[Cite as *State v. Freeman*, 2009-Ohio-3052.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 08 MA 81
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
WILLIAM FREEMAN,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 07CR1291A.
JUDGMENT:	Reversed and Remanded.

APPEARANCES:

For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Ralph Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Attorney Ronald Yarwood 42 North Phelps Street Youngstown, Ohio 44503

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 19, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant William Freeman appeals from the jury verdict rendered in the Mahoning County Common Pleas Court finding him guilty of aggravated robbery and guilty of complicity on the gun specification attached to that charge. Six issues are raised in this appeal. The first issue is based upon the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, and whether the defect in the indictment, which allegedly failed to state the requisite mens rea element of aggravated robbery, permeated the trial and resulted in structural error. The second issue is whether Freeman's statutory right to a speedy trial was violated. The third issue is when the evidence is viewed in the light most favorable to the prosecution, was it sufficient to prove the elements beyond a reasonable doubt. The fourth issue is whether the conviction is against the manifest weight of the evidence. The fifth issue is whether the trial court abused its discretion in failing to sua sponte order a second competency evaluation. The sixth and final issue is whether trial counsel was ineffective for failing to request a second competency evaluation. For the reasons expressed below, we find merit with the first assignment of error, however, we find no merit with the remaining assignments of error. Thus, the judgment of the trial court is reversed and the case is remanded for further proceedings.

STATEMENT OF FACTS AND CASE

¶{2} On October 2, 2007, Oliver Eaton was sitting in his car in the parking lot of 1629 Shehy, Youngstown, Ohio, when he was allegedly robbed by Hector Perez and Freeman. That evening, Eaton, Perez and Freeman, among others, were at Amber Horvath's apartment at 1629 Shehy. Due to an alleged disrespectful act by Eaton towards Perez's fiancée, Perez planned to scare Eaton that night with his shotgun; he allegedly did not plan on robbing Eaton. (Tr. 219). Perez asserted at trial that Freeman knew of the plan to scare Eaton and brought Perez's gun to him at 1629 Shehy. (Tr. 219). At trial, Freeman acknowledged that he took the gun to the apartment that night for Perez, but he denied any knowledge of, or involvement in, the alleged robbery of Eaton. (Tr. 350).

¶{3} According to the victim and Perez, the robbery occurred as follows. Perez and Freeman approached Eaton while he was in his car; Perez carried the shotgun and Freeman was armed with a knife. (Tr. 177, 185, 227). Perez shot one round in the air and Freeman slashed the tires of the car. (Tr. 178-179, 184, 225). Then, while holding a knife to Eaton's side, Freeman went through the victim's pockets and took over $900. (Tr. 178-179, 184, 225). Eaton testified that after Freeman took the money, he allegedly left the scene. (Tr. 185). A struggle then occurred between Perez and Eaton that resulted in the gun breaking. (Tr. 185 229). Eaton ran and found a police car nearby in the street. (Tr. 200, 229). Perez ran up into the apartment at 1629 Shehy and hid the gun. (Tr. 229). The police arrived, arrested Perez and recovered the gun. (Tr. 185-186, 230).

¶{4} As a result of the incident, Freeman was charged with one count of aggravated robbery, a violation of R.C. 2911.01(A)(1)(C), a first degree felony, and a firearm specification, a violation of R.C. 2941.145(A). 11/01/07 Indictment. In early January 2008, the trial court ordered a competency evaluation. In March 2008, upon reviewing the competency report, the trial court found Freeman competent to stand trial. 03/20/08 J.E. Freeman then filed a motion to dismiss based upon a speedy trial violation; the trial court denied the motion. 03/26/08 Motion to Dismiss. Trial began on March 31, 2008, and the jury found Freeman guilty of aggravated robbery and guilty of complicity on the gun specification.

¶{5} Sentencing occurred on April 8, 2008. Freeman received five years for the aggravated robbery conviction and a mandatory three year sentence for the gun specification. 04/10/08 J.E. The sentences were required to be served consecutively. 04/10/08 J.E. Freeman filed a timely appeal from the conviction and sentence.

FIRST ASSIGNMENT OF ERROR

¶{6} "THE INDICTMENT OF APPELLANT FAILS TO STATE THE REQUISITE MENS REA FOR ROBBERY AS CHARGED IN VIOLATION OF THE COURT'S HOLDING IN *STATE V. COLON*. FURTHER, THE STATE FAILS TO ARGUE AND/OR ATTEMPT TO PROVE ANY MENS REA AND APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUION THEREFORE,

THE DEFECT IN THE INDICTMENT PERMEATED THIS MATTER AND MUST BE VIEWED AS A STRUCTURAL ERROR REQUIRING REVERSAL."

¶{7} Appellant was convicted of aggravated robbery in violation of R.C. 2911.01(A)(1), which provides:

¶{8} "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

¶{9} "(1) Have a deadly weapon on or about the offender's person or under the offender's control *and* either display the weapon, brandish it, indicate that the offender possesses it, or use it." (Emphasis added).

¶{10} Appellant argues for the first time on appeal that the indictment's failure to contain the mental state of recklessness for the display/brandish/indicate/use element constituted a structural error requiring reversal of his conviction. The state argues that the element contested here is a strict liability element. In the alternative, the state urges that any defect in the indictment is not structural error because there were no other errors inextricably linked to this one.

¶{11} This assignment of error requires us to proceed through various steps set forth in *Colon*. First, we must address whether the indictment was defective for the failure to charge a mental state for the display/brandish/indicate/use element of aggravated robbery. This requires a determination of whether this is a strict liability element or whether it requires a recklessness mens rea.

¶{12} If the mental state for this element is recklessness, then we proceed to address whether the defect in the indictment is a structural error requiring automatic reversal. If the error is not structural, then appellant waived the error by failing to raise it below, in which case this court applies a mere plain error analysis, wherein we consider whether the claimed error was obvious and of such prejudicial nature that the outcome of the trial would have been different.

¶{13} The first step in our analysis could be resolved in favor of appellant by merely citing to our recent case of *State v. Larese Jones*, 7th Dist. No. 07MA200, 2008-Ohio-6971. In that case, we rejected the notion that there is strict liability for the display/brandish/indicate/use element of aggravated robbery and held that an

indictment is defective if it fails to charge the recklessness mens rea for this element. Id. at ¶50, 53.

¶{14} At oral argument, the state insisted that our decision in *Larese Jones* was incorrect, noting that other courts have ruled otherwise. We recognized and discarded these holdings in the *Larese Jones* opinion. See id. at ¶33-46. For the sake of clarity, we have decided to reiterate our position here by setting forth a full analysis on the topic.

¶{15} We begin with the relevant portion of the general mens rea statute, which provides:

¶{16} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the offense, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." R.C. 2901.21(B).

¶{17} In applying this statute, the Supreme Court has held that the robbery element of "inflict, attempt to inflict, or threaten to inflict physical harm on another" requires the mental state of recklessness and that an indictment that fails to include this mens rea is defective. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, ¶14-15. We stop to point out that this was really not an unexpected holding, and the state and the dissent even agreed with such holding. See id. at ¶15, 46. Rather, the unexpected holding in *Colon* was the application of the structural error doctrine, which we will discuss in the second stage of our analysis. See id. (four to three decision, with appellate judge as one of majority).

¶{18} The Supreme Court had previously held that the mens rea for the robbery element of "have a deadly weapon on or about the offender's person or under the offender's control" is a strict liability element. *State v. Wharf* (1999), 86 Ohio St.3d 375, 378 (the catch-all mental state of recklessness does not apply to this element). The state relies on this holding to support its position here. However, the Supreme Court's reasoning in *Wharf* clearly supports appellant's position.

¶{19} The *Wharf* Court pointed out that the deadly weapon element of the robbery offense at issue in that case did not require "use, display, or brandishing of a weapon, or intent to do any of the aforementioned acts." Id. The Court stated:

¶{20} "Had the legislature so intended, it certainly could have required a level of conduct more severe than it did in order to show a violation of the statute. Thus, by employing language making *mere possession or control of a deadly weapon, as opposed to actual use or intent to use*, a violation, it is clear to us that the General Assembly intended that R.C. 2911.02(A)(1) be a strict liability offense." Id. (emphasis added).

¶{21} Thus, the *Wharf* Court essentially set up its holding for future cases where the robbery offense contains not only the possession or control element but also contains the display/brandish/indicate/use element as in the case of aggravated robbery under R.C. 2911.01(A)(1). That is, the Court basically stated that mere possession or control of the weapon requires no culpability, but a prohibition on the further act of using, displaying, indicating possession or brandishing is modified by the recklessness mens rea.

¶{22} Possession and control of a deadly weapon are passive elements, whereas using, displaying, indicating possession and brandishing are more active elements. These active elements are more comparable to the alternative robbery element involving the inflicting or attempting to inflict physical harm as was at issue in *Colon*.[1]

¶{23} Finally, as we pointed out in *Larese Jones*, the Supreme Court had the chance to fully address whether R.C. 2911.01(A)(1) and its display/brandish/indicate/use element contains the mental state of recklessness. *Jones*, 7th Dist. No. 200 at ¶51-52, citing *State v. Davis*, 119 Ohio St.3d 113, 2008-Ohio-3879. We have researched the entire background of the *Davis* case below and in the Supreme Court, including the state's motion for reconsideration in *Davis*, and it

[1]We note that as in *Colon*, the specific language of the statute defining the offense does not expressly state a mental state for another element. Cf. *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, ¶23, 29 (legislative act of specifically ascribing mental state of knowledge to one element of offense means that strict liability rather than recklessness is mental state for other element), applying *State v. Wac* (1981), 68 Ohio St.2d 84, 86-87. The mental states applicable to the theft element of robbery or aggravated robbery are contained in another statute, and *Colon* did not mention an intent to alter the *Maxwell* and *Wac* line of cases.

is clear that the issue before the Supreme Court was the failure to indict on a mental state for the display/brandish/indicate/use element of aggravated robbery. Instead of issuing a full opinion on the matter, the Supreme Court merely reversed the defendant's conviction on the authority of *Colon*. *Davis*, 119 Ohio St.3d 113. This was a natural implementation of the future holdings anticipated by *Wharf*.

¶{24} For all of these reasons, we are not retreating from our holding in *Larese Jones* that the display/brandish/indicate/use element of aggravated robbery under R.C. 2911.01(A)(1) requires the mental state of recklessness. Because *Colon* considers an indictment that fails to charge a mental state for an essential element of the offense to be constitutionally defective, the indictment for aggravated robbery under R.C. 2911.01(A)(1) that fails to provide recklessness as the mental state for the display/brandish/indicate/use element is also constitutionally defective. See *Colon,* 118 Ohio St.3d 26 at ¶29.

¶{25} This brings us to the second stage of our analysis, which addresses the question of whether there was structural error requiring automatic reversal (as such error is not subject to harmless error analysis) or whether we merely apply the typical plain error test, wherein we could hold that because there was no objection the error was harmless or otherwise refuse to exercise discretion to recognize the error. See *Colon*, 118 Ohio St.3d 26. *Colon* is applicable here as this case was pending at the time that decision was announced. See *State v. Colon* (*Colon II*), 119 Ohio St.3d 204, 2008-Ohio-3749, ¶5.

¶{26} The test for determining whether structural error exists in a case where the indictment is defective due to the omission of the mens rea for an essential element asks whether multiple errors occurred that are inextricably linked to the flawed indictment. *Colon II*, 119 Ohio St.3d 204 at ¶7. Thus, there is structural error if the indictment error led to errors that "permeate[d] the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence." Id. at ¶8, citing *Colon I*, 118 Ohio St.3d 26 at ¶23.

¶{27} In *Colon*, the other errors that resulted from the defective indictment were: (1) no evidence to show the defendant had notice that recklessness was an element; (2) state did not argue that the defendant's conduct was reckless; (3) state's

closing argument proceeded as if the infliction of physical harm was a strict liability element; (4) the trial court's jury instructions did not include recklessness as an element of the offense. Id. at ¶6, citing *Colon I*, 118 Ohio St.3d 26 at ¶30-31.

¶{28} In *Larese Jones*, this court found that the defective indictment error did not lead to other errors that permeated the entire trial. *Jones*, 7th Dist. No. 07MA200 at ¶62. In *Jones*, the prosecutor and the trial court did not just apply the mental state of knowingly to the theft element, but they also specifically applied the knowingly mental state to the display/brandish/indicate/use element. Id. at ¶67, citing Tr. 746-757. As we pointed out in *Larese Jones*, knowingly is harder to prove than recklessly. Id. at ¶67. Consequently, the defective indictment problem, which could improperly lead a rational person to conclude that the display/brandish/indicate/use element was a strict liability element, was not inextricably linked to other permeating errors regarding strict liability. We thus applied the plain error test and found the error harmless. Id. at ¶67.

¶{29} The *Colon II* majority opined that cases with permeating errors or multiple errors that stem from a defective indictment will be rare. *Colon II*, 119 Ohio St.3d 204 at ¶7-8. Along this premise, *Larese Jones* was not a structural error case as there was no indication that strict liability applied to the display/brandish/indicate/use element. However, where the state and trial court act under the erroneous assumption that an element is strict liability, then not only will there be a defective indictment but also the prosecutor's arguments will be based upon this premise and will not contain a recklessness mens rea and the jury instructions will not contain the proper recklessness mens rea and will instead allow the jury to infer strict liability.

¶{30} Here, both the state and the trial court acted under this erroneous assumption. Thus, we do not merely have a constitutionally defective indictment which fails to charge the mental state of recklessness for the display/brandish/indicate/use element of aggravated robbery. We have other errors that are inextricably linked to the defective indictment. The defective indictment, along with these other errors, permeated the entire trial just as they did in *Colon*.

¶{31} Notably, the Supreme Court did not review the factual background of the case or evaluate prejudice from each error in determining permeation. Rather, they

merely listed a few errors, which were borne out of the defective indictment. The first *Colon* factor exists here: there is no evidence in the record that appellant or defense counsel had notice that the display/brandish/indicate/use element of aggravated robbery was not a strict liability element but in fact contained a mens rea of recklessness.

¶{32} Moreover, just as in *Colon*, the state never argued that appellant acted recklessly in displaying, brandishing, indicating possession of or using the weapon. In closing, the prosecutor noted appellant's testimony that he did not know of his codefendant's plan to scare the victim with a gun. (Tr. 373, 384). However, this was related to the complicity allegations on the firearm specification rather than the aggravated robbery which appellant was said to have committed with a knife. The prosecutor did not state that knowledge was the mental state for the display/brandish/indicate/use element as in our *Jones* case. Rather, the state's closing argument specific to this element could be read as being suggestive of strict liability for this element of the offense. (Tr. 370-371, 388).

¶{33} In fact, the state had placed a chart in front of the jury containing the elements the state believed it had to prove, and there was no mens rea element for the display/brandish/indicate/use element. (Tr. 369, 370-371). We note that the jury unsuccessfully asked to review this chart during deliberations. (Tr. 429). Furthermore, regarding the prosecutor's position, the state maintains:

¶{34} "Appellant is absolutely correct in that the State did not prove that he acted *recklessly* in displaying, brandishing, using, or indicating possession of the firearm. That's because the element is not required." Appellee's Brief at 9.

¶{35} Finally, and even more importantly (since the jury is to receive its instructions on the elements from the court and not from the prosecutor), the jury instructions were lacking as in *Colon*. The trial court did not instruct on recklessness. While instructing on the elements of aggravated robbery, the court gave no direction as to the required mental state. (Tr. 395). In defining theft thereafter, the court referred to the proper mental state of knowingly; however, that mens rea clearly only applied to the theft element, which is defined by another statute. (Tr. 396). Cf. *Jones*,

7th Dist. No. 07MA200 at ¶67, citing Tr. 746-747 (where court specifically applied knowingly mens rea to display/brandish/indicate/use element).

¶{36} In referring to the display/brandish/indicate/use element later, the court stated that the first three choices must have occurred during or immediately after the theft offense; once again, the court did not refer to any mental state. (Tr. 397). The court defined brandish as "to wave or exhibit in a menacing or challenging way." (Tr. 398). However, this does not suggest recklessness or a greater mental state; a reasonable juror could conclude that a weapon can be accidentally or negligently exhibited in a way that another could perceive as menacing. In any event, the definition for brandish did not address the other three options within the display/brandish/indicate/use element for which there was absolutely no indication of any required mens rea given. The lack of an instruction on the mental state for the display/brandish/indicate/use element allowed the jury to infer that this was a strict liability element, so that guilt was automatic if the weapon is somehow displayed or used even if done accidentally or negligently.

¶{37} For all of these reasons, which correspond to the *Colon* factors, the other errors here are inextricably linked to the defective indictment and cause the defective indictment problem to permeate the entire trial. As such, we conclude that there was structural error in this case, and we reverse and remand on this basis without regard to whether the error may have been harmless.

SECOND ASSIGNMENT OF ERROR

¶{38} "THE TRIAL COURT ERRED WHEN OVERRULING APPELLANT'S MOTION TO DISMISS AS APPELLANT WAS NOT BROUGHT TO TRIAL IN ACCORDANCE WITH HIS RIGHT TO A SPEEDY TRIAL PURSUANT TO SECTION TEN ARTICLE ONE OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

¶{39} Although we are reversing and remanding on the first assignment of error (which would possibly allow the state to reindict or amend the indictment), we still must address this assignment of error because if Freeman's speedy trial rights were violated retrial would not be allowed. Or, in other words, if there is any merit with this assignment of error, the conviction would be reversed without remand.

¶{40} Freeman contends that his speedy trial rights were violated and that the trial court erred when it denied his motion to dismiss based upon that argument.

¶{41} We have previously stated that:

¶{42} "Our standard of review of a speedy trial issue is to count the days of delay chargeable to either side and determine whether the case was tried within the time limits set by R.C. 2945.71. *Oregon v. Kohne* (1997), 117 Ohio App.3d 179, 180; *State v. DePue* (1994), 96 Ohio App.3d 513, 516. Our review of the trial court's decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. McDonald* (June 30, 1999), Mahoning App. Nos. 97 C.A. 146 and 97 C.A. 148, unreported, 1999 WL 476253. Due deference must be given to the trial court's findings of fact if supported by competent, credible evidence. *Id.* However, we must independently review whether the trial court properly applied the law to the facts of the case. *Id.*" *State v. High* (2001), 143 Ohio App.3d 232, 241-242.

¶{43} "Ohio recognizes both a constitutional and a statutory right to a speedy trial. Section 10, Article I of the Ohio Constitution; Sixth and Fourteenth Amendments to the United States Constitution. Ohio enacted R.C. 2945.71 to 2945.73 to provide specific time requirements for the state to bring a defendant to trial, *State v. Baker,* 78 Ohio St.3d 108, 110, 1997-Ohio-229, and courts must strictly construe these statutes against the state. *Brecksville v. Cook,* 75 Ohio St.3d 53, 57, 1996-Ohio-171." *State v. Slater*, 12th Dist. No. 2007-10-017, 2008-Ohio-6379, ¶4.

¶{44} Freeman's arguments concentrate on the statutory speedy trial rights. Pursuant to R.C. 2945.71(C)(2), Freeman, being charged with a felony, must be brought to trial within two hundred seventy days. However, each day during which the accused is held in jail in lieu of bail on the pending charge must be counted as three days. R.C. 2945.71(E). This is known as the triple count provision. Both the state and Freeman agree that the triple count provision applies to him. Thus, the state was required to bring Freeman to trial within ninety days.

¶{45} The record indicates that Freeman was arrested on October 7, 2007. Consequently, his speedy trial time began to run on October 8, 2007. *State v. Deltoro*,

7th Dist. No. 07MA90, 2008-Ohio-4815, ¶15 (stating that speedy trial time begins to run when the accused is arrested, however, the date of arrest is not counted).

¶{46} On November 16, 2007, Freeman filed a motion for a bill of particulars. Despite Freeman's insistence to the contrary, a request for a bill of particulars tolls the running of the speedy trial clock. R.C. 2945.72(E); *State v. Brown,* 98 Ohio St.3d 121, 2002-Ohio-7040, at ¶26. Admittedly, we have previously held that when the state allows open file discovery, as Mahoning County does, a bill of particulars is not required. *State v. Oliver*, 7th Dist. No. 07MA169, 2008-Ohio-6371, ¶38. However, the state never responded to the request by either producing a bill of particulars or indicating in a response that it is not required to produce one because of open file discovery. Therefore, in this instance, a possible argument could be made that since a bill of particulars is not required or because the state never responded to the motion, the motion requesting a bill of particulars did not toll the speedy trial time. That said, we do not need to determine whether or not such an argument has merit because as will be shown below even if it did not toll the time, the speedy trial time had not expired when Freeman moved to dismiss based on speedy trial violations; our computation below will not count any of the days as tolling.

¶{47} On November 21, 2007, Freeman filed a motion for discovery. A motion for discovery also tolls the speedy trial clock. R.C. 2945.72(E); *Brown,* 98 Ohio St.3d 121, 2002-Ohio-7040, at ¶26. The state responded to the motion that same day. Thus, from October 8, 2007 until November 20, 2007, 44 days elapsed.

¶{48} While an answer to discovery would typically start the time running again, on the same day that Freeman filed the motion for discovery, he also filed a motion for the transcript of the preliminary hearing, which was granted on December 10, 2007. Such act also tolls the speedy trial time because it necessitates delay. R.C. 2945.72(E); *State v. Miller*, 7th Dist. No. 07MA215, 2008-Ohio-3085, ¶24 citing *State v. Crayton,* 8th Dist. No. 81257, 2003-Ohio-2299, ¶14. The docket is devoid of any indication when this preliminary transcript was filed, which would end the tolling time; the trial transcript seems to indicate it was filed sometime before trial, however, a date is never stated. (Tr. 2-6). Therefore, it is impossible for this court to conclude how much time was tolled.

¶{49} Regardless, even without a clear number of days that tolled for the preliminary hearing transcript to be filed, Freeman caused other tolling events. In a November 23, 2007 judgment, the trial court granted a continuance that was requested by Freeman and accordingly reset the matter for December 17, 2007. Freeman argues that the continuance does not act as a tolling event because the trial court in its judgment entry did not explain the reason for the continuance. A continuance sought by the defense or a reasonable continuance sought by the state are tolling events pursuant to R.C. 2945.72(H). "An explanation for a continuance in a journal entry is not necessary, though certainly recommended, when a continuance is clearly granted on the defendant's own motion. *State v. Seward*, 4th Dist. No. 04CA2784, 2005-Ohio-934, ¶17, citing *State v. Stamps* (1998), 127 Ohio App.3d 219, 224 and *State v. Richardson,* 2d Dist. No. 03CA92, 2004-Ohio-5815. Thus, as the continuance was clearly sought by Freeman, there was not a need to explain the continuance and, as such, it does act as a tolling event.

¶{50} Furthermore, another continuance was granted on December 12, 2007. In the judgment entry, the court noted that the parties agreed to continue the matter until January 7, 2008. When the parties agree to a continuance, even if it was not on the motion of the defendant, the continuance is presumptively reasonable and there is no need to explain the reason for the continuance on the record. *State v. Rupp*, 7th Dist. No. 05MA166, 2007-Ohio-1561, ¶108. Thus, that continuance also tolled the speedy trial time.

¶{51} Accordingly, even if we do not count the request for the preliminary hearing transcript as a tolling event, given the continuances discussed above, the time would have began again on November 22, 2007 (the day after the discovery motion was responded to), but would have stopped on November 23, 2007 (the day the continuance on Freeman's motion was granted). Thus, only one more day would be added to the 44 days already calculated and the total time until the new trial date of January 7, 2008 would have been 45 days.

¶{52} On January 7, 2008, the time would then begin to run. However, on January 9, 2008, the time would have tolled again because the trial court ordered a Competency Evaluation pursuant to R.C. 2945.37(B) and 2945.371. 01/09/08 J.E.

According to R.C. 2945.72(B), the time an accused must be brought to trial is tolled for any period the accused is mentally incompetent to stand trial or **during any period that the accused's mental competency is being determined**. Thus, from January 7, 2008 until January 9, 2008, two days elapsed bringing the total to 47 days.

¶{53} On March 20, 2008, the trial court, after receiving the competency report from the Psychiatric Center of Northeast Ohio, Inc. on March 18, 2008, determined that Freeman was competent to stand trial. The speedy trial clock then began to run on that date. Trial was scheduled for March 31, 2008, which was clearly within the speedy trial time.

¶{54} Prior to the date of trial, Freeman filed a motion to dismiss on speedy trial grounds. 03/26/08 Motion. The speedy trial clock stops on the day the defendant files a motion to dismiss based on a speedy trial violation, and time is tolled while the motion is resolved. *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 67; *State v. Nottingham*, 7th Dist. No. 05BE39, 2007-Ohio-3040, ¶14, citing *State v. Jones* (1997), 119 Ohio App.3d 59, 66. The motion was denied on March 31, 2008, immediately prior to trial. (Tr. 6).

¶{55} In conclusion, as can be seen from a review of the record, Freeman was clearly brought to trial within the speedy trial time, and the trial court did not commit error when it denied the motion to dismiss. This assignment of error lacks merit.

THIRD ASSIGNMENT OF ERROR

¶{56} "THE CONVICTION OF APPELLANT IS BASED ON INSUFFICIENT EVIDENCE AS NO EVIDENCE PERTAINING TO MENS REA WAS GIVEN AT TRIAL IN VIOLATION OF APPELLANTS DUE PROCESS RIGHTS UNDER BOTH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION."

¶{57} Although we are reversing and remanding on other grounds, Freeman's sufficiency argument must still be addressed. *State v. Alexander*, 7th Dist. No. 03CA789, 2004-Ohio-5525, ¶36; *State v. Kyser* (Aug. 10, 2000), 7th Dist. No. 98CA144. We must do so because if there is any merit to the argument, double jeopardy would bar retrial. *Alexander*, 7th Dist. No. 03CA789, 2004-Ohio-5525, ¶36;

Kyser, 7th Dist. No. 98CA144. See, also, *In re KB*, 12th Dist. No. CA2006-03-077, 2006-Ohio-1647, ¶28, ftnt 1, citing *Tibbs v. Florida* (1982), 457 U.S. 31.

¶{58} When an appellate court reviews a record upon a sufficiency challenge, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Leonard,* 104 Ohio St.3d 54, 67, 2004-Ohio-6235, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Sufficiency of the evidence is a legal test dealing with the adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

¶{59} Freeman was convicted as the principal for the aggravated robbery charge and as the accomplice for the firearm specification attached to the charge. Our analysis will begin with whether there was sufficient evidence for the aggravated robbery charge.

¶{60} Freeman argues that the state did not meet its burden of production because it failed to offer evidence and it did not argue in its closing argument the mental state required for aggravated robbery. The state counters by contending that Freeman is referring to the mental state of recklessness and the state stands by its earlier proposition that aggravated robbery is a strict liability offense. The state makes no alternative arguments on how it produced evidence on recklessness. In his reply brief, Freeman contends that he was not only referring to the mental state of recklessness required for aggravated robbery, but also the mental state of knowingly that is required for the theft element in aggravated robbery.

¶{61} As explained under the first assignment of error, recklessness is the required mens rea for aggravated robbery as defined in R.C. 2911.01(A)(1). When looking at the statutory definition of aggravated robbery as defined in that section, it is clear that in order to prove aggravated robbery, the state must also prove theft as defined in R.C. 2913.01. That statute defines theft offense to include a violation of R.C. 2913.02. ,Subsection (A)(4) of R.C. 2913.02 is the applicable theft offense in this case, which states that no person with the purpose to deprive an owner from their property shall knowingly obtain or exert control over the property by threat. This

requires the mental state of knowingly. Thus, the state was required to produce evidence that Freeman acted recklessly in having a deadly weapon on or about his person and brandishing it, displaying it, indicating he had it or using it and was also required to produce evidence that Freeman acted knowingly in committing the theft offense as defined in R.C. 2913.02(A)(4).

¶{62} While Freeman is correct that in closing arguments, the state did not argue recklessness or clearly argue knowingly as the mental state, as explained above, in a sufficiency review we look at the evidence in the light most favorable to the prosecution to determine whether it meets the essential elements of the offense. Closing arguments are not evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 269-270. Thus, the arguments or lack thereof during trial do not affect a sufficiency review.

¶{63} Starting with the mental state of recklessness, there was evidence submitted at trial which could indicate that Freeman acted recklessly in having a deadly weapon on or about his person and displaying it, brandishing it, indicating he had it, or using it. Recklessly is defined as:

¶{64} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

¶{65} Testimony reveals that during the commission of the offense Freeman used a knife, which may be considered a deadly weapon. The Twelfth Appellate District has explained that under Ohio law, there is no presumption that a knife is a deadly weapon. *Sate v. Pringle*, 12th Dist. Nos. CA2007-08-193, CA2007-09-238, 2008-Ohio-5421, ¶43. Rather, the prosecution must prove either (1) that the knife was designed or specifically adapted for use as a weapon, or (2) the defendant possessed, carried, or used the knife as a weapon. Id.

¶{66} Even if there is no presumption that a knife is a deadly weapon, there is testimony that Freeman used the knife as a weapon and that he used it at least recklessly. Both Eaton and Perez testified that Freeman had a knife on his person and

used it during the aggravated robbery. Eaton testified that Freeman slashed all four of his tires, put the knife to Eaton's side and told him not to move. (Tr. 184). Freeman then went through Eaton's pockets and took his money. (Tr. 184). Perez testified that Freeman held a knife to Eaton's throat and went through Eaton's pockets. (Tr. 225). While Perez and Eaton's testimony may not coincide in every aspect, it is clear that both testified that Freeman used the knife as a weapon. Furthermore, this testimony also indicates that Freeman acted at least recklessly; he used the knife with heedless indifference to the consequences.

¶{67} As to the knowingly element of theft, it likewise appears that there was sufficient evidence produced at trial for the state to meet its burden of production. Knowingly is defined as:

¶{68} "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." R.C. 2901.22(B).

¶{69} As stated above, the evidence must show that Freeman knowingly obtained control over Eaton's property by threat. Besides Eaton's testimony concerning Freeman's use of the knife and the fact that he went through Eaton's pockets, Eaton also testified Freeman made statements like "this is how we do it in Youngstown" and "empty your pockets." (Tr. 178). When all that evidence is considered, it clearly shows, if the testimony is believed, that Freeman's act of using the knife in the manner he did was done knowingly to obtain Eaton's money by threat. As such, Freeman's sufficiency arguments as to the mental state for aggravated robbery fails.

¶{70} Freeman's brief does not argue that his conviction on the gun specification was insufficient. As such, we will not address the sufficiency of that conviction.

¶{71} In conclusion, for all the above reasons this assignment of error lacks merit.

FOURTH ASSIGNMENT OF ERROR

¶{72} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND HE WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION."

¶{73} Our disposition of the first assignment of error renders any argument that the conviction is against the manifest weight of the evidence moot. *State v. Anderson*, 7th Dist. No. 03MA252, 2006-Ohio-4606, ¶121. Regardless, for the sake of thoroughness, it is addressed.

¶{74} Under a manifest weight standard, the appellate court, "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against conviction." *Thompkins,* 78 Ohio St.3d at 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

¶{75} Freeman argues that the state was unable to prove that he was at the scene of the crime when it occurred. He contends that Eaton's identification of him was done through a photographic lineup that was not verified. Furthermore, according to Freeman, when Eaton's identification of him is thrown out, Perez is the only other witness that puts him at the scene of the crime, and Perez's testimony is not credible, especially when viewed in the light of the other witnesses' testimony.

¶{76} Starting with his complaints about the photographic lineup, this is the first time that Freeman has raised an issue with the lineup; the issue was not raised through a suppression motion or any other means to the trial court. The state contends that Freeman cannot raise this issue for the first time on appeal. Freeman disagrees.

¶{77} The Ninth Appellate District has stated that when there was no motion filed to suppress the identification prior to trial and there was no objection raised during trial to the in-court identification, any issue regarding identification is not preserved and not properly before the appellate court. *State v. Stanford* (Aug. 15, 1984), 9th Dist.

No. 11611, citing *State v. Barker* (1978), 53 Ohio St. 2d 135, 147 (stating that reviewing court will not consider errors that defendant failed to raise below). Likewise, the Eighth Appellate District, regarding an allegation that the out-of-court identification was suggestive that was not raised to the trial court, held that that argument raised for the first time on appeal did not have to be addressed. *State v. Crumedy* (Aug. 2, 1979), 8th Dist. No. 39143, citing *State v. Williams* (1977), 51 Ohio St.2d 112. Thus, the issue is waived.

¶{78} However, even if we were to deem the argument not waived, Freeman's factual basis for the argument is not supported by the record. Freeman contends that the lineup contained a picture of Freeman that the officer could not testify as to the origin of the picture. He references this court to page 305 of the transcript for support of his position. It seems the portion he is referring to is the following question and answer:

¶{79} "Q. Arthur Carter, the officer, wasn't the one who supplied the photo to you or the information to you?

¶{80} "A. No. It was listed in the police report when I received it in the morning." (Tr. 304-305).

¶{81} However, when Detective Sergeant Blackburn's entire testimony is read, it reveals that the origin of the photograph could be verified:

¶{82} "Q. And the photo that you had of Mr. Freeman, you said that was from his BMV photo?

¶{83} "A. Yes.

¶{84} "Q. Okay. My question to you is where did you get that photo?

¶{85} "A. From OHLEG, which is Ohio Law Enforcement Gateway. It's basically a system – I'm sorry. Go ahead.

¶{86} "Q. No.

¶{87} "A. It's basically a system where you could look up vehicle registrations, Ohio driver's license, things such as that." (Tr. 303).

¶{88} Thus, his testimony did establish where the picture that was used in the lineup came from. As such, the factual basis upon which Freeman makes his argument is not supported by the record; the photograph could be verified. Therefore,

the argument lacks basis and there is nothing in the record to dispute Eaton's identification of Freeman as the assailant with the knife that robbed him.

¶{89} As to Freeman's second contention that without Eaton's identification, only Perez, who was not credible, could identify him as the second assailant with the knife. As stated above, Eaton could identify Freeman and there is nothing suspect about that identification. Regardless, when just looking at Perez's testimony, there are some inconsistencies with his testimony as compared to the testimony of other witnesses. For instance, Amber Horvath, the woman whose apartment Perez, Eaton, and Freeman were at, testified that Perez came up to her apartment a lot. (Tr. 263). However, Perez testified that before that night he had never been to Amber's apartment before. (Tr. 224). Likewise, George Koches, who teaches GED classes at Mahoning County Justice Center, also testified. He indicated that he was familiar with Perez and that in a Commitment to Change Program, Perez stated that Freeman was an innocent man and was not involved in the aggravated robbery of Eaton. (Tr. 338). Koches also indicated that Perez stated that he was going to tell the judge that. (Tr. 338). Perez, however, testified that he never said any of that. (Tr. 243). Perez also testified that he received four years for his part in the aggravated robbery; his gun specification was changed from three years to one year. (Tr. 216-217).

¶{90} As can be seen from the above recitation of some of the testimony, Perez may not have been the most credible witness. That said, credibility is an issue for the trier of fact, the jury in this instance. *State v. DeHass* (1967), 10 Ohio St.2d 230. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, at ¶58. Jurors are free to believe or disbelieve any or all of a witness' testimony. *State v. Snyder*, 5th Dist. No. 2008-CA-25, 2008-Ohio-6709, ¶34, citing *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67 and *State v. Burke,* 10th Dist. No. 02AP1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667. Thus, we give great deference to the trier of fact's resolution of inconsistent evidence.

¶{91} Therefore, despite the inconsistencies and possible credibility issues, the jury's resolution that Freeman was involved in this aggravated robbery is supported by Eaton's testimony and identification of Freeman as holding a knife to Eaton's side and taking money out of his pocket. Furthermore, Perez's testimony, although inconsistent with other witnesses' testimony, did correspond with Eaton about Freeman being involved in the aggravated robbery. The jury was free to believe some, all or none of Perez's testimony.

¶{92} Accordingly, for the above stated reasons, Freeman's argument that his conviction was against the manifest weight of the evidence is meritless.

FIFTH ASSIGNMENT OF ERROR

¶{93} "THE TRIAL COURT ERRED WHEN IT FAILED TO ORDER A SECOND COMPETENCY EVALUATION OF APPELLANT AFTER THE COURT DOUBTED APPELLANT'S COMPETENCY DURING TRIAL AND APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OHIO CONSTITUTION."

¶{94} Under this assignment of error, Freeman contends that the trial court erred when it did not sua sponte order a second competency evaluation. As aforementioned in the fact section, the trial court ordered a competency evaluation prior to trial. 01/09/08 J.E. Attached to that order are two handwritten compositions by Freeman, which appear to have provided the basis for ordering the evaluation. The first is titled "Letter Rogatory"[2] and the second is titled "Commercial Security Agreement." In those compositions, Freeman talks about being a debtor, he references "admiralty rules," "commercial dishonors," liens, paramount creditors, legal fictions, personal jurisdiction, corporations, negotiable instruments, and the Uniform Commercial Code (UCC). Following a competency evaluation by the Forensic Psychiatric Center of Northeast, Ohio, Inc., Freeman was found competent to stand trial.

[2]A letter rogatory is also known as a letter of request. It is "a document issued by one court to a foreign court requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case." Black's Law Dictionary (8 Ed.2004) 924.

¶{95} During trial, after the close of the state's case in chief, Freeman, pro se, moved for a Crim.R. 29 Motion for Acquittal. In doing so he stated the following:

¶{96} "THE DEFENDANT: Sure, sure. On January 7th, 2008, of this year, there was a letterrogatory [sic] introduced into this court system. It was addressed to you, Your Honor, Judge Durkin. What I'm doing today is I'm appearing – my name is William Freeman. That's capital W, lower case I, lower case L, lower case L, lower case I, lower case A, lower case M, Freeman, capital F, lower case R, lower case E, lower case E, lower case M, lower case A, and lower case N. I am an authorized representative of the said defendant in this case. I'm the secured party creditor. I am here standing as fiduciary trustee.

¶{97} "THE COURT: I'm going to – I'm going to ask that you take a seat Mr. Freeman.

¶{98} "THE DEFENDANT: May I ask why, sir?

¶{99} "THE COURT: No. I'm going to ask you to take a seat for a minute.

¶{100} "THE DEFENDANT: Are you referring to the defendant?

¶{101} "THE COURT: I'm going to ask you to take a seat for a minute, please.

¶{102} "THE DEFENDANT: I wonder if you're under the assumption that I am still the defendant, Your Honor. I'm here as an intervening party. I have my – I have my Uniform Commercial Code –" (Tr. 326-327).

¶{103} At that point a conference with the attorneys was held in chambers. (Tr. 328). Following that conference, the trial court stated that Freeman was competent to stand trial by explaining:

¶{104} "THE COURT: Mary Kay, we're back on the record again out of the presence of the jury. Mr. Freeman, when he began to make a Rule 29 motion and I stopped him, asked me if I was still under the assumption that he was the defendant in this case when he was standing here before me as the intervening party. Let the record reflect that back on March 14th of 2008, this court received a letter and report from the Psychiatric Center of Northeast Ohio. It was a competency evaluation which was performed by the Forensic Center. The competency evaluation found that Mr. Freeman did not appear to suffer any symptoms of a severe mental disease and that it was the opinion with reasonable psychological certainty that Mr. Freeman is able to

understand the nature and objective of the legal proceedings and was further able to assist in his defense, and as a result of that, the report found and it was stipulated to and the court ordered that Mr. Freeman was competent to stand trial.

¶{105} "One of the matters specifically addressed during the interview with Mr. Freeman was a letter that Mr. Freeman had sent to the court. Actually, two compositions were shared with counsel and provided to Dr. Gazley, G-A-Z-L-E-Y, and I'm going to quote from the report:

¶{106} *"'The diagnosis of delusional disorder grandiose type is considered based on the content of Mr. Freeman's two extraordinary composition directed to the judge and to the assistant prosecuting attorney. Mr. Freeman obviously views himself as being knowledgeable in the law. He makes some highly abstract and oft-based arguments which would lead to concern about his mental status. Mr. Freeman acknowledged on interview that at least the initial document was inappropriate. He did not, however, retract the content.*

¶{107} *"'Mr. Freeman's presentation on interview gave no indication or hint of the unusual thinking that must have gone into writing his legal briefs?[sic] As a result, the rule-out qualifier is appropriate with the delusional disorder diagnosis and Mr. Freeman again was subsequently found to be competent to stand trial.*'

¶{108} "As Mr. Freeman began making his own Rule 29 motion, the *letterrogatory* [sic] that he referred to and his status as not the defendant but as a secured party and representative along with any UCC filings that may have taken place are exactly consistent with the two compositions that were referred to the doctor at the Forensic Psychiatric Center and which were analyzed, reviewed, and considered in making the finding that he was competent. The arguments today, although I cut Mr. Freeman off, are exactly consistent with those two compositions. * * *." (Tr. 328-331) (Italics in original).

¶{109} R.C. 2945.37(B) states that the competency of the defendant may be raised by the court, the defense or the prosecutor. If it is raised prior to the commencement of trial, the court must hold a hearing; however, if it is raised after the commencement of trial, a hearing will be held only for good cause shown or on the court's own motion. R.C. 2945.37(B). Accordingly, we review the trial court's decision

to not sua sponte hold a second competency hearing for an abuse of discretion. *State v. Rahman* (1986), 23 Ohio St.3d 146, 156. An abuse of discretion is more than an error of judgment; it demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

¶{110} The Ninth Appellate District has explained the factors to look at when determining whether the trial court abused its discretion in failing to sua sponte hold a hearing:

¶{111} "The trial court should consider the following factors in determining whether good cause exists to hold a competency hearing sua sponte: (1) statements made by a defendant's counsel regarding competency; (2) evidence of irrational behavior or demeanor at trial by a defendant; and (3) prior medical opinions relating to a defendant's ability to stand trial. *State v. Rubenstein* (1987), 40 Ohio App.3d 57, 60-61. See, also, *Drope v. Missouri* (1975), 420 U.S. 162, 177, fn. 13, and 179-180." *City of Elyria v. Bozman*, 9th Dist. No. 01CA007899, 2002-Ohio-2644, ¶7.

¶{112} We will now apply each of those factors to this case. Regarding the first factor, the defense made no statements concerning competency.

¶{113} The second factor concerns Freeman's behavior at trial. During trial, Freeman spoke two times. The first was regarding the Crim.R. 29 motion and the second time was when he testified on his own behalf. Admittedly, the statements he made during his Crim.R. 29 motion could call his competency into question. However, during his direct and cross-examination, nothing he said even remotely indicates that he was incompetent to stand trial; his answers corresponded with the questions asked. Furthermore, during that testimony, there is no indication in the record that the trial court had to reprimand him for questionable behavior. Other than the statements made during the pro se Crim.R. 29 motion, there is nothing in the trial transcript that displays irrational behavior.

¶{114} The third factor concerns prior medical opinions. The trial court clearly and accurately indicated that the statements made during the pro se Crim.R. 29 motion were consistent with the two compositions that Freeman filed pro se with the court. Those compositions were the reason Freeman's competency was evaluated. That evaluation clearly indicated that Freeman was competent to stand trial.

¶{115} Considering the above factors, we do not find that the trial court abused its discretion in failing to hold a second competency hearing. Consequently, we find no merit with this assignment of error.

SIXTH ASSIGNMENT OF ERROR

¶{116} "COUNSEL'S FAILURE TO REQUEST A SECOND COMPETENCY EVALUATION RESULTED IN INEFFECTIVE ASSISTANCE OF COUNSEL."

¶{117} Our disposition of the first assignment of error renders any argument that trial counsel was ineffective moot. *In re Whatley*, 7th Dist. No. 06MA56, 2007-Ohio-3039, ¶30. Regardless, and for the sake of thoroughness, this assignment of error is addressed.

¶{118} The arguments made in this final assignment of error are closely related to the arguments made in the fifth assignment of error. Here, Freeman contends that counsel was ineffective for failing to request a second competency evaluation.

¶{119} We review a claim of ineffective assistance of counsel under the standard pronounced in *Strickland v. Washington* (1984), 466 U.S. 668, 687. It is a two prong test: first, the appellant must show counsel's performance was deficient or unreasonable under the circumstances; and second, the appellant must show that the deficient performance prejudiced the defense. Id.; *State v. Madrigal,* 87 Ohio St.3d 378, 388-389, 2000-Ohio-448. A court may dispose of a case by considering the second prong first, if that would facilitate disposal of the case. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, citing *Strickland*, 466 U.S. at 697.

¶{120} In this instance, Freeman cannot show prejudice. As was explained under the fifth assignment of error, the trial court did not abuse its discretion by not holding a second competency evaluation. If defense counsel would have requested a second competency evaluation the result would not have changed; it still would have been within the trial court's discretion to grant the request, *Rahman*, 23 Ohio St.3d at 156, and the trial court would not have abused its discretion in denying such a request. The fact remains that the behavior Freeman exhibited, which possibly called his competency into question, was the same exact behavior that was evaluated at the first competency evaluation. This competency evaluation was completed within a couple weeks of trial. As nothing in the record indicates that his conduct at trial was worse

than the initial incident, i.e. statements in the compositions, there is no indication that the result of the competency evaluation would have changed and that the trial court would have found Freeman incompetent to stand trial. As such, no prejudice resulted from any failure by defense counsel to request a second competency evaluation. This assignment of error lacks merit.

CONCLUSION

¶{121} In conclusion, the first assignment of error is meritorious; the indictment was defective and resulted in structural error. All remaining assignments of error lack merit. Thus, on that basis, the judgment of the trial court is hereby reversed and the case is remanded for further proceedings.

Waite, J., concurs.
DeGenaro, J., concurs.