[Cite as *State v. Dewitt*, 2010-Ohio-6476.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23735

vs. : T.C. CASE NO. 09CR1020

KEITH W. DEWITT :

Defendant-Appellant :

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O P I N I O N

Rendered on the 29th day of December, 2010.

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GRADY, J.:

{¶ 1} Defendant, Keith Dewitt, appeals from his conviction and sentence for carrying a concealed weapon and having a weapon under disability.

{¶ 2} On March 27, 2009, Defendant was stopped for a window tint violation by Dayton Police Officer Daniel Reynolds. At the

time Defendant was driving a Chevy Malibu eastbound on Prescott Avenue, near England Avenue. Three passengers were in the vehicle. During the traffic stop Officer Reynolds requested that a drug detection dog be brought to the scene. After performing an open-air sniff of the vehicle, the dog alerted. Officer William Geiger, the dog's handler, searched Defendant's vehicle and discovered a loaded .380 caliber semi-automatic handgun beneath the driver's seat.

{¶ 3} Prior to police removing Defendant and the three passengers from the vehicle for the canine sniff, backseat passenger Michael Powers observed Defendant moving around in his seat as though he was hiding something. Defendant told his passengers that there was a gun in the vehicle, before police removed everybody from the vehicle. After being removed from the vehicle, Defendant and Powers were placed in the backseat of Officer Reynolds' cruiser, where their subsequent conversations were captured on the cruiser's recording system. Defendant can be heard acknowledging that the gun was loaded, that there was one round in the chamber, and saying he would be charged for having it and he would get at least three years. When interviewed by police after his arrest, Defendant denied that the gun belonged to him. He told police the gun was already inside the vehicle when he got in the vehicle, and that he merely looked at it and put it

back under the seat.

{¶ 4} Defendant was indicted on one count of carrying a concealed weapon, R.C. 2923.12(A)(2), and one count of having a weapon under disability, R.C. 2923.13(A)(2). Defendant filed a motion to suppress the statements he made to police and the evidence recovered from the vehicle he was driving. Following a hearing, the trial court overruled Defendant's motion to suppress. Following a jury trial, Defendant was found guilty of both charges. The trial court sentenced Defendant to concurrent prison terms totaling four years.

{¶ 5} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 6} "THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF CARRYING A CONCEALED WEAPON AND HAVING WEAPONS UNDER DISABILITY."

{¶ 7} Defendant argues that his convictions for carrying a concealed weapon and having a weapon under disability are not supported by legally sufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶ 8} A sufficiency of the evidence argument challenges whether the State has presented evidence on each element of the offense alleged to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins,* (1997), 78 Ohio St.3d 380.

The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 9} "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."

{¶ 10} To be found criminally liable, a person must engage in conduct prohibited by law that "includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing," and act with the "requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense." R.C. 2901.21(A).

{¶ 11} Defendant was found guilty of violating R.C. 2923.12(A)(2), carrying a concealed weapon, which provides:

{¶ 12} "(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

{¶ 13} * *

{¶ 14} "(2) A handgun other than a dangerous ordnance."

{¶ 15} Defendant was also found guilty of violating R.C. 2923.13(A)(2), having a weapon under disability, which provides:

{¶ 16} "(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:

{¶ 17} * *

{¶ 18} "(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."

{¶ 19} "Knowingly" is defined in R.C. 2901.22:

{¶ 20} "(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 21} The two offenses of which Defendant was convicted require proof that he was in possession of the loaded gun found beneath

the driver's seat of the vehicle he operated before he was stopped by police. Possession is defined in R.C. 2925.01(K): "Possess or possession means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

{¶ 22} "Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession." R.C. 2901.24(D)(1). Possession may therefore be either actual physical possession or constructive possession. *State v. Butler* (1989), 42 Ohio St.3d 174, 538 N.E.2d 98. A person has constructive possession of a item when he is conscious of the presence of the object and able to exercise dominion and control over that item, even if it is not within his immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87; *State v. Wolery* (1976), 46 Ohio St.2d 316. The State may prove constructive possession solely through circumstantial evidence. *State v. Barnett*, Montgomery App. No. 19185, 2002-Ohio-4961. Circumstantial and direct evidence have the same probative value. *Jenks, supra*.

{¶ 23} Defendant's recorded admission that he knew the gun was loaded with a single round is sufficient evidence, if believed,

that he possessed the gun voluntarily, for a time adequate to make that determination, following which Defendant returned the gun to the place beneath his seat where he found it instead of ending his possession of it within the time that was available to him. That same evidence is sufficient to demonstrate that he acted knowingly.

{¶ 24} This evidence, when viewed in a light most favorable to the State, is sufficient to permit a rational trier of facts to find beyond a reasonable doubt all of the essential elements of carrying a concealed weapon and having a weapon under disability. Defendant's convictions are supported by legally sufficient evidence.

{¶ 25} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 26} "[t]he 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and

a new trial ordered." Accord: *State v. Thompkins*, supra.

{¶ 27} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 28} "Because the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 29} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 30} Defendant argues that his convictions for carrying a concealed weapon and having a weapon under disability are against the manifest weight of the evidence because no one saw Defendant in physical possession of the gun, there were no fingerprints on the gun, the vehicle Defendant was driving and in which the gun

was found belonged to someone else, and defense witnesses Chad Dewitt, Defendant's cousin, and Terry Martin, the brother of Chad Dewitt's fiancé, testified that it was Michael Powers who had the gun and put it underneath Defendant's seat.

{¶ 31} Defendant's recorded statement that the gun had one live round in its chamber supports an inference that he had handled the gun, and after that placed it back beneath the driver's seat in which he sat, within his easy reach. Further, his passenger, Michael Powers, testified that he saw Defendant "scrambling around" in the driver's seat, as though he was attempting to hide something, before they were removed from the vehicle.

{¶ 32} The jury did not lose its way in this case simply because they chose to believe the State's witnesses and version of the events rather than Defendant's, which they had a right to do. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts to determine. *DeHass*. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's convictions are not against the manifest weight of the evidence.

{¶ 33} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 34} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS."

{¶ 35} Defendant argues that the trial court erred by denying his motion to suppress because the duration of his traffic stop for a window tint violation was unlawfully prolonged while waiting for a drug detection dog to come to the scene to conduct an open air sniff of the vehicle Defendant was driving.

{¶ 36} When considering a motion to suppress, the trial court assumes the role of the trier of facts and is therefore in the best position to resolve factual questions and evaluate the credibility of the witnesses. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Accepting those facts as true, the appellate court must then independently determine, without deference to the trial court's conclusion, whether those facts satisfy the applicable legal standard. *Id.*

{¶ 37} The trial court found that Officer Reynolds initiated a traffic stop of the vehicle driven by Defendant for a window tint violation at 2:10 p.m. Officer Reynolds tested the window tint with a meter and found that the tint allowed only 33% of the light through the window. Ohio law requires 50% of the light to

show through the window. It was Officer Reynolds' intention to write a traffic citation for excessive window tint. Within a minute or two after the stop, Officer Reynolds called for a drug detection dog to be brought to the scene to conduct an open-air sniff of the vehicle. As part of routine police procedure, Officer Reynolds obtained identification from all of the occupants of the vehicle and ran a computer check on that information for outstanding warrants. At 2:20 p.m., Officer Reynolds was delayed for about one minute when he responded to questions from Defendant. Officer Reynolds told Defendant that he was still working on his ticket.

{¶ 38} The court found that the K-9 officer, Geiger, arrived five to seven minutes after the call for the dog was made. The cruiser video shows that the K-9 unit arrived about 2:25 p.m., fifteen minutes after the request for the dog was made. In any event, the drug detection dog arrived on the scene before Officer Reynolds completed the citation for the window tint violation. The dog sniff began at 2:28 p.m., following a brief delay caused by Defendant arguing with officers that he did not have to exit his vehicle. The dog alerted twice, at each of the vehicle's front doors. A search of the vehicle was conducted and a handgun was found under the driver's seat. Defendant was then arrested. According to Officer Reynolds, a traffic stop for a window tint violation takes ten to fifteen minutes to complete.

{¶ 39} Defendant does not challenge the validity of the original stop for the window tint violation. The use of a trained narcotics dog in the course of an otherwise valid stop does not constitute a search; therefore, an officer need not have formed a reasonable suspicion that drug related activity is occurring in order to request that a drug dog be brought to the scene to conduct a sniff of the vehicle. *State v. Hudson*, Miami App. No. 2003-CA-39, 2004-Ohio-3140. The issue is whether the duration of the traffic stop for the window tint offense was unlawfully prolonged for the dog sniff of the vehicle.

{¶ 40} In *State v. Ramos,* 155 Ohio App.3d 396, 801 N.E.2d 523, 2003-Ohio-6535, we stated:

{¶ 41} "The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. A traffic stop by a law enforcement officer must comply with the Fourth Amendment's reasonableness requirement. The duration of a traffic stop may last no longer than is necessary to resolve the issue that led to the original stop, absent some specific and articulable facts that further detention was reasonable. 'When a law enforcement officer stops a vehicle for a traffic violation, the officer may detain the motorist for a period of time sufficient to issue the motorist a citation and to perform routine procedures such as a computer check on the motorist's driver's license,

registration and vehicle plates. * * * In determining if an officer completed these tasks within a reasonable length of time, the court must evaluate the duration of the stop in light of the totality of the circumstances and consider whether the officer diligently conducted the investigation.'

{¶ 42} "In *State v. Loffer,* Montgomery App. No. 19594, 2003-Ohio-4980, we held that when the search of a vehicle occurs during a reasonable period of time for processing a traffic citation, i.e., during a period of lawful detention, a police officer need not have a reasonable articulable suspicion of criminal behavior other than the traffic infraction.

{¶ 43} "However, after the reasonable period of time for issuing the traffic citation has passed, an officer must have a reasonable articulable suspicion of illegal activity to continue the detention. The Supreme Court of Ohio has explained: 'When a police officer's objective justification to continue detention of a person stopped for a traffic violation for the purpose of searching the person's vehicle is not related to the purpose of the original stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some illegal activity justifying an extension of the detention, the continued detention to conduct a search constitutes an illegal seizure.' When a canine drug search is involved, the police must have a

reasonable suspicion that a vehicle contains drugs in order to detain a suspect further while a drug-sniffing canine is brought to the scene." *Ramos, supra at* 401-402, 2003-Ohio-6535, ¶¶ 10-13, 155 Ohio App.3d 396, 801 N.E.2d 523.

{¶ 44} "Thus, '[o]nce a police officer legitimately stops a vehicle for a traffic violation, the driver may be detained for only as long as the officer continues to have reasonable suspicion that there has been a violation of the law.' *State v. Desman,* Montgomery App. No. 19730, 2003-Ohio-7248, ¶26, citation omitted. 'Resolution of that suspicion by issuance of a citation terminates the basis for the detention. The detention may not be attenuated beyond its reasonable purposes.' Id." Hudson, at ¶17.

{¶ 45} The evidence in this case does not support a finding that the traffic stop was unlawfully prolonged. The canine sniff occurred before Officer Reynolds completed his citation, and only eighteen minutes after the traffic stop began, within the normal amount of time for processing and issuing a traffic citation for a window tint violation. *Hudson*. There is no evidence that Defendant's traffic stop for that violation was extended by or for the purpose of the dog sniff. *Id*. Less than twenty minutes elapsed from the initial stop to the canine alerting to the vehicle. *Id*. Once the drug dog alerted to the scent of drugs in the vehicle, police had probable cause to search the vehicle. Defendant's

Fourth Amendment rights were not violated and the trial court properly overruled his motion to suppress the evidence obtained as a result of the traffic stop.

{¶ 46} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 47} "THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN EVIDENCE WAS NOT PRESERVED BY THE STATE."

{¶ 48} Defendant argues that his due process rights were violated because the State failed to preserve the cruiser camera video of his traffic stop, in its entirety. Approximately eight minutes at the beginning of that video recording of Defendant's traffic stop were taped over with video from a different traffic stop.

{¶ 49} In *State v. Treesh*, 90 Ohio St.3d 460, 2001-Ohio-4, at pg.475, the Ohio Supreme Court stated:

{¶ 50} ". . . It is axiomatic that '[s]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215, 218. 'In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is

a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense.' *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus, following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481. '[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' *Arizona v. Youngblood* (1988), 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281, 289."

{¶ 51} This record does not demonstrate that the State suppressed material evidence or acted in bad faith in failing to preserve potentially useful evidence. There is no suggestion that the missing portion of the video of Defendant's traffic stop was destroyed by the State after Defendant made a request for such evidence. Rather, a copy was made of the cruiser camera video of the traffic stop and that copy was provided to Defendant as part of the discovery in this case. It was later determined that part of the video recording was omitted from the copy provided. The video begins with the stop of Defendant's vehicle, then

switches to a different traffic stop, then returns to Defendant's stop.

{¶ 52} Officer Reynolds testified that he does not know why portions of Defendant's traffic stop are missing from the copy he made. By the time this defect was discovered the original tape recording that contained the entire traffic stop was no longer available as police erase those after forty-five days per their routine procedures. No bad faith on the part of the police has been demonstrated. To avoid these kinds of inadvertent destruction of original tapes, counsel may seek an order prohibiting their destruction, promptly after charges are filed. The record does not reflect that such a motion was filed in the present case.

{¶ 53} Defendant merely speculates that the missing portion of the cruiser video would show that Officer Reynolds did not act with due diligence in completing the citation for the window tint violation, and that the trial court therefore would have granted his motion to suppress based upon an unlawful prolonging of the duration of the traffic stop had the court been able to view the video depicting the entire traffic stop. There is no evidence in this record to support Defendant's contention that the missing portion of the videotape was materially exculpatory in those respects. Defendant did not present any evidence during the

suppression hearing to contradict Officer Reynolds' testimony, which indicated that he acted diligently to complete the traffic stop. This record does not show that the missing video footage was materially exculpatory, or even potentially useful. No violation of Defendant's due process rights have been demonstrated.

{¶ 54} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

WAITE, J., concurs.

(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

FROELICH, J., concurring in part and dissenting.

{¶ 55} Dewitt was charged with carrying a concealed weapon and having a weapon while under disability. His disability arose from a juvenile adjudication for assault and an adult conviction for felonious assault. His defense was that he did not "possess" the weapon or even know it was in the vehicle. On appeal, Dewitt's assignments of error were limited to arguments that his convictions were based on insufficient evidence and were against the manifest weight of the evidence and that the trial court erred in denying his motions to suppress.

{¶ 56} An appellate court is generally limited to addressing

the errors assigned by an appellant. See App.R. 12(A), stating in part that a court of appeals shall "[d]etermine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16 *." To that extent, I concur with the majority that the verdicts are supported by sufficient evidence and are not against the manifest weight of the evidence, and that the trial court did not err in denying the motions to suppress.**

{¶ 57} But our duty goes beyond a blind obeisance to appellate counsel's assignments of error. For example, pursuant to *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, and *Penson v. Ohio* (1988), 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300, when notified by appellant's counsel that the appeal is frivolous, our responsibility is to conduct an independent review of the record to proactively notice any potential errors of arguable merit. Such action in every appeal would be beyond a court's temporal constraints and, more importantly, would supplant the independent advocacy, tactics, strategies, and safeguards involved in the adversary system.

{¶ 58} However, in exceptional circumstances, especially in criminal cases, an appellate court, in the public interest, may on its own motion notice potential errors to which no objection was made at trial or no assignment was made in the appeal, if the potential errors seriously affect the fairness or integrity of

the judicial proceedings. See, e.g., *United States v. Atkinson* (1936), 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed 555. As stated by the Ohio Supreme Court: "In reviewing the judgment of a court, a Court of Appeals is guided by App.R. 12(A), which provides that the Court of Appeals need only pass upon errors assigned and briefed; errors not specifically pointed out in the record and separately argued by brief may be disregarded. Nevertheless, nothing prevents a Court of Appeals from passing upon an error which was neither briefed nor pointed out by a party." *C. Miller Chevrolet, Inc. v. City of Willoughby Hills* (1974), 38 Ohio St.2d 298, 301. See, also, *Toledo's Great Eastern Shoppers City, Inc. v. Abde's Black Angus Steak House No. III, Inc.* (1986), 24 Ohio St.3d 198, 202-203; *State v. Hudson*, Summit App. No. 24009, 2008-Ohio-4075, ¶4 (merging two counts of murder for a single killing under plain error analysis, despite the lack of an assignment of error raising R.C. 2941.25).

{¶ 59} In reviewing the record, there are issues that were neither briefed nor pointed out by appellate counsel. First, had the charges been severed or had Dewitt waived a jury on the weapon while under disability charge, the jury on the concealed weapon charge would not have been aware of the prior offenses. It is true that Dewitt testified at trial and the adult conviction was used in cross-examination, but that decision to testify was

apparently not definitively made until the last moment (see, e.g., Tr. at 211, for a discussion between the judge and Dewitt regarding his testimonial rights). The record reflects no motion to sever and no attempt to waive a jury on the having weapons while under disability charge.

{¶ 60} Second, although the court properly instructed the jury both during the trial and in final instructions concerning the limited purpose of certain testimony regarding a drug-sniffing canine and the discovery of marijuana, and gave the standard instruction to consider each count separately, there was no request for, or objection to the lack of, an instruction concerning how the jury was to use the evidence of Dewitt's adjudication/conviction. E.g., 2 Ohio Jury Instructions 401.23, 401.25.

{¶ 61} Third, Dewitt was indicted in Count II for having the weapon "having been previously convicted of a felony of violence or having been adjudicated a delinquent child for an offense which would be a felony of violence if committed by an adult, being Assault on May 5, 2005 IN RE: Keith Dewitt, being Case Number J.C. A 2005-2730 01 in the Montgomery County Juvenile Court and being Felonious Assault on December 19, 2006, in State of Ohio versus Keith W. Dewitt, being Case Number 06CR1455 in the Stark County Common Pleas Court ***." The parties stipulated to both the

adjudication and the conviction.

{¶ 62} In her opening statement, the prosecutor commented that there had been a stipulation concerning both the adult conviction for felonious assault and the juvenile adjudication for assault, a felony offense of violence if it had been committed by an adult. In closing argument, she noted the stipulations of a conviction for a felony offense of violence, felonious assault, and an adjudication as a delinquent child for an offense of violence if it was committed by an adult, assault out of Montgomery County Juvenile Court.

{¶ 63} In the court's instructions, the jury was only told it must be proved that Dewitt "had been convicted of or had been adjudicated a delinquent child for commission of an offense that, if committed by an adult, would have been an assault or a felonious assault," and the verdict form merely says that the jury finds Dewitt guilty "of Having Weapons While Under Disability as charged in the Indictment." Moreover, a stipulation is, as the judge informed the jury, "an agreement between counsel as to a fact or facts which are not in dispute and for which no evidence need be presented because neither side disputes that fact." A stipulation does not change the State's burden of proof or the role of the jury. *State v. Runner*, Belmont App. No. 99-BA-36, 2001-Ohio-3263. There was no instruction, or objection to the lack of an

instruction, concerning the use of the stipulation and the jury's duties.

{¶ 64} Finally, at sentencing, the judge orally informed Dewitt that following his release from prison "you *could be* supervised *up to three years* on this case." (Emphasis added.) The court also specifically said it would "*not make any recommendations or disapprovals* with regard to shock incarceration or intensive program prison." (Emphasis added). However, the Termination Entry says "the defendant *will be* supervised by the Parole Board *for a period of Three years* Post-Release Control after the defendant's release from imprisonment, if the Parole Board determines that a period of Post Release Control is necessary for the defendant;" the entry also says "*the Court disapproves* of the defendant's placement in a program of shock incarceration *, or in the intensive program prison ***, and disapproves the transfer of the defendant to transitional control ***." (Emphasis added.)**

{¶ 65} Dewitt's appellate counsel did not raise any of these issues on appeal. But Dewitt's appointed appellate counsel also represented him before the trial court. The appointment of the trial counsel as appellate counsel is always problematic. "[W]hen the appointed appellate counsel is the same attorney who represented the defendant at trial, he must be presumed incapable of making an effective argument that the defendant was denied the

effective assistance of counsel at trial." *State v. Fuller* (1990), 64 Ohio App.3d 349, 356.

{¶ 66} I do not know if any of these or other parts of the trial constitute error or, if so, whether it is plain or reversible error. And we cannot decide this without additional briefing. "In fairness to the parties, a Court of Appeals which contemplates a decision upon an issue not briefed should *** give the parties notice of its intention and an opportunity to brief the issue." *C. Miller Chevrolet*, 38 Ohio St.2d at 301, fn. 3. Arguably, such additional briefing could include an assignment of error involving ineffective assistance of counsel. My concern is that Dewitt's counsel could not effectively raise these issues, because he also was Dewitt's trial attorney. Again, this is not to insinuate that there was ineffectiveness at trial or that it or any other issue should have even been raised on appeal – let alone that any such argument is meritorious or would prevail. I would withhold a decision pending briefing by appellate counsel that did not represent the appellant at trial.

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