[Cite as *State v. Qirat,* 2015-Ohio-863.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 14-CA-72
WILLIE DESMOND QIRAT	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 14CR00054
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 10, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH OSWALT Licking County Prosecutor 20 South Second Street Newark, OH 43055	CHRISTOPHER M. COOPER Cooper & Pennington Co., L.P.A. 3055 Cleveland Ave. Columbus, OH 43224

Gwin, P.J.

{¶1} Appellant Willie D. Qirat, aka Desmond W. Qirat ["Qirat"] appeals from his convictions and sentences after a jury trial in the Licking County Court of Common Pleas on Aggravated Robbery, pursuant to R.C. 2911.01, a felony of the first degree, with a three-year firearm specification, R.C. 2941.145; Felonious Assault, R.C. 2903.11, a felony of the second degree, with a three year firearm specification; Attempted Murder, R.C. 2923.02 a felony of the first degree with a firearm specification R.C. 2941.145; Extortion, R.C. 2905.11 a felony of the third degree, with a firearm specification R.C. 2941.145 and as a Repeat Violent Offender Specification, R.C. 2941.149.

Facts and Procedural History

{¶2} On January 22, 2014, Qirat and two others, De'Quan Harrison [aka, "Bue"] and Dacian Cabiness, entered the home of the victim, Brandon Elliott, to allegedly purchase marijuana. The discussion regarding the purchase soon turned into a robbery when Qirat and his co-defendants, pulled guns out. Elliott and Qirat wrestled for the gun produced by Qirat. When Qirat regained control of the gun, he shot Elliott once in the back, severing Elliott's spine.

{¶3} There were four witnesses, in addition to Elliott, who were in the home — Dakota Seabolt, Jordan Frazier, Matthew Mallasee, and April Elliott. These witnesses were able to identify Dacian Cabiness by name and the second individual as Alla De Harrison or "Bue," which is the name that De'Quan Harrison uses on Facebook. Additionally, the home had a security system that recorded all individuals near the home and entering and exiting the home.

{¶4} The trio fled to the home of Jennifer Snyder and her daughter Caitlyn Luckeydoo, located at 95 Hoover St., Newark, Ohio. Caitlyn Luckeydoo is Dacian Cabiness's girlfriend and the mother of his child. Caitlyn Luckeydoo admitted that Dacian Cabiness, De'Quan Harrison ("Bue"), and "Dez" spent most of Tuesday, January 21, 2014, at her home. She testified they left her home at approximate 1:00 a.m. Wednesday morning, telling her they were going to Elliott's home. She said that approximately 30 minutes later, all three returned to her home together, antsy and nervous. All three made statements within her hearing of attempting to rob Brandon Elliott. Caitlyn also stated that her friend Brittney Quinn gave the three codefendants a ride to 1598 Pembroke Avenue, Columbus, Ohio, and then Brittney later gave Caitlyn a ride to that same address. Caitlyn was given a photo line up to see if she could identify "Dez." In this photo line-up, Caitlyn positively identified Qirat as the individual she knew as "Dez."

{¶5} Jennifer Snyder testified that when she arrived home at 8:00 a.m. on January 22, 2014, she found Dacian Cabiness, "Bue," and "Dez" at her home. Ms. Snyder testified that she located a firearm in her laundry basket full of clothes at the house, and had confronted "Bue" and "Dez" about the gun. Ms. Snyder did observe the surveillance video from Elliott's home, and identified Dacian Cabiness, "Bue," and "Dez" as the people in the video. She also testified that the coat that "Dez" is wearing in the video is the same one he wore at her home.

{¶6} Brittney Quinn transported Dacian Cabiness, "Bue," and "Dez" to Columbus on Thursday, January 23, 2014. T. at 174-176. "Dez" told her he did not

know why he had shot Elliott. She also came back, got Caitlyn Luckeydoo, and transported her to the same house where she had dropped off the three co-defendants.

{¶7} Police responded to 1598 Pembroke Avenue, Columbus, Ohio, and located the trio in the house together. Police located several firearms hidden in the attic area. Two of the firearms were identified as those stolen from Elliott's house by the trio. Additionally, police located a black, quilted jacket that appeared to be the same as the one worn by "Dez" in the security video from Elliott's home.

{¶8} Detective Steven Vanoy testified that Qirat was arrested and agreed to be interviewed after being *Mirandized.* This interview was recorded. During this interview, Qirat admitted that Dacian Cabiness, De'Quan Harrison, and he went to Elliott's house to rob him. He also admitted that all three of them had guns on them and that Elliott was shot. Qirat blamed De'Quan Harrison for the shooting. Qirat said that, after Elliott was shot, he, Qirat, stole a shotgun that was on the ground near Elliott's feet. He also stated that the three of them then ran to Caitlyn Luckeydoo's home, and were actually in the home when the police came and knocked on the door. Qirat told the detective that, on Thursday, Brittney gave them a ride to Columbus. Qirat viewed a photograph of the guns that were found in their possession at 1598 Pembroke Avenue, Columbus, Ohio. Qirat pointed out to the detectives which one particular gun each of the trio had on them when they robbed Elliott, and which ones they had stolen from Elliott's home.

{¶9} On the date of the shooting, snow had fallen. Criminalist Timothy Elliget had been able to photograph some distinctive shoe prints, which had been left on the approach to the rear kitchen door of Elliott's home. Upon arrest, the shoes of all of the co-defendants were collected. The left shoe worn by Qirat on the date of his arrest was

found to be consistent with respect to size and tread pattern with the prints left at Elliott's residence on the night of the shooting.

{¶10} On February 6, 2014, detectives with the Newark Police Department transported the firearms seized at 1598 Pembroke Avenue, Columbus, Ohio, to BCI-London Office. Detectives requested that the firearms be test fired for operability. Detectives further requested that a FIOCCHI .45 caliber cartridge case, which had been found in Elliott's home, be compared to bullets test fired by the Ruger model SR45, .45 Auto caliber semi-automatic pistol to determine if that gun fired the casing. This testing was performed on March 19, 2014, and all guns were found to be operable. Testing also determined that the cartridge found in Elliott's home, as well as the bullet taken from Elliott's body, was fired from the Ruger model SR45. The guns were not tested for fingerprinting and DNA evidence. Detective Tim Elliget, an expert in forensics, testified that he would not have recommended these tests due to the multiple people who had handled the guns and the many times they had been transported.

{¶11} On March 25, 2014, Qirat's trial attorney inquired regarding possible DNA testing of the guns that were recovered. On April 3, 2014, Qirat filed a Motion to Dismiss Complaint and Charges Contained Therein, based upon the supposed destruction of exculpatory evidence by the State of Ohio, such evidence being potential DNA and fingerprint evidence on the guns.

{¶12} On April 8, 2014, Qirat filed a Motion to Exclude Evidence and Preclude Trial Identification regarding the photo array given to Caitlyn Luckeydoo.

{¶13} The state filed a Memorandum in Opposition to Qirat's Motion to Dismiss on April 10, 2014, and a Supplemental Memorandum in Opposition to Qirat's Motion to

Dismiss on June 25, 2014. The state also filed a Memorandum in Opposition to Qirat's Motion to Exclude Evidence & Preclude Trial Identification on April 22, 2014.

{¶14} An evidentiary hearing was held on these motions on June 30, 2014. The trial court took the two motions under advisement at that time. The trial court denied both motions by Judgment Entry filed August 4, 2014.

{¶15} The case proceeded to trial by jury. Qirat and the state entered into a written stipulation regarding his prior conviction, to be used solely as to Count 3 of the Indictment, Having Weapons While Under Disability.

{¶16} Qirat testified in his own defense. Qirat testified and claimed that he was home at the time the crimes were committed. Qirat claimed that he took the blame for Jack Johnson, so that Jack Johnson could spend a few more weeks with his family. On direct-examination, Qirat admitted he had been previously convicted of three counts of Aggravated Robbery with a Gun Specification. On cross-examination Qirat admitted he had spent thirteen years in prison for those crimes.

{¶17} After the trial, the jury returned verdicts of guilty on each and every count. The Court then proceeded with the following sentence: 11 years on the attempted murder, count 4, count 2 felonious assault merged with the aggravated robbery count, count 1, aggravated robbery to a term of 8 years imprisonment, a three year gun specification, two years on the extortion charge and on the weapon under disability charge. The court further found that pursuant to 2929.14(B)(2)(A) of the revised code, the term is inadequate to punish Qirat and protect the public, and would be demeaning to the seriousness of the offense. Accordingly the trial court then imposed a period of 6 years for the repeat violent offender specification. Qirat was sentenced to an aggregate

term of thirty-two years. The court ran the sentences consecutively, finding it necessary to protect the public based on Qirat's prior criminal history, behavior throughout the trial and lack of remorse. There were no fines or costs other than costs of prosecution and counsel fees.

Assignments of Error

{¶18} Qirat raises four assignments of error,

{¶19} "I. THE TRIAL COURT ERRED WHEN IT ALLOWED THE OUT OF COURT IDENTIFICATION OF THE APPELLANT.

{¶20} "II. THE TRIAL COURT ERRED IN NOT GRANTING THE APPELLANTS' MOTION TO DISMISS.

{¶21} "III. THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL FOR THE STATE'S INTRODUCTION OF CHARACTER EVIDENCE BEYOND THE SCOPE OF THE STIPULATION.

{¶22} "IV. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

I.

{¶23} In his first assignment of error, Qirat argues that the trial court erred by not suppressing the photo lineup identification of him by Caitlyn Luckeydoo. Qirat claims that the procedure was unduly suggestive.

{¶24} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154-155, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When ruling on a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and to evaluate witness

credibility. See *State v. Dunlap*, 73 Ohio St.3d 308,314, 1995-Ohio-243, 652 N.E.2d 988; *State v. Fanning*, 1 Ohio St.3d 19, 20, 437 N.E.2d 583 (1982). Accordingly, a reviewing court must defer to the trial court's factual findings if competent, credible evidence exists to support those findings. See *Burnside,* supra; *Dunlap,* supra; *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1(4th Dist.1998); *State v. Medcalf*, 111 Ohio App.3d 142, 675 N.E.2d 1268 (4th Dist.1996). However, once this Court has accepted those facts as true, it must independently determine as a matter of law whether the trial court met the applicable legal standard. See *Burnside,* supra, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539(4th Dist 1997); See, generally, *United States v. Arvizu*, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740(2002); *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911(1996). That is, the application of the law to the trial court's findings of fact is subject to a *de novo* standard of review *Ornelas*, supra. Moreover, due weight should be given "to inferences drawn from those facts by resident judges and local law enforcement officers." *Ornelas*, supra at 698, 116 S.Ct. at 1663.

{¶25} Introducing as evidence the results of an unduly suggestive police identification procedure may violate a defendant's right to due process and require a trial court to suppress that evidence. *See Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969) (finding that due process required the exclusion of an eyewitness identification obtained through a procedure making identification of the defendant inevitable). Due process concerns arise, however, only when (1) the identification procedure is arranged by law enforcement officials, (2) the procedure is unnecessarily suggestive, and (3) the procedure creates a substantial likelihood of

misidentification. See *Perry v. New Hampshire*, ––U.S.––––, 132 S.Ct. 716, 724, 181 L.Ed.2d 694 (2012). Moreover, even when police use an unduly suggestive procedure, due process does not necessarily require the suppression of the resulting identification. *Manson v. Brathwaite,* 432 U.S. 98, 112–13, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). "Where the 'indicators of [a witness'] ability to make an accurate identification' are 'outweighed by the corrupting effect' of law enforcement suggestion, the identification should be suppressed. Otherwise, the evidence (if admissible in all other respects) should be submitted to the jury." Id. (citations omitted). See, also*, State v. Mitchell*, 5th Dist., Stark No. 2013CA00030, 2013-Ohio-3696, ¶21, 22.

{¶26} *Perry* clarified that the due process concerns on which the undue-suggestiveness framework is based arise only when identification is "infected by improper police influence." 132 S.Ct. at 720. By contrast, the Supreme Court stated that it would "not [extend] pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers." Id. at 720–21. It reached this outcome by noting that the undue-suggestiveness framework is not premised on unreliability of evidence alone, but "turn[s] on the presence of state action and aim[s] to deter police from rigging identification procedures." Id. at 721.

{¶27} In *Perry*, police responded to a call reporting that an African–American male was trying to break into cars parked in the lot of the caller's apartment building. Officer Clay responded to the call. Upon arriving at the parking lot, Clay heard what "sounded like a metal bat hitting the ground." She then saw Perry standing between two cars. Perry walked toward Clay, holding two car-stereo amplifiers in his hands. A metal

bat lay on the ground behind him. Clay asked Perry where the amplifiers came from. "[I] found them on the ground," Perry responded.

{¶28} By this time, another officer had arrived at the scene. Clay asked Perry to stay in the parking lot with that officer, while she and another tenant went to talk another eyewitness inside the apartment building. When the officer asked the eyewitness to describe the man, the witness pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Perry's arrest followed this identification.

{¶29} On appeal, Perry argued that the trial court erred in requiring an initial showing that police arranged a suggestive identification procedure. Suggestive circumstances alone, Perry contended, suffice to require court evaluation of the reliability of an eyewitness identification before allowing it to be presented to the jury.

{¶30} The Supreme Court in *Perry* held the Due Process Clause does not require a preliminary judicial inquiry into the reliability of eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. In other words, if there is no showing that police employed an unduly suggestive procedure to obtain an identification, the unreliability of the identification alone will not preclude its use as evidence at trial. Instead, such unreliability should be exposed through the rigors of cross-examination. *Perry* at 132 S.Ct. at 728–730.

{¶31} In Ohio, R.C. 2933.83, Minimum requirements for live lineup or photo lineup procedures, suggests a preference for the double blind and sequential method as

opposed to the traditional "six pack" array method for photo arrays. The statute provides, in part,

> (6) "Folder system" means a system for conducting a photo lineup that satisfies all of the following:
>
> (a) The investigating officer uses one "suspect photograph" that resembles the description of the suspected perpetrator of the offense provided by the eyewitness, five "filler photographs" of persons not suspected of the offense that match the description of the suspected perpetrator but do not cause the suspect photograph to unduly stand out, four "blank photographs" that contain no images of any person, and ten empty folders.
>
> (b) The investigating officer places one "filler photograph" into one of the empty folders and numbers it as folder 1.
>
> (c) The administrator places the "suspect photograph" and the other four "filler photographs" into five other empty folders, shuffles the five folders so that the administrator is unaware of which folder contains the "suspect photograph," and numbers the five shuffled folders as folders 2 through 6.
>
> (d) The administrator places the four "blank photographs" in the four remaining empty folders and numbers these folders as folders 7 through 10, and these folders serve as "dummy folders."
>
> (e) The administrator provides instructions to the eyewitness as to the lineup procedure and informs the eyewitness that a photograph of the

alleged perpetrator of the offense may or may not be included in the photographs the eyewitness is about to see and that the administrator does not know which, if any, of the folders contains the photograph of the alleged perpetrator. The administrator also shall instruct the eyewitness that the administrator does not want to view any of the photographs and will not view any of the photographs and that the eyewitness may not show the administrator any of the photographs. The administrator shall inform the eyewitness that if the eyewitness identifies a photograph as being the person the eyewitness saw the eyewitness shall identify the photograph only by the number of the photograph's corresponding folder.

(f) The administrator hands each of the ten folders to the eyewitness individually without looking at the photograph in the folder. Each time the eyewitness has viewed a folder, the eyewitness indicates whether the photograph is of the person the eyewitness saw, indicates the degree of the eyewitness's confidence in this identification, and returns the folder and the photograph it contains to the administrator.

(g) The administrator follows the procedures specified in this division for a second viewing if the eyewitness requests to view each of the folders a second time, handing them to the eyewitness in the same order as during the first viewing; the eyewitness is not permitted to have more than two viewings of the folders; and the administrator preserves the order of the folders and the photographs they contain in a facedown

position in order to document the steps specified in division (A)(6)(h) of this section.

(h) The administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (f) of this section before the eyewitness views each of the folders a second time and before the administrator views any photograph that the eyewitness identifies as being of the person the eyewitness saw. The documentation and record includes the date, time, and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photographs shown to the eyewitness; copies of each photograph shown to the eyewitness; the order in which the folders were presented to the witness; the source of each photograph that was used in the procedure; a statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of the photographs as being of the person the eyewitness saw that is taken immediately upon the reaction of the eyewitness to viewing the photograph; and any additional information the administrator considers pertinent to the lineup procedure. If the eyewitness views each of the folders a second time, the administrator shall document and record the statement of the eyewitness's confidence in the eyewitness's own words as to the certainty of the eyewitness's identification of a photograph as being of the person the eyewitness saw and document that the

identification was made during a second viewing of each of the folders by the eyewitness.

(i) The administrator shall not say anything to the eyewitness or give any oral or nonverbal cues as to whether or not the eyewitness identified the "suspect photograph" until the administrator documents and records the results of the procedure described in divisions (A)(6)(a) to (g) of this section and the photo lineup has concluded.

{¶32} However, failure to present the photo array using the double-blind and sequential methods does not make the identification procedure unduly suggestive. When a police agency uses the double-blind method, a photo array is shown by a neutral officer without knowledge of who the targeted suspect is so that the officer cannot subconsciously or unintentionally communicate to the witness which photo should be selected. The sequential-presentation method uses single photos of the suspect and other individuals, rather than the traditional "six-pack" array. *State v. Monford,* 190 Ohio App.3d 35, 2010-Ohio-4732, 940 N.E.2d 634, ¶51-54(10th Dist.).

{¶33} In the case at bar, the traditional "six pack" array method was used. The failure to strictly comply with R.C. 2933.83 does not render the pretrial identification procedure per se impermissibly suggestive. Rather, all facts and circumstances must be considered. *See State v. Murphy*, 91 Ohio St.3d 516, 534, 2001-Ohio-112, 747 N.E.2d 765.

{¶34} In the current case, Caitlyn Luckeydoo was the witness who had participated in the photo array. She had observed Qirat for almost the entire day before the crimes occurred and for at least a day and one-half after the crimes occurred. The

photo array in the case at bar was created using the Ohio Law Enforcement Gateway system (OLEG). T. June 27, 2014, at 20. This system,

> Automatically populates his picture, randomly places it in the lineup, and then automatically pulls the candidates that have the same height, weight, hair and eye color, and it pulls pictures for you.

T. June 27, 2014, at 20. The array is populated with driver license photos whenever possible. Id. at 21. A key is provided with the lineup that contains all the driver license information concerning each picture. (Id.).

{¶35} In the case at bar, the lineup was conducted by a "blind administrator," as defined by R.C. 2933.83 (A)

> (3) "Blinded administrator" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness. "Blinded administrator" includes an administrator who conducts a photo lineup through the use of a folder system or a substantially similar system.

T. June 27, 2014, at 23-24; 31. Ms. Luckeydoo was given the appropriate admonition. R.C. 2933.83(B)(5). The procedure adopted by the Newark Police department was admitted at the hearing. R.C. 2933.83(D). The entire identification procedure was recorded. State's Exhibit 5; T. June 27, 2014 at 34.

{¶36} In the case at bar there was no improper police influence in the identification procedure. However, even assuming arguendo the procedure was unduly suggestive, we would find any such error to be harmless beyond a reasonable doubt, because when, after the tainted evidence is removed, the remaining evidence is

overwhelming. *State v. Williams*, 6 Ohio St.3d 281, 290, 452 N.E.2d 1323 (1983), *quoting Harrington v. California,* 395 U.S. at 254, 89 S.Ct. 1726, 23 L.Ed.2d 284. *State v. Morris*, __ Ohio St.3d __, 2014-Ohio-5052, __ N.E.3d __ (2014), ¶32.

{¶37} In the case at bar, Detective Steven Vanoy testified that Qirat admitted he was at the home, that all three individuals had guns, and after Elliott was shot the trio ran to Ms. Luckeydoo's home. Elliott himself testified that Qirat shot him. The two co-defendants, Dacian Cabiness and De'Quan Harrison testified that Qirat shot Elliott. Brittany Quinn transported the trio to Columbus, Ohio during which Qirat stated he did not know why he shot Elliott. The home had a video surveillance system, which captured images of the individuals arriving and departing Elliott's residence.

{¶38} Based upon the entire record before us, we conclude that any error in the admission of the photo array testimony by Ms. Luckeydoo was harmless beyond a reasonable doubt.

Qirat's first assignment of error is overruled.

II.

{¶39} In his second assignment of error, Qirat claims that the trial court erred in denying his motion to dismiss, because the state destroyed materially exculpatory evidence. Specifically, Qirat contends that the state failed to request or preserve potential fingerprint and DNA evidence on the weapons that were recovered from 1598 Pembroke Avenue, Columbus, Ohio.

{¶40} In *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281(1988), the United States Supreme Court addressed the issue of whether a criminal

defendant is denied due process of law by the State's failure to preserve evidence. The United States Supreme Court stated the following:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in [*Maryland v. Brady* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant....We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless 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.

488 U.S. at 57-58, 109 S.Ct. 333, 102 L.Ed.2d 281. Thus, the *Youngblood* Court established two tests: one that applies when the evidence is "materially exculpatory" and one when the evidence is "potentially useful." If the state fails to preserve evidence that is materially exculpatory, the defendant's rights have been violated. If, on the other hand, the state fails to preserve evidence that is potentially useful, the defendant's rights

have been violated only upon a showing of bad faith. “If the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation.” *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶10; *State v. Combs,* 5th Dist. Delaware No. 03CA-C-12-073, 2004-Ohio-6574, ¶ 16; *State v. Cummings*, 5th Dist. Stark No. 2005-CA-00295, 2006-Ohio-2431, ¶29.

{¶41} Mere speculation does not meet the accused’s burden to show that the withheld evidence is material. *State v. Davis*, 116 Ohio St.3d 404, 2008–Ohio–2, 880 N.E.2d 31, at ¶339; *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549(1991), *quoting United States v. Agurs* 427 U.S. 97, 109–110, 96 S.Ct. 2392, 49 L.Ed.2d 342(1976) (“‘The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the constitutional sense’”). *State v. Rivas,* 121 Ohio St.3d 469, 2009-Ohio-1354, 905 N.E.2d 618, ¶14.

{¶42} In the case at bar, Qirat never asked the state for permission to have the firearms, shell casing or bullet tested. Consequently, Qirat cannot demonstrate that the state withheld the, at best, potentially exculpatory evidence from him. Further the state presented testimony that the items were not tested because 1). Heat from firing the gun could have destroyed the fingerprint or DNA evidence, if any; 2). The person who placed or loaded the round into the weapon may not be the same person who fired the weapon; and 3). Multiple parties had access to the weapon after the shooting. Therefore, Qirat cannot prevail because the record does not reveal bad faith by the police or the prosecution. In *State v. Powell, the Ohio Supreme Court observed,*

> "The term 'bad faith' generally implies something more than bad judgment or negligence." *State v. Tate*, 5th Dist. No. 07CA55, 2008-Ohio-3759, 2008 WL 2896658, ¶13. "'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent *246 to mislead or deceive another.' " *Hoskins v. Aetna Life Ins. Co*., 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (1983), *quoting Slater v. Motorists Mut. Ins. Co*., 174 Ohio St. 148, 187 N.E.2d 45 (1962), paragraph two of the syllabus. [Overruled on other grounds in *Zoppo v. Homestead Ins. Co*., 71 Ohio St.3d 552 (1994)].

132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶81.

{¶43} Even if Qirat's fingerprints or DNA was not found on the weapons, shell casing or bullet it would not necessarily lead to Qirat's exoneration. A person need not be the principal offender to be convicted of a crime. R.C. 2923.03(A)(2) provides that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." "To support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796 (2001), syllabus. "The criminal intent of the aider and abettor can be inferred from the presence, companionship, and conduct of the defendant before and after the offense is committed" *State v. Hickman*, 5th Dist. Stark

No. 2003-CA-00408, 2004-Ohio-6760, ¶44. A person who violates R.C. 2923.03(A)(2) is guilty of complicity and "shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense." R.C. 2923.03(F).

{¶44} In the case at bar, Detective Steven Vanoy testified that Qirat admitted he was at the home, that all three individuals had guns, and after Elliott was shot the trio ran to Ms. Luckeydoo's home. Elliott himself testified that Qirat shot him. The two co-defendants, Dacian Cabiness and De'Quan Harrison testified that Qirat shot Elliott. Brittany Quinn transported the trio to Columbus, Ohio during which Qirat stated he did not know why he shot Elliott. The home had a video surveillance system, which captured images of the individuals arriving and departing Elliott's residence.

{¶45} There is absolutely no evidence in the record before this Court that any law enforcement agency, personnel or prosecutor acted in bad faith.

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

III.

{¶47} In his third assignment of error, Qirat maintains that the trial court should have declared a mistrial because the state violated a pre-trial stipulation concerning the use of his prior convictions for three aggravated robberies with gun specifications.

{¶48} State's exhibit 1, "Stipulation" states as follows,

> Now comes the State of Ohio and the defendant, through their respective counsel, and hereby agree and stipulate to the following:
>
> At all times relevant to this case, the Defendant had previously been convicted of an offense of violence that is a felony of the first degree.

{¶49} Qirat argues that this stipulation was to be used to show the prior conviction for establishing the element required for the state to convict Qirat of Having a Weapon While under a Disability.

{¶50} A "stipulation" has been defined as,

> A stipulation is a voluntary agreement entered into between opposing parties concerning the disposition of some relevant point in order to avoid the necessity for proof on an issue. *In re All Kelley & Ferraro Asbestos Cases*, Cuyahoga App. Nos. 83348 and 83628, 2005-Ohio-2608, 2005 WL 1245639, *citing Rice v. Rice* (Nov. 8, 2001), Cuyahoga App. No. 78682, 2001 WL 1400012. A stipulation may also be defined as a voluntary agreement, admission, or concession made by the parties or their attorneys concerning disposition of some relevant point in order to eliminate the need for proof or to narrow the range of issues to be litigated. *State v. Small*, 162 Ohio App.3d 375, 2005-Ohio-3813, 833 N.E.2d 774; *Baum v. Baum* (Nov. 26, 1997), Wayne App. No. 97CA0022, 1997 WL 775770.

Wilson v. Harvey, 164 Ohio App.3d 278, 2005-Ohio-5722, 842 N.E.2d 83(8th Dist), ¶ 12. The Ohio Supreme Court has observed,

> "Agreements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable. * * * Although R.C. 2945.06 requires the court to 'examine the witnesses' in determining whether the accused is guilty of aggravated murder, we find that appellant was bound by the

> agreed-upon procedure wherein the state would proffer a statement of facts in lieu of witnesses or other evidence.

State v. Post, 32 Ohio St.3d 380, 393, 513 N.E.2d 754(1987); *Accord, State v. Wesson,* 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶50. A stipulation, which is agreed to by both parties, is evidence. *State v. Turner,* 105 Ohio St.3d 331, 2005-Ohio-1938, 826 N.E.2d 266, ¶40. "'[W]hen a stipulation of facts is handed up by the adversaries in a case, the trier of facts must accept what is set forth as a statement of settled fact that is undisputed and binding upon the parties to the agreement.'" *DiSanto v. Safeco Ins. of Am*., 168 Ohio App.3d 649, 2006-Ohio-4940, 861 N.E.2d 573(11th Dist.), ¶ 53, *quoting Newhouse v. Sumner*, 1st Dist. Hamilton No. C–850665, at 3–4, 1986 WL 8516(Aug. 6, 1986); *Kestner v. Kestner,* 173 Ohio App.3d 632, 2007-Ohio-6222, 879 N.E.2d 849(7th Dist.), ¶29.

{¶51} In the case at bar, it was Qirat himself, not the state that brought up his prior conviction,

> [Qirat]: Known him since I was - - 14. We grew up together. We were both bound over as adults.
>
> [Defense counsel]: Bound over as juveniles and tried as an adult?
>
> [Qirat]: Yes, ma'am.
>
> [Defense counsel]: And that was for three aggravated robberies that you were convicted of?
>
> [Qirat]: Yeah, when I was 16, yes ma'am.
>
> [Defense Counsel]: When you were 16. So you were in prison with him [Jack Johnson].

[Qirat]: A. Yes, ma'am.

2T. at 499. "Under Evid.R. 609, a trial court has broad discretion to limit any questioning of a witness on cross-examination which asks more than the name of the crime, the time and place of conviction and the punishment imposed, when the conviction is admissible solely to impeach general credibility." *State v. Amburgey*, 33 Ohio St.3d 115, 515 N.E.2d 925(1987), syllabus. *See, also, State v. Wright*, 48 Ohio St.3d 5, 548 N.E.2d 923(1990); *State v. Robb,* 88 Ohio St.3d 59, 71, 2000-Ohio-275, 723 N.E.2d 1019.

{¶52} In the case at bar, Qirat brought to the attention of the jury that Qirat had been 1). Bound over and tried as an adult; 2). Convicted of three aggravated robberies; and 3). Served time in prison. In contrast, the state brought out that Qirat spent thirteen years in prison. (2T. at 510). In light of Qirat's own admissions to the jury, Qirat does not make a compelling argument that the length of the prison sentence was so prejudicial that a mistrial was warranted.

{¶53} Qirat's third assignment of error is overruled.

IV.

{¶54} In his fourth assignment of error, Qirat argues that he was denied effective assistance of trial counsel. Specifically, Qirat contends that counsel should have should have requested DNA and fingerprint testing of the weapons, shell casing and bullet and should have renewed a Crim.R. 29 motion for a judgment of acquittal after the jury returned its verdict.

{¶55} The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St.3d

136, 538 N.E.2d 373(1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

{¶56} First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and volatile of any of his essential duties to the client.

{¶57} Recently, the United States Supreme Court discussed the prejudice prong of the *Strickland* test,

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at

> 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, __U.S.__, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

{¶58} Qirat moved for acquittal at the close of the state's case and the close of the defense case. Both motions were overruled by the trial court. Nothing in the record suggests that had he made a Crim.R. 29 motion after the jury convicted him, the result would have been different. Defense counsel's failure to move for a Crim.R. 29 acquittal does not constitute deficient performance when there is no reasonable possibility the motion would succeed. *State v. Brown,* 2nd Dist. Montgomery No. 19113, 2002 -Ohio-6370, ¶48.

{¶59} As we discussed in resolving Qirat's second assignment of error, not finding his fingerprints or DNA on the weapon, shell casing or bullet would not necessarily lead to an acquittal or exoneration.

{¶60} Having reviewed the record that Qirat cites in support of his claim that he was denied effective assistance of counsel, we find Qirat was not prejudiced by defense counsel's representation of him. The result of the trial was not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel. Qirat has failed to demonstrate that there exists a reasonable probability that, had trial counsel presented a motion for DNA evidence or fingerprint evidence or moved for acquittal the result of his case would have been different. Because we have found no instances of prejudice in this case, we find Qirat has not demonstrated that he was prejudiced by trial counsel's performance.

{¶61} Qirat's fourth assignment of error is overruled.

{¶62} For the forgoing reasons, the judgment of the Licking County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur