

[Cite as *State v. Myrick*, 2011-Ohio-244.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case
	:	No. 23843
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-2047
v.	:	
	:	
JOHN L. MYRICK	:	(Criminal
	:	Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	

.....

OPINION

Rendered on the 21st day of January, 2011.

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MATHIAS H. HECK, JR., by MICHELE D. PHIPPS, Atty. Reg. #0069829, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} On the eve of his bench trial John Myrick waived his right to counsel and proceeded to defend himself pro se. Myrick wanted to call favorable witnesses, though he had never in the months leading up to trial mentioned any such witnesses to

defense counsel. The trial court agreed to let Myrick call three witnesses if they could be served with subpoenas during a two-day continuance. Before adjourning, the court insisted that, if he was going to testify himself, Myrick testify at that time. Myrick refused to testify before his witnesses had done so. None of the witnesses was served, so no defense witnesses testified. Myrick was convicted for tampering with evidence and for having a weapon under a disability. He was also convicted on the 3-year firearm specification that accompanied the tampering-with-evidence charge.

{¶ 2} Myrick argues that the trial court's refusal to compel his witnesses' attendance, its denial of a continuance to secure their attendance, its limiting the number of defense witnesses, and its insisting that Myrick testify before his witnesses constituted, individually or together, a violation of due process. Myrick also argues that the evidence supporting the specification is insufficient. We find that the trial court did not violate due process. But we agree that the evidence is insufficient to support the 3-year specification.

I. FACTS

A. Factual Background

{¶ 3} The events leading to Myrick's convictions occurred during the afternoon of June 24, 2009, at an apartment building where Myrick lived with Elizabeth Wynn, his common-law wife. Also living there, in separate apartments, and present that afternoon were Douglas Pittman, Wynn's grandson, and Melinda Boykins, Wynn's daughter. It is not clear whether Angela Jones, Pittman's girlfriend, lived there too, but in any event she was present. Wynn asked Pittman if he would go over to her apartment (evidently

she was not in her apartment at the time) and turn on the air conditioner. Pittman agreed. Myrick did not want the air conditioner on, and the pair argued loudly in Wynn's apartment for five or so minutes. Myrick then left the apartment building and returned ten minutes later with a small black revolver. He pointed the revolver at Pittman, telling Pittman that he would kill him. Eventually, and without pulling the trigger, Myrick left the building through the back door.

{¶ 4} Officer Susan Bengé was the first to arrive. Bengé pulled up roughly thirty feet away from Myrick, who was in back of the apartment building near the tree- and fence-lined edge of the property. When Myrick saw Bengé he stretched out his arm and threw a black object over the fence into the trees. Bengé immediately arrested Myrick, placed him in her cruiser, and stood nearby awaiting backup. Within minutes, Officers Herron and Locke arrived. While Locke watched Myrick, Bengé and Herron searched the area where Myrick threw the object. They found—and Herron retrieved—a loaded black revolver.

B. Procedural History

{¶ 5} On July 20, 2009, Myrick was indicted on one count of aggravated menacing, R.C. 2903.21, one count of tampering with evidence, R.C. 2921.12(A)(1) (alter/destroy), that included a 3-year firearm specification, R.C. 2941.145(A), and one count of having a weapon under a disability, R.C. 2923.13(A)(3) (prior drug conviction). A public defender was appointed, and trial was set for September 8, 2009. A week before trial, Myrick asked for a continuance. The trial court agreed, and, on September 9, the trial was rescheduled for the week of December 7, 2009. A pre-trial hearing on

November 30 confirmed that the trial would begin on December 8.

{¶ 6} At an in-court status conference held the day before trial, Myrick told the trial court that he wanted to defend himself. Myrick had no real complaints about defense counsel; he simply believed that he could defend himself better: “I think I can do that [defend himself] better. I think I can just represent—no offense to him [defense counsel], Your Honor. But, you know, like I’m dealing with—I mean, you know, I’m going to be the one locked up not him. So I’d rather—if something happen. So I’d rather represent myself.” (Tr. 15).

{¶ 7} The state began presenting its case, as scheduled, on December 8. Pittman, Boykins, Jones, and Wynn all testified that they saw a small black revolver in Myrick’s hand. The next day, Wednesday, December 9, after calling several police officers, the state rested. Myrick then began to argue with the trial judge over the calling of defense witnesses. Myrick eventually identified two police and three non-police witnesses. The court agreed to continue the trial for two days, telling Myrick that he could call the three non-police witnesses on Friday. The court took a brief recess so that Myrick could file the necessary subpoenas. Myrick filed subpoenas for the two police witnesses and one non-police witness. When the trial resumed later that day, the court told Myrick that, in order to make a good use of time, if he planned to testify in his own defense he must do so that day. Myrick refused, saying that he wanted his witnesses to testify first.

{¶ 8} When trial resumed on Friday, December 11, none of Myrick’s witnesses were present. Service of all the subpoenas had failed for insufficient time for service. The trial court denied Myrick’s request to compel the witnesses’ attendance and denied

his request to continue the trial. Myrick again refused to take the stand himself before his witnesses had testified. Myrick continued to argue with the judge, who eventually deemed that Myrick had rested his defense.

{¶ 9} The court found Myrick not guilty of aggravated menacing but convicted him of the remaining charges, sentencing Myrick to one year's imprisonment for the two offenses and to a consecutive three years' imprisonment for the firearm specification.

II. ANALYSIS

{¶ 10} Myrick assigns five errors to the trial court. The first four, which we will address together, allege due-process violations during the trial. The fifth alleges that there is insufficient evidence to support the 3-year firearm specification.

A. Due process

First Assignment of Error

{¶ 11} “The trial [court] committed reversible error and denied Mr. Myrick’s rights to compulsory process, a fair trial, and due process of law, in violation of Mr. Myrick’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

Second Assignment of Error

{¶ 12} “The trial court abused its discretion when it denied Mr. Myrick’s right to present a complete defense to the State’s charges against him, and exerted excessive

control over Mr. Myrick's trial, in violation of Mr. Myrick's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution."

Third Assignment of Error

{¶ 13} "The trial court abused its discretion when it overruled Mr. Myrick's multiple motions to continue his trial, in violation of Mr. Myrick's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution."

Fourth Assignment of Error

{¶ 14} "The cumulative nature of the trial court's errors during Mr. Myrick's trial, as presented within the Assignments of Error I, II, and III, denied Mr. Myrick's rights to a fair trial and due process of law, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution."

{¶ 15} Justice demands fairness. See *U.S. v. Valenzuela-Bernal* (1982), 458 U.S. 858, 872, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (saying that "fairness [is] essential to the very concept of justice"). That a criminal defendant will be treated with fairness is guaranteed by the Due Process Clauses of the Ohio and United States constitutions. Cf. *id.* The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law"; the Due Process Clause of the Ohio Constitution

provides similarly, see Section 16, Article I, Ohio Constitution. In a criminal trial, a defendant's right "to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi* (1973), 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297, cited in *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, at ¶12. The U.S. and Ohio constitutions therefore "guarantee[] criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (Internal citations omitted.). The right to a fair and meaningful opportunity to defend includes the right to present witnesses. *Washington v. Texas* (1967), 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (saying that "a fundamental element of due process of law" is the right to present witnesses).

{¶ 16} The matters to which Myrick has assigned error implicate matters within the sound discretion of the trial court. It is clear from the transcript that the trial judge worked hard to treat Myrick fairly and was successful. The judge was commendably patient with Myrick's argumentativeness and with Myrick's stubborn insistence on the way he believed he "should" be permitted to defend himself. While another court may have determined these matters differently, we see no due-process violation or abuse of discretion in the way this court determined them.

1. *Compelling a witness's attendance*

{¶ 17} The right to present witnesses is guaranteed by the Compulsory Process Clauses of the Ohio and United States constitutions,¹ which contain the right to have

¹The Compulsory Process Clause of the Sixth Amendment to the U.S. Constitution

compulsory process for obtaining favorable witnesses. *State v. Brock*, Montgomery App. No. 19291, 2002-Ohio-7292, at ¶11. As their name suggests, the Compulsory Process Clauses also include the right to compel the attendance of those favorable witnesses. *Id.* at ¶11.

{¶ 18} Myrick contends that the trial court deprived him of his due-process right to compulsory process when the court refused to compel the attendance of his witnesses. We disagree. Myrick failed first to exercise his right to present favorable witnesses by failing to subpoena them in a timely manner.

{¶ 19} The right to a fair opportunity to defend is not absolute, and it does not require that all evidence favorable to the defendant be admitted. *Swann*, at ¶13 (Citations omitted.). When exercising this right, the defendant must comply with the rules of procedure. *Id.* at ¶14 (“ ‘In the exercise of this right, the accused * * * must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’ ”), quoting *Chambers*, at 302. The defendant is not denied a fair opportunity to defend solely because a rule operates to exclude favorable evidence. *Id.* at ¶15, quoting *U.S. v. Scheffer* (1998), 523 U.S. 303, 316, 118 S.Ct. 1261, 140 L.Ed.2d 413.

{¶ 20} In Ohio, Criminal Rule 17 both implements a defendant’s right to present witnesses and limits it. A defendant exercises the right by having the clerk issue a Crim.R. 17(A) subpoena. *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, at ¶123. If the defendant does not first exercise his right to present witnesses by ensuring

provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor”; the Compulsory Process Clause of Ohio’s Constitution provides similarly, see Section 10, Article I, Ohio Constitution.

valid service of a subpoena, he may not later exercise his right to invoke the trial court's power to compel their attendance at trial. See *Brock*, at ¶40 (saying that a defendant has "the right to invoke the trial court's power to compel the attendance of any defense witness who ha[s] been duly served with a subpoena"); see, also, *State v. Juenger*, Butler App. No. CA2003-02-049, 2004-Ohio-796, at ¶30-36 (finding no compulsory process violation in a trial court's refusal to compel the attendance of a defense witness for whom a subpoena was filed but never served).

{¶ 21} Here, none of Myrick's three witnesses was served with a subpoena. According to the record, on December 11, service on all three failed because the time available for service was insufficient. Indeed, one of the officers was on vacation leave and would not return for over a week. Since none of Myrick's witnesses was served, the trial court did not err by refusing to compel their attendance. In addition, Myrick failed to proffer what testimony these witnesses would provide. Evid.R. 103(A)(2) requires an offer of proof to preserve any error in excluding evidence. *State v. Gilmore*, 28 Ohio St.3d 190 (1986).

2. Limiting the number of defense witnesses

{¶ 22} Myrick contends that the trial court deprived him of due process when it limited to three the number of favorable witnesses that he could call. We disagree.

{¶ 23} As we noted above, the right to present favorable witnesses may be limited. Pertinently, a trial court may limit the number of witness that a defendant may present without violating due process. See *State v. Denis* (1997), 117 Ohio App.3d 442, 446. This is particularly true when the defendant fails to show that additional

witnesses would help his defense. *State v. Kreuzer* (Aug. 6, 1999), Greene App. No. 98-CA-100 (saying that “in order to establish a violation of his Sixth Amendment right[] * * * to have compulsory process to obtain witnesses in his favor, a defendant must demonstrate that he was deprived of testimony that would have aided him in his defense”) (Citation omitted.).

{¶ 24} When the trial court first asked Myrick who he wished to call Myrick replied that he planned on calling “some police officers,” whose names he did not then know. (Tr. 72). Myrick eventually identified five potential witnesses, only two of whom he could not have presented—Wayne Harris and Cheryl Jackson. Myrick did not tell the trial court who these two people are, what role they played in the events, or whether they were even present that afternoon. We therefore find no due process violation.

3. *Order of testimony*

{¶ 25} Myrick contends that the trial court violated his right to due process when the court insisted that he testify before his witnesses did. Myrick is correct, but we find that the matter is moot since no witnesses testified.

{¶ 26} Requiring a defendant to testify before his witnesses violates due process. The United States Supreme Court held in *Brooks v. Tennessee* (1972), 406 U.S. 605, 612, 92 S.Ct. 1891, 32 L.Ed.2d 358, that a statutory requirement that before presenting other defense witnesses the criminal defendant must first take the stand violated not only a defendant’s right against self incrimination but also the defendant’s right to due process. “[T]he accused and his counsel,” said the Court, “may not be restricted in deciding whether, and when in the course of presenting his defense, the

accused should take the stand.” *Brooks*, at 613.

{¶ 27} Here, because it had agreed to delay the trial for two days, the court wanted “to make the most expeditious use of our time that we can make.” (Tr. 326). To that end, the court insisted that, if he was going to testify, Myrick testify that day before his witnesses did. The court relented somewhat and told Myrick that, if he wished, Myrick could testify again after his witnesses had done so. In any event, since no other witnesses but Myrick testified, he suffered no harm from the trial court’s ruling.

4. *Denying a longer continuance*

{¶ 28} Myrick contends that the trial court should have granted him a another continuance, or a longer continuance, to secure the appearance of his witnesses. We disagree.

{¶ 29} “The grant or denial of a continuance is a matter that is entrusted On the eve of his bench trial John Myrick waived his right to counsel and proceeded to defend himself pro se. Myrick wanted to call favorable witnesses, though he had never in the months leading up to trial mentioned any such witnesses to defense counsel. The trial court agreed to let Myrick call three witnesses if they could be served with subpoenas during a two-day continuance. Before adjourning, the court insisted that, if he was going to testify himself, Myrick testify at that time. Myrick refused to testify before his witnesses had done so. None of the witnesses was served, so no defense witnesses testified. Myrick was convicted for tampering with evidence and for having a weapon under a disability. He was also convicted on the 3-year firearm specification that accompanied the tampering-with-evidence charge.

{¶ 30} Myrick argues that the trial court's refusal to compel his witnesses' attendance, its denial of a continuance to secure their attendance, its limiting the number of defense witnesses, and its insisting that Myrick testify before his witnesses constituted, individually or together, a violation of due process. Myrick also argues that the evidence supporting the specification is insufficient. We find that the trial court did not violate due process. But we agree that the evidence is insufficient to support the 3-year specification.

{¶ 31} The events leading to Myrick's convictions occurred during the afternoon of June 24, 2009, at an apartment building where Myrick lived with Elizabeth Wynn, his common-law wife. Also living there, in separate apartments, and present that afternoon were Douglas Pittman, Wynn's grandson, and Melinda Boykins, Wynn's daughter. It is not clear whether Angela Jones, Pittman's girlfriend, lived there too, but in any event she was present. Wynn asked Pittman if he would go over to her apartment (evidently she was not in her apartment at the time) and turn on the air conditioner. Pittman agreed. Myrick did not want the air conditioner on, and the pair argued loudly in Wynn's apartment for five or so minutes. Myrick then left the apartment building and returned ten minutes later with a small black revolver. He pointed the revolver at Pittman, telling Pittman that he would kill him. Eventually, and without pulling the trigger, Myrick left the building through the back door.

{¶ 32} Officer Susan Bengé was the first to arrive. Bengé pulled up roughly thirty feet away from Myrick, who was in back of the apartment building near the tree- and fence-lined edge of the property. When Myrick saw Bengé he stretched out his arm and threw a black object over the fence into the trees. Bengé immediately arrested Myrick,

placed him in her cruiser, and stood nearby awaiting backup. Within minutes, Officers Herron and Locke arrived. While Locke watched Myrick, Bengé and Herron searched the area where Myrick threw the object. They found—and Herron retrieved—a loaded black revolver.

{¶ 33} On July 20, 2009, Myrick was indicted on one count of aggravated menacing, R.C. 2903.21, one count of tampering with evidence, R.C. 2921.12(A)(1) (alter/destroy), that included a 3-year firearm specification, R.C. 2941.145(A), and one count of having a weapon under a disability, R.C. 2923.13(A)(3) (prior drug conviction). A public defender was appointed, and trial was set for September 8, 2009. A week before trial, Myrick asked for a continuance. The trial court agreed, and, on September 9, the trial was rescheduled for the week of December 7, 2009. A pre-trial hearing on November 30 confirmed that the trial would begin on December 8.

{¶ 34} At an in-court status conference held the day before trial, Myrick told the trial court that he wanted to defend himself. Myrick had no real complaints about defense counsel; he simply believed that he could defend himself better: “I think I can do that [defend himself] better. I think I can just represent—no offense to him [defense counsel], Your Honor. But, you know, like I’m dealing with—I mean, you know, I’m going to be the one locked up not him. So I’d rather—if something happen. So I’d rather represent myself.” (Tr. 15).

{¶ 35} The state began presenting its case, as scheduled, on December 8. Pittman, Boykins, Jones, and Wynn all testified that they saw a small black revolver in Myrick’s hand. The next day, Wednesday, December 9, after calling several police

officers, the state rested. Myrick then began to argue with the trial judge over the calling of defense witnesses. Myrick eventually identified two police and three non-police witnesses. The court agreed to continue the trial for two days, telling Myrick that he could call the three non-police witnesses on Friday. The court took a brief recess so that Myrick could file the necessary subpoenas. Myrick filed subpoenas for the two police witnesses and one non-police witness. When the trial resumed later that day, the court told Myrick that, in order to make a good use of time, if he planned to testify in his own defense he must do so that day. Myrick refused, saying that he wanted his witnesses to testify first.

{¶ 36} When trial resumed on Friday, December 11, none of Myrick's witnesses were present. Service of all the subpoenas had failed for insufficient time for service. The trial court denied Myrick's request to compel the witnesses' attendance and denied his request to continue the trial. Myrick again refused to take the stand himself before his witnesses had testified. Myrick continued to argue with the judge, who eventually deemed that Myrick had rested his defense.

{¶ 37} The court found Myrick not guilty of aggravated menacing but convicted him of the remaining charges, sentencing Myrick to one year's imprisonment for the two offenses and to a consecutive three years' imprisonment for the firearm specification.

{¶ 38} Myrick assigns five errors to the trial court. The first four, which we will address together, allege due-process violations during the trial. The fifth alleges that there is insufficient evidence to support the 3-year firearm specification.

{¶ 39} “The trial [court] committed reversible error and denied Mr. Myrick’s rights to compulsory process, a fair trial, and due process of law, in violation of Mr. Myrick’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

{¶ 40} “The trial court abused its discretion when it denied Mr. Myrick’s right to present a complete defense to the State’s charges against him, and exerted excessive control over Mr. Myrick’s trial, in violation of Mr. Myrick’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

{¶ 41} “The trial court abused its discretion when it overruled Mr. Myrick’s multiple motions to continue his trial, in violation of Mr. Myrick’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

{¶ 42} “The cumulative nature of the trial court’s errors during Mr. Myrick’s trial, as presented within the Assignments of Error I, II, and III, denied Mr. Myrick’s rights to a fair trial and due process of law, in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

{¶ 43} Justice demands fairness. See *U.S. v. Valenzuela-Bernal* (1982), 458

U.S. 858, 872, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (saying that “fairness [is] essential to the very concept of justice”). That a criminal defendant will be treated with fairness is guaranteed by the Due Process Clauses of the Ohio and United States constitutions. Cf. *id.* The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law”; the Due Process Clause of the Ohio Constitution provides similarly, see Section 16, Article I, Ohio Constitution. In a criminal trial, a defendant’s right “to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi* (1973), 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297, cited in *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, at ¶12. The U.S. and Ohio constitutions therefore “guarantee[] criminal defendants a meaningful opportunity to present a complete defense.” *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (Internal citations omitted.). The right to a fair and meaningful opportunity to defend includes the right to present witnesses. *Washington v. Texas* (1967), 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (saying that “a fundamental element of due process of law” is the right to present witnesses).

{¶ 44} The matters to which Myrick has assigned error implicate matters within the sound discretion of the trial court. It is clear from the transcript that the trial judge worked hard to treat Myrick fairly and was successful. The judge was commendably patient with Myrick’s argumentativeness and with Myrick’s stubborn insistence on the way he believed he “should” be permitted to defend himself. While another court may have determined these matters differently, we see no due-process violation or abuse of

discretion in the way this court determined them.

{¶ 45} The right to present witnesses is guaranteed by the Compulsory Process Clauses of the Ohio and United States constitutions,² which contain the right to have compulsory process for obtaining favorable witnesses. *State v. Brock*, Montgomery App. No. 19291, 2002-Ohio-7292, at ¶11. As their name suggests, the Compulsory Process Clauses also include the right to compel the attendance of those favorable witnesses. *Id.* at ¶11.

{¶ 46} Myrick contends that the trial court deprived him of his due-process right to compulsory process when the court refused to compel the attendance of his witnesses. We disagree. Myrick failed first to exercise his right to present favorable witnesses by failing to subpoena them in a timely manner.

{¶ 47} The right to a fair opportunity to defend is not absolute, and it does not require that all evidence favorable to the defendant be admitted. *Swann*, at ¶13 (Citations omitted.). When exercising this right, the defendant must comply with the rules of procedure. *Id.* at ¶14 (“ ‘In the exercise of this right, the accused * * * must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’ ”), quoting *Chambers*, at 302. The defendant is not denied a fair opportunity to defend solely because a rule operates to exclude favorable evidence. *Id.* at ¶15, quoting *U.S. v.*

²The Compulsory Process Clause of the Sixth Amendment to the U.S. Constitution provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor”; the Compulsory Process Clause of Ohio’s Constitution provides similarly, see Section 10, Article I, Ohio Constitution.

Scheffer (1998), 523 U.S. 303, 316, 118 S.Ct. 1261, 140 L.Ed.2d 413.

{¶ 48} In Ohio, Criminal Rule 17 both implements a defendant's right to present witnesses and limits it. A defendant exercises the right by having the clerk issue a Crim.R. 17(A) subpoena. *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, at ¶123. If the defendant does not first exercise his right to present witnesses by ensuring valid service of a subpoena, he may not later exercise his right to invoke the trial court's power to compel their attendance at trial. See *Brock*, at ¶40 (saying that a defendant has "the right to invoke the trial court's power to compel the attendance of any defense witness who ha[s] been duly served with a subpoena"); see, also, *State v. Juenger*, Butler App. No. CA2003-02-049, 2004-Ohio-796, at ¶30-36 (finding no compulsory process violation in a trial court's refusal to compel the attendance of a defense witness for whom a subpoena was filed but never served).

{¶ 49} Here, none of Myrick's three witnesses was served with a subpoena. According to the record, on December 11, service on all three failed because the time available for service was insufficient. Indeed, one of the officers was on vacation leave and would not return for over a week. Since none of Myrick's witnesses was served, the trial court did not err by refusing to compel their attendance. In addition, Myrick failed to proffer what testimony these witnesses would provide. Evid.R. 103(A)(2) requires an offer of proof to preserve any error in excluding evidence. *State v. Gilmore*, 28 Ohio St.3d 190 (1986).

{¶ 50} Myrick contends that the trial court deprived him of due process when it limited to three the number of favorable witnesses that he could call. We disagree.

{¶ 51} As we noted above, the right to present favorable witnesses may be limited. Pertinently, a trial court may limit the number of witness that a defendant may present without violating due process. See *State v. Denis* (1997), 117 Ohio App.3d 442, 446. This is particularly true when the defendant fails to show that additional witnesses would help his defense. *State v. Kreuzer* (Aug. 6, 1999), Greene App. No. 98-CA-100 (saying that “in order to establish a violation of his Sixth Amendment right[] * * * to have compulsory process to obtain witnesses in his favor, a defendant must demonstrate that he was deprived of testimony that would have aided him in his defense”) (Citation omitted.).

{¶ 52} When the trial court first asked Myrick who he wished to call Myrick replied that he planned on calling “some police officers,” whose names he did not then know. (Tr. 72). Myrick eventually identified five potential witnesses, only two of whom he could not have presented—Wayne Harris and Cheryl Jackson. Myrick did not tell the trial court who these two people are, what role they played in the events, or whether they were even present that afternoon. We therefore find no due process violation.

{¶ 53} Myrick contends that the trial court violated his right to due process when the court insisted that he testify before his witnesses did. Myrick is correct, but we find that the matter is moot since no witnesses testified.

{¶ 54} Requiring a defendant to testify before his witnesses violates due process. The United States Supreme Court held in *Brooks v. Tennessee* (1972), 406 U.S. 605, 612, 92 S.Ct. 1891, 32 L.Ed.2d 358, that a statutory requirement that before presenting other defense witnesses the criminal defendant must first take the stand

violated not only a defendant's right against self incrimination but also the defendant's right to due process. "[T]he accused and his counsel," said the Court, "may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand." *Brooks*, at 613.

{¶ 55} Here, because it had agreed to delay the trial for two days, the court wanted "to make the most expeditious use of our time that we can make." (Tr. 326). To that end, the court insisted that, if he was going to testify, Myrick testify that day before his witnesses did. The court relented somewhat and told Myrick that, if he wished, Myrick could testify again after his witnesses had done so. In any event, since no other witnesses but Myrick testified, he suffered no harm from the trial court's ruling.

{¶ 56} Myrick contends that the trial court should have granted him a another continuance, or a longer continuance, to secure the appearance of his witnesses. We disagree.

{¶ 57} "The grant or denial of a continuance is a matter that is entrusted

{¶ 58} to the broad, sound discretion of the trial judge." *State v. Brooks* (1989), 44 Ohio St.3d 185, 195, citing *State v. Unger* (1981), 67 Ohio St.2d 65, at paragraph one of the syllabus. And a reviewing court must give due deference to the trial judge's decision in the matter. See *Ungar v. Sarafite* (1964), 376 U.S. 575, 591, 84 S.Ct. 841, 11 L.Ed.2d 921.

{¶ 59} The question for the reviewing court is whether the trial court's denial was so arbitrary as to violate due process. See *id.* at 589. When deciding this, "[t]here are no mechanical tests." *Id.* Rather, the reviewing court must use "a balancing test which

takes cognizance of all competing considerations.” *State v. Sowders* (1983), 4 Ohio St.3d 143, 144, citing *Unger*. Such considerations include particular objective factors: “it must consider the length of the requested continuance; any prior continuances; the inconvenience to the litigants, witnesses, opposing counsel and the court; reasons for the delay; whether the defendant contributed to the delay; and other relevant factors.” *State v. Mullins*, Montgomery App. No. 21277, 2007-Ohio-1051, at ¶42 (Citation omitted.); *Unger*, at 67-68. “It is within the trial court’s discretion to decide which of the above factors is to be given the most weight.” *State v. Parker*, Montgomery App. No. 18926, 2002-Ohio-3920, at ¶16 (Citation omitted.).

{¶ 60} Here, several factors support the trial court’s decision. Myrick had already been granted a continuance three months prior, shortly before the case was originally scheduled for trial. Moreover, Myrick never told the court how long of a continuance he needed.³ Importantly, Myrick himself created the need for a delay.

{¶ 61} Myrick never mentioned these or any witnesses until the day before trial—not in the months leading up to the original trial date nor in the months leading up to the rescheduled date. As the trial court pointed out, Myrick knew the day the first continuance was granted—three months before—that the trial would be begin the week of December 8. And this date was confirmed at the November 30 hearing, a week before the trial. Yet, in all this time, Myrick never disclosed these witnesses to anyone—not even to defense counsel. The court asked counsel about defense witnesses during a sidebar held at the December 7 status conference:

³We infer that it needed to be at least nine days because according to the record one of the officers was taking pre-approved vacation-time for another nine days.

{¶ 62} “THE COURT: * * * [W]ould you have had any other defense witnesses besides him [Myrick]?”

{¶ 63} “[STATE]: No list has been filed.

{¶ 64} “[COUNSEL]: No, nobody beyond what [the state] has listed.

{¶ 65} “* * *

{¶ 66} “[COUNSEL]: I’m unaware of any new witnesses as I stand here. I mean

{¶ 67} he may have something else to tell you, but I don’t know of any such people.

{¶ 68} “THE COURT: Okay. Has he told you I want you to have—I want you to talk to so-and-so?

{¶ 69} “[COUNSEL]: No.

{¶ 70} “THE COURT: I want that person—

{¶ 71} “[COUNSEL]: No.

{¶ 72} “THE COURT: —called as a witness, and that person will say such-and-such?

{¶ 73} “[COUNSEL]: No.”

{¶ 74} We note too that by rule Myrick had the duty to timely disclose any witnesses that he intended to call at trial: “Each party shall provide to opposing counsel a written witness list * * * of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal.” Crim.R. 16(I). The fundamental purpose of this rule “is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity

of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large.” Crim.R. 16(A). “All

{¶ 75} duties,” the rule continues, “are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal.” *Id.*

{¶ 76} Myrick had at least three months in which to subpoena witnesses, but he waited until the last minute. The trial court could legitimately consider this factor and weigh it heavily in denying Myrick another continuance. See *Parker*, at ¶20 (finding that the trial court did not err by denying a continuance where the defendant had sufficient time to cooperate with his attorney and obtain whatever witnesses the defendant believed were necessary). We find no violation of due process in the trial court’s decision not to delay the case any longer.

5. *Cumulative error*

{¶ 77} We have observed that “the Supreme Court of Ohio has stated that numerous harmless errors may cumulatively deprive a defendant of a fair trial and thus may warrant the reversal of his conviction.” *Mullins*, at ¶57, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. Since we have found no harmless errors, Myrick’s contention that the above four errors together constitute reversible error plainly has no merit. Because we find that Myrick was not deprived of due process in any of the particulars alleged in the first four assignments of error, they are all overruled.

B. Sufficiency of the evidence

Fifth Assignment of Error

{¶ 78} “The trial court committed reversible error when it entered a judgment of conviction regarding the firearm specification to Mr. Myrick’s charge of tampering with evidence, and sentenced Mr. Myrick to a three-year term of incarceration regarding the firearm specification, in violation of Mr. Myrick’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.”

{¶ 79} Myrick here contends that the evidence is not sufficient to support the 3-year firearm specification. “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 * * * proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, at paragraph two of the syllabus.

{¶ 80} Section 2929.14(D)(1)(a) of the Revised Code criminalizes having a firearm while committing a felony. Under subsection (iii), in addition to the punishment for the underlying offense, R.C. 2929.14(E)(1)(a), an offender convicted of having a firearm receives a 1-year mandatory prison sentence. Under subsection (ii) the mandatory sentence increases to 3 years if the offender “display[ed] the firearm, brandish[ed] the firearm, indicat[ed] that the offender possessed the firearm, or us[ed] it to facilitate the offense.” R.C. 2929.14(D)(1)(a)(ii).

{¶ 81} Officer Bengé was the only person to see Myrick toss the gun. Bengé testified that, when she first came upon Myrick, she saw him standing beside the fence- and tree-lined edge of the property. She continued: “I was to the side of him. I looked

over this way as soon as I saw him to my left and then as soon as it appeared that he observed me, his arm stretched out like this and he made a pitching motion and I saw something black leave his hand and go into the tree line.” (Tr. 234). We watched the video recording included in the appellate record of the officer giving this testimony. Bengé imitates what she saw by stretching her right arm out and away from the right side of her body, raising it almost shoulder-height, and flicking her wrist like one might to throw a frisbee.

{¶ 82} Myrick concedes that the evidence is sufficient to find that he had a gun. However he contends that he did not display, brandish, indicate he possessed, or use it to facilitate the underlying offense of tampering with evidence. We agree.

{¶ 83} “We start, as always, with the language of the statute.” *Williams v. Taylor* (2000), 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435. The test of subsection (ii) provides that a sentencing court shall impose a 3-year prison sentence if an offender is convicted

{¶ 84} of “having a firearm on or about the offender’s person or under the offender’s control while committing the felony and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense.” R.C. 2929.14(D)(1)(a)(ii). The Ohio Supreme Court has noted that “in enacting (former) R.C. 2929.71,⁴ the General Assembly intended to send a message to the criminal world: ‘If you use a firearm you will get an extra three years of incarceration.’” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 385 (Citation omitted.).

⁴“R.C. 2929.71 has been repealed, effective July 1, 1996. The firearm enhancement provisions are now contained in R.C. 2929.14.” *Thompkins*, at 385 n.3.

The sentencing enhancement in subsection (ii), like the firearm enhancement in the federal sentencing-guidelines, “accounts for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible.” *Dean v. U.S.* (2009), 129 S.Ct. 1849, 1855, 173 L.Ed.2d 785. An offender who not only has a gun but also displays the gun, brandishes it, indicates he possesses it, or uses it to commit the crime “increases the risk that others will be injured, that people will panic, or that violence (with its own danger to those nearby) will be used in response.” *Id.* at 1856.

{¶ 85} Here, we do not think that a rational trier of fact could find beyond a reasonable doubt that Myrick engaged in conduct that the General Assembly sought to punish with a 3-year prison term. None of the risk-increasing types of conduct specified in subsection (ii) is defined by the Revised Code, so we follow the Code’s rule of construction that words and phrases without a technical or particular meaning “be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42. “Dictionaries are a helpful resource in ascertaining the common meaning of terms that a statute leaves undefined,” *Shlahtichman v. 1-800 Contacts, Inc.* (C.A.7, 2010), 615 F.3d 794, 799, citing *Crawford v. Metro. Govt. of Nashville & Davidson Cty., Tenn.* (2009), 129 S.Ct. 846, 850, 172 L.Ed.2d 650, and we look to one leading dictionary to help understand the four types of conduct in subsection (ii). First, Myrick did not use the gun to “facilitate” the underlying offense of tampering with evidence. A thing that “facilitates” “make[s] (an action or process) easy or easier.” Oxford English Dictionary Online, available at <http://oxforddictionaries.com> (last visited Dec. 29, 2010). Having the gun did not make it easier for Myrick to conceal or remove the gun—the gun was the thing concealed or removed. Second, Myrick did not “indicate” that he possessed the

gun. The verb “indicate” generally means “point out; show,” and when the word is used of a person it means “direct attention to (someone or something) by means of a gesture.” Oxford English Dictionary Online, available at <http://oxforddictionaries.com> (last visited Dec. 29, 2010). We do not see any gesture by means of which Myrick directed Officer Benge’s attention to the gun. “Brandish,” third, means “wave or flourish (something, especially a weapon) as a threat or in anger or excitement.” Oxford English Dictionary Online, available at <http://oxforddictionaries.com> (last visited Dec. 29, 2010). Myrick plainly did nothing like that. And fourth, we do not think it could be said that Myrick “displayed” the gun. “Display” in its transitive verb form means “make a prominent exhibition of (something) in a place where it can be easily seen: *the palace used to display a series of Flemish tapestries*.” Oxford English Dictionary Online, available at <http://oxforddictionaries.com> (last visited Dec. 29, 2010). Based on Officer Benge’s testimony we think that the only reasonable inference is that Myrick was simply trying to get rid of the gun. He did not point it at Benge; he made no grand gestures with it. Rather, when he saw a police officer pull up, Myrick quickly tossed the gun over the fence—an obstacle that made it necessary for him to raise his arm.

{¶ 86} While we will reverse the 3-year firearm specification conviction, we will also remand so that the trial court may enter a judgment of conviction for a 1-year firearm specification and resentence Myrick accordingly. See *State v. Holmes*, 181 Ohio App.3d 397, 2009-Ohio-1241, at ¶21 (saying that “in the absence of evidence that defendant did ‘display the weapon, brandish it, indicate that [she possessed] it, or use it,’ there is insufficient evidence to support the three-year firearm specification, and defendant must be resented only on the one-year firearm specification under R.C.

2941.141"). Myrick concedes, and we agree, that the evidence is sufficient for conviction on this specification.

{¶ 87} The fifth assignment of error is sustained.

III.

{¶ 88} We have overruled the first, second, third, and fourth assignments of error, but we have sustained the fifth. Accordingly, the 3-year firearm specification conviction is Reversed, but in all other respects the judgment of the trial court is Affirmed. This matter is Remanded to the trial court so the trial court can impose the one-year sentence provided in R.C. 2941.141.

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FAIN and GRADY, JJ., concur.

Copies mailed to:

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