentiate the proof as to the charges against appellant and his co-defendants. While the facts of the case involved the participation of several individuals in the shootout, the record shows that the state presented evidence as to each defendant, and that the jury could distinguish the evidence as it pertained to appellant and his co-defendants. In fact, the jury was able to acquit appellant, Shadeed, and Teray on some counts and convict them on others; with regard to Terry, the trial court declared a mistrial after the jury was hopelessly deadlocked. This strongly indicates that the jury was not confused by the testimony adduced at trial and was able to attribute to each defendant evidence particular to that particular party. We find no indication in the record that the jury "lumped" appellant with his co-defendants in reaching its verdict or that it convicted appellant by guilt by association.

{¶98} Based upon the foregoing, we find appellant has failed to demonstrate he was prejudiced by the joinder of his trial with that of his co-defendants, and therefore, we find no plain error. Appellant's eighth assignment of error is overruled.

{¶99} Assignment of Error No. 9:

{¶100} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY ENTERING JUDGMENT OF CONVICTION AND SENTENCE AFTER A TRIAL IN WHICH EGREGIOUS PROSECUTORIAL MISCONDUCT DEPRIVED HIM OF HIS FOURTEENTH AMENDMENT RIGHT TO A FUNDAMENTALLY FAIR TRIAL."

{¶101} Appellant argues that the state committed prosecutorial misconduct during its closing argument by falsely characterizing the testimony of some of the witnesses.

{¶102} Before we begin our analysis, we must point out that appellant's counsel failed to object to the alleged prosecutorial misconduct. As such, any perceived error which was not brought to the attention of the trial court is waived unless it rises to the level of plain error. Crim.R. 52; *State v. VanLoan*, Butler App. No. CA2008-10-259, 2009-Ohio-4461, ¶33.

Prosecutorial misconduct rises to the level of plain error if it is clear the defendant would not have been convicted in the absence of the improper comments. Id.

{¶103} The test for prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. Id. at ¶32. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. Prosecutors are "normally entitled to a certain degree of latitude in [their] concluding remarks." *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14. Nevertheless, prosecutors must avoid assertions calculated to mislead; may not allude to matters not supported by admissible evidence; *Lott* at 166, and cannot go beyond the evidence which is before the jury when arguing for a conviction. *Smith* at 14; *State v. Smidi* (1993), 88 Ohio App.3d 177 (it is improper to argue "facts" that are not supported by the evidence).

{¶104} During closing arguments, the prosecutor argued that "Tyrone Smith, everybody saw a blue Taurus that evening. *** [Demetrius] saw Tyrone driving the car and shooting from the window. Zeph Jennings saw Tyrone shooting out of the blue Taurus. James Wilson saw him shooting out of the blue Taurus." Subsequently, during rebuttal, the prosecutor stated "there were four or five witnesses that specifically said that Tyrone was driving the car and there was a couple that even said he was shooting out of it;" "as for Tyrone Smith, the defense attorney said there is no evidence of him shooting. That's actually not true. There was at least three witnesses that specifically said I saw Tyrone shooting out of the car. *** [T]here were three witnesses who said I saw Tyrone shooting;" and "In fact, [Demetrius] said I saw the gun in his hand and he was shooting. I couldn't tell you what kind of gun it was, but I saw the muzzle blast. I saw his face and it was coming out of the window."

{¶105} We are troubled by the foregoing remarks made by the prosecutor during

closing arguments. We have thoroughly reviewed the record and absolutely *no* witnesses testified seeing appellant with a weapon and/or firing a weapon from the Taurus or at any time. In fact, when specifically asked, both Demetrius and James unequivocally testified they never saw appellant holding or firing a weapon that night. As for Zeph, he simply testified seeing shots being fired from the Taurus. Demetrius, James, and Griffis similarly so testified. We are also troubled by the state's failure on appeal to acknowledge that the foregoing remarks were not supported by the evidence submitted at trial. In its appellate brief, the state simply states that witnesses saw appellant drive the Taurus and that gunshots were fired from the car.

{¶106} The statements made by the prosecutor were thus clearly improper. A prosecutor may prosecute with earnestness and vigor and strike hard blows; however, he is not at liberty to strike foul ones. *Smith*, 14 Ohio St.3d at 14. "The prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious but to see that justice shall be done." Id.

{¶107} Although the remarks were improper, we find they do not rise to the level of plain error. First, while not dispositive, we note that the trial court instructed jurors they were not to use statements made in closing arguments as evidence in their deliberations. As previously noted, we must presume the jury followed the trial court's instructions. *VanLoan*, 2009-Ohio-4461 at ¶38. Next, the improper remarks clearly did not prejudicially affect appellant's substantial rights as the jury acquitted him of the firearm specification dealing with discharge of a firearm from a vehicle. Finally, given the evidence against appellant, we find that even in the absence of the improper comments, he would have been convicted of felonious assault as an aider and abettor.

{¶108} We therefore find that the state did not commit prosecutorial misconduct during closing arguments. However, our conclusion that the prosecutor's misstatements

during closing arguments did not deprive appellant of a fair trial should not be construed as an approval of the prosecutor's conduct during closing arguments. Appellant's ninth assignment of error is overruled.

{¶109} Assignment of Error No. 10:

{¶110} "APPELLANT WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL."

{¶111} Appellant argues he received ineffective assistance of counsel at trial because his counsel failed to (1) "insist upon a jury determination" of the RVO specification; (2) provide timely discovery of Kristanoff as a defense witness; and (3) object to the prosecutor's improper remarks during closing arguments.

{¶112} In order to establish ineffective assistance of counsel, appellant must show that his trial counsel's performance was both deficient and prejudicial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. Specifically, appellant must show that his counsel's performance "fell below an objective standard of reasonableness," and that there is a reasonable probability that but for his counsel's deficient performance, the outcome of the trial would have been different. *Strickland* at 688, 693-694. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct;" as a result, a reviewing court's "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

{¶113} A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel. *State v. Hoop*, Brown App. No. CA2004-02-003, 2005-Ohio-1407, ¶20. A criminal defendant must overcome a presumption that his counsel's actions or inactions "might be considered sound trial strategy." *Strickland* at 689. Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel. *Hoop* at ¶20. Further, "it is not enough for the defendant to show that the errors had some

conceivable effect on the outcome of the proceeding." *Bradley*, 42 Ohio St.3d at 142.

{¶114} Appellant first asserts he received ineffective assistance of counsel when trial counsel failed to provide timely discovery of Kristanoff as a defense witness.

{¶115} Assuming, arguendo, that trial counsel's failure to provide timely discovery of Kristanoff constituted deficient performance, we find appellant has not shown there is a reasonable probability that, but for counsel's conduct, the outcome of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* at 689. As stated earlier, Kristanoff would likely have testified that shots were fired at the Taurus. However, such evidence was already before the jury through Cierra's testimony. Thus, Kristanoff was at best an impeachment witness. Given the totality of the evidence against appellant, and the high standard for finding ineffective assistance under *Strickland*, we cannot say that counsel's failure to provide timely discovery of Kristanoff constituted ineffective assistance of counsel.

{¶116} Next, appellant asserts he received ineffective assistance of counsel when trial counsel failed to object to the prosecutor's improper remarks during closing arguments.

{¶117} The trial court instructed the jury that opening statements and closing arguments are not evidence. "Consequently, it is within counsel's realm of tactical decision-making to choose to avoid interrupting closing arguments." *State v. Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455, ¶22. Failure to object to prosecutorial misconduct "'does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision.'" Id., quoting *State v. Gumm*, 73 Ohio St.3d 413, 428, 1995-Ohio-24. The record shows that during appellant's closing arguments, trial counsel responded to the prosecutor's remarks by telling the jury "[n]ot a single witness here that you heard in the last three or four days, testified that [appellant] had a weapon or used a weapon."

{¶118} Even if we were to find that trial counsel's failure to object constituted deficient

performance, appellant is still required to show prejudice. Appellant has not demonstrated that the result of the trial would have been different had counsel objected to the prosecutor's remarks during closing arguments. Appellant's counsel was therefore not ineffective for choosing not to object to the prosecutor's remarks during closing arguments. See *Brown*.

{¶119} Finally, with regard to trial counsel's failure to "insist upon a jury determination" of the RVO specification, we have already determined that a RVO determination must be made by a trial court, not by a jury. Accordingly, trial counsel's failure to "insist upon a jury determination" of the RVO specification does not constitute ineffective assistance of counsel. Appellant's tenth assignment of error is overruled.

{¶120} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.

[Cite as *State v. Smith*, 2009-Ohio-5517.]