[Cite as *State v. Harrison*, 2020-Ohio-3624.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DARYL D. HARRISON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 JE 0009

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case Nos. 18 CR 187; 18 CR 216.

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed in Part.
Reversed and Vacated in Part.

Atty. Jane M. Hanlin, Jefferson County Prosecutor and *Atty. Frank J. Bruzzese*, Assistant Prosecuting Attorney, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee.

Atty. Adam M. Martello, P.O. Box 1484, Steubenville, Ohio 43952, for Defendant-Appellant.

Dated: June 29, 2020

WAITE, P.J.

{¶1} Appellant Daryl D. Harrison appeals an April 16, 2019 Jefferson County Court of Common Pleas judgment entry convicting him of several crimes. Appellant advances claims of ineffective assistance of counsel and also argues that his convictions are against the manifest weight of the evidence. For the reasons provided, Appellant's argument as to his conviction for receiving stolen property has merit. Appellant's remaining arguments, however, have no merit. Accordingly, Appellant's conviction for receiving stolen property is reversed and vacated and the corresponding sentence is also vacated. The judgment of the trial court is affirmed as to the remaining convictions.

Factual and Procedural History

{¶2} A Jefferson County Grand Jury indicted Appellant on various offenses stemming from two separate incidents. The first incident involved a high-speed motorcycle pursuit that occurred on August 12, 2018. While parked on the shoulder of State Route 7 ("SR-7"), Ohio State Patrolman Trevor Koontz observed a yellow motorcycle travelling in the left lane at what appeared to be an excessive speed. (4/1/19 Trial Tr. Vol. IV, p. 641.) Patrolman Koontz activated his radar and tracked the motorcycle's speed at 109 mph in a 50 mph designated zone. Trooper Koontz activated his emergency lights but did not immediately activate his siren as he merged onto the right lane of the road. The driver of the motorcycle pulled into the right lane and decreased his speed to 60 mph. He did not stop, however. Instead, the driver looked back at the cruiser before accelerating to speeds in excess of 120 mph.

{¶3} Trooper Koontz researched the motorcycle's license plate information on his computer and learned that the vehicle was registered to Appellant. According to Trooper Koontz, Appellant's LEADS photograph was displayed on his screen during the pursuit. Trooper Koontz stated that he had two opportunities to observe the operator of the motorcycle at close proximity, and determined that it was Appellant. Trooper Koontz also stated that he had seen Appellant operating the same motorcycle two days prior to this incident.

{¶4} Appellant exited SR-7 at the Lincoln Avenue exit and ran a red light as he turned right onto 6th Street in Steubenville. Trooper Koontz followed, driving approximately 80 mph in a 25 mph designated zone in a residential neighborhood. The motorcycle crossed a double yellow line into the path of oncoming traffic and traveled approximately 800 feet in that lane before reentering the proper lane. Appellant also ran a stop sign located at the intersection of 6th Street and Slack Street. A car traveling in the opposite direction had to swerve to avoid colliding with the motorcycle.

{¶5} Deeming his pursuit to be dangerous and having identified the driver, Patrolman Koontz terminated his pursuit. He wrote and mailed Appellant several traffic tickets for speeding, running a red light, running a stop sign, and driving left of center. This lead to Appellant's indictment in case number 18 CR 187 on one count of failure to comply with the order or signal of a police officer, a felony of the third degree in violation of R.C. 2921.331(B), (C)(5)(a)(iii).

{¶6} The second incident occurred on December 13, 2018 when Steubenville police officers were dispatched to a Wendy's restaurant located at Hollywood Plaza to conduct a welfare check on two individuals who were reportedly smoking marijuana in a

Sports Utility Vehicle ("SUV"). (4/1/19 Trial Tr. Vol. III, p. 324.) Patrolman James Marquis arrived at the scene first. Officer Sean Exterovich and Patrolman Edward Karovic arrived shortly thereafter. Two of the cruisers had cameras mounted on their dashboard and the officers wore microphones which captured the events.

{¶7} When the officers walked towards the vehicle, they observed Appellant in the driver's seat of the vehicle and a woman later identified as his girlfriend in the passenger seat. Officers observed both occupants reach underneath their seats. As the officers approached the vehicle, they detected a strong smell of marijuana and saw Appellant smoking a marijuana cigarette.

{¶8} At the officer's request, Appellant exited the vehicle and handed Patrolman Marquis the marijuana cigarette. He claimed that he had reached under his seat to locate his GPS unit, which he held in his hand. Based on the odor and presence of marijuana, the officers conducted a probable cause search of the vehicle and also a patdown of both Appellant and his girlfriend. The officers did not find any contraband on Appellant's person, but located what appeared to be crack cocaine and a crack pipe in his girlfriend's hooded sweatshirt.

{¶9} Officer Exterovich asked Appellant whether he had any firearms inside the vehicle. Appellant responded that he did not, as he is a convicted felon and subject to a weapons disability. However, during a search of the vehicle officers found a firearm underneath the passenger seat. A loose bullet and a magazine were located in the center console. Both Appellant and his girlfriend denied having any knowledge of the firearm. Officers relayed the firearm's serial number to dispatch and learned that it had been reported stolen several days before by a Steubenville resident.

{¶10} The officers determined that the SUV belonged to the girlfriend's mother. Appellant had apparently been repairing the vehicle and used it to drive his girlfriend to work at the Wendy's restaurant. It appears that Appellant had sole possession of the car during the repair process, however, it is unclear when the repairs first began.

{¶11} Officers arrested both Appellant and his girlfriend and transported them separately to the Jefferson County Justice Center. During the booking process, Patrolman Exterovich noticed a belt around Appellant's waist. Patrolman Exterovich thought this was odd, because Appellant wore pajama pants at the time of his arrest and did not have any clothing that had belt loops. Additionally, the belt was wrapped around his waist over a shirt. According to Patrolman Exterovich, the belt had been altered to hold a makeshift holster. The belt was confiscated and bagged along with the rest of Appellant's possessions.

{¶12} These actions lead to Appellant's indictment in case number 18 CR 216 on one count of having a weapon while under disability, a felony of the third degree in violation of R.C. 2923.13(A)(3); one count of receiving stolen property, a felony of the fourth degree in violation of R.C. 2913.51(A), (C); tampering with evidence, a felony of the third degree in violation of R.C. 2921.12(A)(1), (B); and improperly handling a firearm in a motor vehicle, a felony of the fourth degree in violation of R.C. 2923.16(B).

{¶13} After a hearing on the matter, the trial court consolidated the two cases for purposes of trial. Although the hearing transcripts are not part of the appellate record, it appears that the parties stipulated to consolidation. A jury trial commenced on March 29, 2019 and concluded on April 2, 2019. The jury found Appellant guilty of all charged offenses.

{¶14} On April 3, 2019, the trial court sentenced Appellant to thirty-six months of incarceration for failure to comply (18 CR 187), thirty-six months for weapons disability (18 CR 216), eighteen months for receiving stolen property (18 CR 216), thirty-six months for tampering with evidence (18 CR 216), and eighteen months for improper handling (18 CR 216). The court ordered the sentences to run consecutively, for an aggregate total of twelve years, but with credit for 111 days served. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S TRIAL COUNSEL FAILED TO OBJECT TO THE TESTIMONY OF POLICE OFFICERS DISCUSSING IRRELEVANT AND UNFAIRLY PREJUDICIAL ITEMS FOUND DURING THE SEARCH OF APPELLANT'S MOTOR VEHICLE, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

ASSIGNMENT OF ERROR NO. 2

APPELLANT'S TRIAL COUNSEL FAILED TO OBJECT TO INADMISSIBLE HEARSAY EVIDENCE, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

ASSIGNMENT OF ERROR NO. 3

APPELLANT'S TRIAL COUNSEL FAILED TO VIEW A BOOKING VIDEO LISTED ON THE STATE'S INTENT TO USE EVIDENCE FILING, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

ASSIGNMENT OF ERROR NO. 4

APPELLANT'S TRIAL COUNSEL PROPERLY OBJECTED TO THE ADMISSION OF THE TEST-FIRE TARGET USED TO PROVE OPERABILITY OF THE FIREARM APPELLANT WAS ACCUSED OF POSSESSING UNDER A DISABILITY, THEN LATER PRESENTED IT TO THE JURY BY ASKING DETECTIVE HOLZWORTH QUESTIONS ABOUT IT, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

ASSIGNMENT OF ERROR NO. 5

APPELLANT'S TRIAL COUNSEL'S CLOSING STATEMENT COMBINED THE TWO CONSOLIDATED CASES, PRESENTING THEM SIMULTANEOUSLY TO THE JURY, AND TRIAL COUNSEL MADE UNSUBSTANTITED AND ODD CLAIMS AND STATEMENTS IN HER OPENING STATEMENT, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

ASSIGNMENT OF ERROR NO. 8

DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE JOINDER OF CASE NUMBERS 18-CR-187 AND 18-CR-216 FOR PURPOSES OF TRIAL WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶15} Appellant's first, second, third, fourth, fifth, and eighth assignments of error all raise allegations of ineffective assistance of counsel. As each of these assignments involve the same legal analysis, they will be jointly addressed.

{¶16} The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is 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." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id*. at 693.

{¶17} As both are necessary, if one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Id*. at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 7th Dist. Columbiana No. 2000-CO-32, 2001 WL 741571 (June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

Drug References

{¶18} Appellant claims that he received ineffective assistance due to trial counsel's failure to file a motion in limine to exclude testimony regarding the drugs found

on his girlfriend's person during the incident which resulted in his gun charges. Appellant, who was not charged with any drug related offenses, believes that the drug references may have confused and enflamed the jury.

{¶19} The state argues that references to crack cocaine were clearly made in regard to Appellant's girlfriend, and not Appellant. The state explains, however, that the presence of marijuana constituted the probable cause which allowed the officers to search the vehicle. Hence, testimony regarding the presence of drugs was relevant to the case. Regardless, as Appellant failed to object at trial he is limited to a plain error analysis. Due to the overwhelming evidence presented to the jury, even if Appellant could show deficient performance, Appellant cannot demonstrate prejudice.

{¶20} Appellant did not object to any of the drug references at trial, thus he is limited to a plain error review. A three-part test is employed to determine whether plain error exists. *State v. Parker*, 7th Dist. Mahoning No. 13 MA 161, 2015-Ohio-4101, ¶ 12, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "First, there must be an error, *i.e.*, a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' " *Parker* at ¶ 12, citing *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25.

{¶21} Although Appellant was not charged with any drug related offenses, his gun charges stemmed from an investigation that began when Steubenville police officers were dispatched to the Wendy's restaurant to conduct a welfare check on Appellant and his girlfriend, who were seen smoking marijuana in an SUV. (4/1/19 Trial Tr. Vol. III, p. 324.) As the officers approached the SUV, they detected a strong odor of marijuana. When the

officers reached the vehicle, Appellant had a marijuana cigarette in his mouth. These facts gave the officers probable cause to conduct the search of the SUV that lead to discovery of the firearm. Thus, all testimony regarding the marijuana was relevant, even though Appellant did not face any drug-related charges.

{¶22} As to the discovery of crack and a crack pipe, it was clear during both Officer Exterovich's and the girlfriend's testimony that these items were found inside the girlfriend's jacket. In fact, Officer Exterovich testified that the girlfriend was charged with possession of crack and a crack pipe. At trial, the girlfriend admitted to her drug abuse and testified that she was in a drug rehabilitation facility at the time of trial.

{¶23} There is nothing within the record to suggest that Appellant possessed or was under the influence of any drug other than marijuana. If anything, the testimony regarding the crack and crack pipe affected the credibility of Appellant's girlfriend, who was a key witness against Appellant. Thus, even if deficient performance could be shown, Appellant cannot demonstrate prejudice. Appellant's first assignment of error is without merit and is overruled.

Hearsay Testimony

{¶24} Appellant argues that his counsel failed to object to testimony from Donald ("Don-Don") Merritt, a friend of Appellant. Appellant argues that Don-Don's testimony included information that he read in a newspaper and heard from another friend. Appellant urges that information obtained from a newspaper is considered hearsay pursuant to *State v. Self,* 112 Ohio App.3d 688, 679 N.E.2d 1173 (12th Dist.1996).

{¶25} In response, the state explains that the party opponent admission exception to hearsay includes statements to which the defendant responds. See *State v. Spires,*

7th Dist. Noble No. 04 NO 317, 2005-Ohio-4471. According to *Spires,* such statements are not hearsay, as they provide context to a defendant's statements, in essence giving meaning to the defendant's words.

{¶26} Contrary to Appellant's arguments, trial counsel did object to Don-Don's testimony at trial. In fact, a side bar was held to discuss this testimony. It appears from the transcripts that the trial court relied on *Spires* in overruling the objection. In *Spires,* we held that statements or questions to which a defendant responds to are considered party opponent admissions even though the statement is made by someone other than the defendant, because such statements provide context to the defendant's statements. *Id.* at ¶ 38, citing *State v. Twitty,* 2d Dist. Montgomery No. 18749, 2002-Ohio-5595, ¶ 27.

{¶27} Both statements challenged by Appellant occurred during a call he made to Don-Don from jail. This phone conversation was recorded, played for the jury, and admitted into evidence. Don-Don also testified about the conversation. As to the first statement, Don-Don informed Appellant that he read in the newspaper that the gun had been stolen and he believed the police would likely charge Appellant with this crime. Appellant responded that he did not steal the gun and that the person who sold it to him would have to deal with the consequences. (State's Exh. 12, 1:55.)

{¶28} As to the second statement, Don-Don told Appellant that someone had seen him with the gun. (State's Exh. 12, 5:00.) Appellant responded that he had the gun out in the open because he was attempting to get rid of it, presumably because of his weapons disability.

{¶29} Pursuant to *Spires,* neither of Don-Don's statements are hearsay because statements to which a defendant responds constitute an admission by a party opponent.

Without Don-Don's statements, Appellant's responses are rendered meaningless. Appellant cannot establish deficient performance for the failure to object to testimony that is not hearsay.

{¶30} Even if Appellant could show deficient performance, he cannot demonstrate prejudice. While the statements included admission of Appellant's ownership of the gun, there is other evidence in the record to show that the gun belonged to him. Appellant, himself, confirmed he owned the gun during that phone call when he stated "I forgot that it [the gun] was there." (State's Exh. 12, 1:55.) During the booking process, a belt was discovered around Appellant's waist with a makeshift holster attached to it. At trial, the gun was placed in the holster to demonstrate that it was apparently constructed to carry this weapon. As such, other evidence supports Appellant's conviction, even absent the contested statements.

Booking Video

{¶31} Appellant argues that his counsel was ineffective for failing to watch a DVD video of the booking process, used as evidence to demonstrate that Appellant was wearing the belt with a makeshift holster. Appellant urges that counsel's failure to watch the video, which he claims is the sole evidence he had this belt, limited counsel's ability to prepare to cross-examine Officer Exterovich.

{¶32} The state contends that the booking video is a public record that could have been obtained through defense counsel's independent investigation. Even so, the state argues that the video and the testimony favored Appellant, as it ultimately did not show the belt.

{¶33} The trial transcripts reveal that there was some confusion as to whether defense counsel was alerted to the existence of the video before trial. At trial, defense counsel moved to exclude the video, because it was not provided by the state in discovery. The state responded with a two-pronged argument. First, that defense counsel should have made a public record request or discovered the video through its own independent investigation instead of relying on the state. It raises this same argument on appeal. The state also argued that the discovery materials given to defense counsel contained in a notice that any other evidence, "if it exists," could be viewed by making an appointment with the prosecutor's office. (4/1/19 Trial Tr. Vol. III, p. 390.) It does not appear that the video was specifically referenced within the discovery materials.

{¶34} The trial court allowed the video to be played in front of the jury and to be admitted into evidence. It is unclear on what basis the trial court made its decision. In regard to the state's argument that counsel needed to make a public records request, the Ohio Supreme Court has previously rejected the state's argument and held "[w]e continue to recognize that neither R.C. 149.43 nor Crim.R. 16 precludes an accused from obtaining public records from law enforcement agencies, but Crim.R. 16 is specific to the procedure in criminal cases and therefore is the preferred mechanism to obtain discovery from the state." *State v. Athon,* 136 Ohio St.3d 43, 2013-Ohio-1956, 989 N.E.2d 1006, ¶ 18.

{¶35} As to the state's argument that defense counsel was aware it was necessary to make an appointment with the prosecutor's office to view any other evidence, the record is not clear that this was sufficient to place defense counsel on notice that a video even existed. This record does not contain the materials provided to Appellant's counsel in discovery. The state averred at trial that as part of the response,

counsel was told in writing that other evidence "if it exists" may be viewed by appointment with the prosecutor's office. (4/1/19 Trial Tr. Vol. III, 390.) Based on this statement, it is debatable whether defense counsel was properly notified of the video's existence.

{¶36} Regardless, Appellant cannot demonstrate deficient performance. The video does not show the presence or absence of the belt in question. The video, which does not include audio, merely shows Officer Exterovich tugging at something near Appellant's waist. It is not apparent on the video just what this object is. After the matter was raised by the state, defense counsel was able to elicit testimony from Officer Exterovich on cross-examination that he conducted a patdown of Appellant at the scene and did not discover any belt. Thus, the video had little, if any, evidentiary significance.

{¶37} Even if counsel was deficient in not viewing the video in question, other evidence independent of the video was presented in regard to the makeshift gun belt. According to Officer Exterovich, when a person is arrested, all of their possessions, including clothing, are removed and placed inside a bag that is locked securely during the person's stay at the jail. Officer Exterovich testified that this belt was discovered, removed and stored according to those procedures. At one point, Det. Holzworth learned of the belt's existence from Officer Exterovich's report and requested to see it. Corrections Officer Trevor Murray testified that he retrieved the belt for Holzworth who examined it. The belt was admitted into evidence at trial. As such, Appellant cannot demonstrate prejudice for failure of counsel to view the video of his booking.

Test Fire Target

{¶38} Appellant asserts that trial counsel successfully moved to exclude a paper test fire target prior to commencement of his trial. However, counsel raised the issue of

the target during trial and opened the door for the state to discuss and admit it into evidence. Without this physical evidence, Appellant contends that the record is devoid of any evidence that would have established that the gun was operable, an essential element of the crime with which Appellant was charged. Appellant contends that he would not have been convicted but for counsel's error.

{¶39} The state concedes that the target itself had been excluded and that counsel opened the door to its admission at trial. However, the state contends that the testimony of Det. Holzworth and Sgt. Bissett independently established operability of the gun, thus Appellant was not prejudiced by admission of the target.

{¶40} The trial court granted Appellant's motion in limine to exclude the target, which is essentially a piece of paper with a bullet hole along with the name and serial number of the weapon, case number, the words "test fire," and Det. Holzworth's dated signature. However, during cross-examination of Det. Holzworth, defense counsel asked whether Sgt. Bissett wrote any report indicating that he provided ammunition for the test fire. Det. Holzworth responded by discussing the test fire target, despite the fact that it had physically been excluded.

{¶41} The following conversation led to the admission of the target.

> [Defense Counsel]: Sergeant Bissett write any report to say that this particular -- that he provided you with any ammunition which Sergeant Bissett signed?
>
> [State]: He thinks he's not allowed to answer. I'll --
>
> THE COURT: She asked the question.

> [Det. Holzworth]: There's a piece of paper which I shot. Sergeant Bissett filled out the piece of paper with the date, the serial number of the gun, things of that sort. We have that. It clearly shows a hole through the piece of paper.

(4/1/19 Trial Tr. Vol. IV, p. 563.)

{¶42} Det. Holzworth's answer obviously exceeded the scope of the question. Defense counsel's sole question to Det. Holzworth was whether Sgt. Bissett wrote a report stating that Bissett had provided Holzworth with ammunition. Det. Holzworth responded by testifying that Sgt. Bissett filled out details pertaining to the test fire on the paper test-fire target, which he classified is a "report." However, this "report" does not reveal whether Sgt. Bissett provided the ammunition to Det. Holzworth, the only subject of the question asked by defense counsel. We note the only name on this "report" is Det. Holzworth's; Sgt. Bissett's name does not appear on the single-page document. The "report" merely documented the type of ammunition used, not where it was obtained. Det. Holzworth also stated that the test fire "report" clearly showed a hole made by the bullet. Defense counsel did not ask whether a bullet hole was visible on the target. Counsel merely asked where Det Holzworth obtained ammunition for a test fire and whether a written report demonstrated who provided this ammunition. Det. Holzworth's testimony regarding the target was outside the scope of defense counsel's question and it appears that it should not have opened the door for the target's admission.

{¶43} Despite the court's apparent error and Det. Holzworth's improper testimony, defense counsel was able to raise several concerns with both the target and the process used to test fire the weapon. For instance, counsel elicited testimony that Det. Holzworth

did not complete a physical inspection of the gun; he merely placed a round in the chamber and fired a bullet through a piece of a paper and into a pile of dirt in a parking lot. Counsel elicited testimony that the "report" does not meet the requirements of the Ohio BCI to constitute a test fire report. This record does not reveal that counsel's line of questioning constitutes deficient performance.

{¶44} Even if counsel's actions could be seen as subpar, Appellant cannot demonstrate prejudice. While defense counsel was able to raise several areas of concern with the test fire, Det. Holzworth had earlier testified that he placed a bullet in the chamber, pulled the trigger, and a bullet discharged. Whether the discharged bullet hit a paper target does not determine whether the gun is operable.

{¶45} If believed, Det. Holzworth's earlier testimony that he fired the gun and caused a bullet to discharge would establish operability. Sgt. Bissett testified that he was present at the time Det. Holzworth test fired the gun and observed the gun fire a bullet. As such, Appellant's fourth assignment of error is without merit and is overruled.

Closing/Opening Statement

{¶46} Appellant asserts that counsel made several claims during her opening and closing statements that were proven to be unreasonable or false, damaging her credibility. For instance, counsel claimed that a camera mounted to a police cruiser dashboard could capture everything that occurred inside a separate vehicle. Appellant points out that, unlike a camera, a person can turn their head or body and see for distances that are outside the parameter of a camera's view. Counsel also asked the jury if any of the jurors drove a Buick, when that type of automobile was not involved in this case. Additionally,

counsel stated that it took Trooper Koontz three weeks to locate Appellant after the motorcycle chase, a fact disproven through Trooper Koontz's testimony.

{¶47} The state notes the trial court instructed the jury that opening and closing statements are not to be considered as evidence. To the extent that trial counsel engaged in debatable trial tactics, the state argues that such tactics are insufficient to justify setting aside Appellant's convictions, which were supported by overwhelming evidence.

{¶48} The first comment with which Appellant takes issue occurred during trial counsel's opening statement. Counsel stated, "[b]y the time the police gets to the sign, could you see the motorcycle? You cannot see if the motorcycle turns right, left, keeps straight. Remember, you're in the seat of the officer. If you can't see it, can he?" (3/29/19 Trial Tr. Vol. I, p. 166.) Placing the comment in context, it appears that counsel was discussing Patrolman Koontz's dashcam video, attempting to use the limitations of that video to attack the credibility of the trooper's identification of Appellant. The driver of the motorcycle was traveling at speeds in excess of 100 mph. It is not possible, viewing the dashcam video alone, to positively identify Appellant as the operator. Trial counsel pointed out in this series of remarks that the jury would have to take Trooper Koontz's word for anything he claimed to have observed that they could not view for themselves. The statement at issue merely calls into question the credibility of the officer.

{¶49} The second statement Appellant attacks also took place during counsel's opening statement.

> Now, surely police officers ought to be able to know what kind of gun it is that they have in their possession, make, model and type and surely what it says on the police report ought to be what it says on every other report

> that shows -- that comes into their possession or in this case, make, model and type.
>
> Now, all of us have driven a vehicle. Has anybody ever driven a Chevrolet Buick?

(3/29/19 Trial Tr. Vol. I, pp. 172-173.)

{¶50} Again, placing the comment into context, counsel was trying to make a point that some objects, such as the gun in this case, have a make, model, and type. It appears that counsel referred to a Buick as an analogy; both automobiles and guns have a make, model, and type. The point was relevant because during trial it was revealed that the make and model of the gun at issue was inconsistently listed in some police reports. While counsel arguably could have been clearer, this analogy does not rise to the level of ineffective assistance.

{¶51} As to the last contested comment, defense counsel claimed that it took Trooper Koontz three weeks to locate Appellant in the case that resulted in the failure to comply charges. Appellant argues that this statement was refuted by Trooper Koontz, who said he filed charges with the prosecutor's office on the day of the incident. Appellant correctly notes that the incident report, which lists him as the suspect, was written on August 12, 2018, the date of the incident. The complaint was filed two days later and Appellant was summoned to appear approximately three weeks later. (4/1/19 Trial Tr. Vol. IV, p. 700.) When Appellant failed to appear, the trial court issued a bench warrant. Appellant was arrested on August 29, 2018.

{¶52} While counsel's statement is somewhat contradicted in the record, Appellant was not prejudiced by this comment. Statements made by counsel in opening statements are not evidence. *State v. Harris,* 7th Dist. Mahoning No. 13 MA 37, 2015-Ohio-2686, ¶ 38. To the degree that the statement was incorrect, it appears she simply misspoke. Our review of the record does not reveal any damage to counsel's credibility with the jury, and Appellant does not cite to any portion of the record in support of this contention. Hence, Appellant's fifth assignment of error is without merit and is overruled.

Joinder

{¶53} Appellant argues that counsel's failure to object to joinder of his separate cases amounts to ineffective assistance of counsel. Appellant argues that there are no common facts between the cases, which occurred months apart. The cases were not of the same or similar character and were not part of the same act or transaction. As to prejudice, Appellant argues that presentation on both cases created a belief in the jury that "where there is smoke, there is fire." He argues that this is apparent because there was no evidence to support his conviction for receiving stolen property.

{¶54} In response, the state points out that the transcripts of the hearing regarding joinder were not made part of the appellate record, thus we must presume the regularity of the matter. The state also notes that at trial, the jury was properly instructed on joinder. Further, the evidence in each case was separate and direct, and the jury was able to separate the facts. Even if Appellant could demonstrate deficient performance, and he cannot, the state argues that there is no prejudice.

{¶55} The law favors joining multiple criminal offenses in a single trial. *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991), citing *State v. Lott*, 51 Ohio St.3d

160, 163, 555 N.E.2d 293 (1990). "[J]oinder and the avoidance of multiple trials is favored for many reasons, among which are conserving time and expense, diminishing the inconvenience to witnesses and minimizing the possibility of incongruous results in successive trials before different juries." *State v. Torres*, 66 Ohio St.2d 340, 343, 421 N.E.2d 1288 (1981). Pursuant to Crim.R. 13, "[t]he court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information."

{¶56} Pursuant to Crim.R. 8(A), joinder is permitted if the offenses are: (1) of the same or similar character; (2) based on the same act or transaction; (3) based on two or more acts or transactions connected together or constituting parts of a common scheme; or, (4) part of a course of criminal conduct. The defendant bears the burden of proving that the trial court abused its discretion in denying a motion to sever and the burden of proving prejudice if joinder has been granted. *State v. Moore*, 2013-Ohio-1435, 990 N.E.2d 625, ¶ 23 (7th Dist.), citing *State v. Coley*, 93 Ohio St.3d 253, 259, 754 N.E.2d 1129 (2001).

{¶57} A defendant may move to sever trial of joined offenses pursuant to Crim.R. 14 if he can establish prejudice. *Lott*, *supra*, at 163. The state may counter a claim of prejudice utilizing two methods. First, the state may demonstrate that the evidence presented at trial for each offense was simple and direct. *Moore*, *supra*, at ¶ 23, citing *State v. Coley*, 93 Ohio St.3d 253, 259, 754 N.E.2d 1129 (2001). Failing that, the state must show that all of the evidence presented at the combined trial would have been admissible in each case if tried separately. *Id*. If the state can demonstrate that the evidence is simple and direct, then it is not required to prove the stricter admissibility test.

State v. Harris, 7th Dist. Mahoning No. 13 MA 37, 2015-Ohio-2686, ¶ 29, citing *State v. Johnson*, 88 Ohio St.3d 95, 109, 723 N.E.2d 1054 (2000).

{¶58} Appellant has failed to provide us with the transcripts of the joinder hearing. As such, we must presume the regularity of those proceedings. "When a defendant fails to provide a complete and proper transcript, a reviewing court will presume regularity of the proceedings in the trial court." *State v. Dumas*, 7th Dist. Mahoning No. 06 MA 36, 2008-Ohio-872, ¶ 14, citing *State v. Johnson*, 9th Dist. Lorain No. 02CA008193, 2003-Ohio-6814, ¶ 9. The sole reference to the hearing is found within a judgment entry, which states: "[a]t the request of the Parties, and for good cause shown Case Nos.: 18CR187 and 18CR216 are hereby consolidated to Case No. 18CR187 for Trial." (2/12/19 J.E.) From this reference, it appears that the parties agreed to joinder of the offenses.

{¶59} In order to successfully appeal the parties' stipulation to joinder, Appellant must show deficient performance and resulting prejudice. As Appellant has failed to make the transcripts available, counsel's reasons for stipulating to joinder are unknown. However, in both cases, the focal point of Appellant's defense was identity. In the failure to comply case, Appellant argued that there was insufficient evidence to establish that he was the operator of the motorcycle. In the gun case, Appellant's defense centered on the fact that both he and his girlfriend denied ownership of the gun at the time of the incident and there was no evidence to prove to whom the gun belonged. Thus, agreeing to joinder of two cases where the identity of the perpetrator was at issue could be seen as trial strategy.

{¶60} Even so, Appellant cannot demonstrate prejudice. As later discussed, there is ample evidence within the record of Appellant's guilt. Again, the state may counter a

claim of prejudice by showing that the evidence presented at trial for each offense was simple and direct or that all of the evidence presented at trial would have been admissible in each trial if tried separately. Evidence is simple and direct when it is apparent that the jury was not confused about which evidence proved which act. *Harris* at ¶ 30, citing *Coley*, *supra*, at 259.

{¶61} The state's case consisted of thirteen witnesses. The first twelve witnesses testified only as to the gun case. None of these witnesses provided any testimony on the motorcycle case. The final witness testified only about the motorcycle case. Thus, the state's presentation of the matter was to separate them into two different cases, one immediately after the other.

{¶62} Additionally, the evidence in each case is wholly different. In the gun case, the evidence consisted of the firearm itself, the belt with the makeshift holster, dash camera videos, testimony about the test fire of the gun, the girlfriend's statements and the jailhouse phone call from Appellant to Don-Don. In the motorcycle case, the evidence included the pursuit video from Trooper Koontz's cruiser, Trooper Koontz's testimony, and the title history of the motorcycle. Because the facts of the cases are simple and easily distinguishable, a reasonable juror would not likely confuse which evidence proved which act.

{¶63} As such, trial counsel's stipulation to joinder was not unreasonable and may have been a part of reasonable trial strategy. Appellant's eighth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 6

APPELLANT'S CONVICTION FOR FAILURE TO COMPLY WITH THE ORDER OF A POLICE OFFICER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 7

APPELLANT'S CONVICTION FOR WEAPONS UNDER DISABILITY, RECEIVING STOLEN PROPERTY, TAMPERING WITH EVIDENCE, AND IMPROPER HANDLING OF A FIREARM IN A MOTOR VEHICLE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶64} Appellant challenges each of his convictions based on a manifest weight of the evidence argument. Appellant argues that specific elements of each offense were not proven and that in both cases the state failed to prove the identity of the perpetrator.

{¶65} "In addition to the elements of the crime, the state is required to prove the identity of the perpetrator of the crime beyond a reasonable doubt." *State v. Heigley*, 11th Dist. Lake No. 2007-L-122, 2008-Ohio-1688, ¶ 26, citing *State v. Cook*, 65 Ohio St.3d 516, 526, 605 N.E.2d 70 (1992).

Failure to Comply

{¶66} Appellant argues that Trooper Koontz's testimony, which represented the state's entire case, did not establish that he operated the motorcycle that engaged in the high-speed police chase. Appellant argues that the LEADS photograph of him that Trooper Koontz supposedly relied on depicts him with long dreadlocks, which he did not have at the time of the incident. Additionally, given that the vehicles traveled in excess of 100 mph during the pursuit, Appellant argues that Trooper Koontz could not have had

a meaningful opportunity to identify the operator of the motorcycle, even if that operator did momentarily turn around and look at Trooper Koontz. While the motorcycle was registered to Appellant at the time of the incident, Appellant argues that a license plate establishes ownership, not possession.

{¶67} In response, the state argues that the jury watched the pursuit video and was able to weigh it alongside Trooper Koontz's testimony. The state cites to testimony of Trooper Koontz where he stated that his vehicle was directly next to the motorcycle at one point. At another point, the motorcyclist turned around and looked at him. Trooper Koontz also testified that he had seen Appellant on the motorcycle two days before the incident. Hence, the state contends there is ample evidence to support Trooper Koontz's identification of Appellant.

{¶68} Based on our review of the video, it is apparent that it has no evidentiary value in determining the identity of the motorcyclist. At the beginning of the video, the cruiser is parked on the right shoulder of SR-7. A few moments later, the motorcycle, which travelled in the far left lane, drove past the cruiser at 109 mph. Trooper Koontz was in the process of merging onto the road in the right lane as the motorcycle passed him. Although the motorcycle does "pull even" with the cruiser for approximately one second as it passes by, the driver's face is not visible on the video. (State's Exh. 24, 1:31.) Trooper Koontz's claim that the driver later turned around and looked at him also is not apparent on the video. There is no point on the video where the driver's face is visible. For most of the pursuit, Trooper Koontz's vehicle is following at a significant distance behind the motorcycle.

{¶69} Trooper Koontz testified that his view of the incident was much clearer than that depicted in the video. He testified that he had two opportunities to view the motorcyclist. The first came when he pulled next to the motorcycle. Again, the video does reflect that the vehicles were next to each other for a brief moment as Trooper Koontz attempted to merge into the right lane and the motorcycle sped past him in the left lane. Trooper Koontz testified that as the motorcycle passed him he was able to see the operator's face. As the video does not capture this, it becomes a matter of credibility. Trooper Koontz also testified that at some point during the pursuit, the driver placed his hand on his leg, turned around, and looked right at him. Again, this does not appear on the video and becomes an issue of credibility.

{¶70} Evidence was introduced into the record demonstrating that Appellant owned title to the motorcycle on the date in question. Appellant owned the motorcycle for more than a year before the incident. Appellant transferred title of the motorcycle to DeMarques A. Meeks on September 10, 2018, one month after the incident. Meeks then transferred title of the motorcycle to Shawn E. Campbell on October 31, 2018.

{¶71} Appellant did not rebut the fact that he owned the motorcycle during the relevant time period nor that he transferred title a month after the incident. While Appellant is correct that registration merely proves ownership, Appellant did not claim that anyone other than himself had access to or possession of his motorcycle on the date of the incident. Defense counsel asked Trooper Koontz whether it was possible that Meeks was driving the motorcycle at the time of the incident. Trooper Koontz responded that the man he saw was not Meeks. Regardless, the trooper testified that Appellant operated the motorcycle during the incident. If this testimony was believed, that alone is enough

to convict Appellant. Thus, the state presented competent and credible evidence to support the jury's finding that Appellant operated the motorcycle during the pursuit and Appellant's assignment is not well-taken.

Weapons Disability

{¶72} Appellant contends that the state failed to present competent, credible evidence to prove that he knowingly possessed the firearm at issue. Appellant argues that the state failed to prove an essential element of his weapons disability charge, of the tampering with evidence charge, and the improper handling of a firearm in a motor vehicle charge.

{¶73} Beginning with the weapons disability conviction, the elements are found within R.C. 2923.13. Appellant was convicted pursuant to subsection (A)(3) which provides that:

> Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

{¶74} Appellant conceded at trial and on appeal that he was under a weapons disability at the time of the charged offense. His sole argument is that the state failed to prove that he knowingly possessed the firearm. In order to "have" a weapon, a defendant must either have actual or constructive possession of the firearm. *State v. Hudson,* 2017-Ohio-645, 85 N.E.3d 371, ¶ 14 (7th Dist.), citing *State v. Haslam*, 7th Dist. Monroe No. 08 MO 3, 2009-Ohio-1663, ¶ 41. Actual possession can be established by proving that the defendant owned or physically controlled the firearm. *State v. Riley,* 7th Dist. Mahoning No. 13 MA 180, 2015-Ohio-94, ¶ 25. Constructive possession is where a defendant knowingly exercises dominion and control over an object regardless of whether the object is within his or her immediate physical possession. *State v. Wolery*, 46 Ohio St.2d 316, 329, 348 N.E.2d 351 (1976).

{¶75} There is no question in this matter that Appellant did not physically control the firearm at the time of its discovery. As to constructive possession, Appellant argues that he did not know the gun was inside the car, so the fact that it was in his immediate reach is irrelevant.

{¶76} A person's mere presence or access to contraband or the area where contraband is found is insufficient to demonstrate dominion and control. *State v. Gardner,* 2017-Ohio-7241, 96 N.E.3d 925, ¶ 35 (8th Dist.), citing *State v. Hall*, 8th Dist. Cuyahoga No. 66206, 1994 WL 677554 (Dec. 1, 1994); *State v. Tucker*, 2016-Ohio-1353, 62 N.E.3d 903 (9th Dist.). There must be some evidence that the person exercised or had the ability to exercise dominion and control. *Gardner* at ¶ 35, citing *State v. Long,* 8th Dist. Cuyahoga No. 85754, 2005-Ohio-5344. "It must also be shown that the person was

conscious of the presence of the object." *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1982).

{¶77} The state relied on the testimony of Appellant's girlfriend and Patrolman Shawn Scott, Appellant's jail call to Don-Don, and the belt with the holster that was found on Appellant's person in order to prove dominion and control. Appellant's girlfriend testified that Appellant had possession of the vehicle prior to the incident as he had been working on repairs. (3/29/19 Trial Tr. Vol. II, p. 198.) She stated that he put the gun underneath the seat, although she was not specific as to when this occurred. While she initially denied any knowledge of the gun at the scene, she testified that the reason she did not immediately inform officers Appellant put the gun under the seat is that she is engaged in a relationship with Appellant and feared he would be upset. (3/29/19 Trial Tr. Vol. II, p. 225.)

{¶78} Patrolman Scott testified that he transported Appellant and his girlfriend from the jail to their initial appearance at the Jefferson County Courthouse. Patrolman Scott stated that during the transport he overheard Appellant ask his girlfriend "why don't you take the gun rap for me because I can get in a lot of trouble if I take it but you got a real small criminal record. So, it really won't be a big problem for you. So, why don't you take it, you know, because it would be fair – it would be fair if you take it as opposed to me taking it." (3/29/19 Trial Tr. Vol. II, p. 264.) According to Patrolman Scott, Appellant pleaded with his girlfriend several times to "take the gun rap." (3/29/19 Trial Tr. Vol. II, p. 264.)

{¶79} On December 16, 2018, Appellant called his friend Don-Don from the jail. Don-Don informed Appellant he read that the gun had been stolen in the newspaper.

Appellant replied, "you know for sure that I didn't do nothing like that," and that the person who sold it to him "got to do deal with that, that ain't my problem." (State's Exh. 12, 1:55-2:26.) Appellant goes on to explain that he and his girlfriend were inside the car when the police arrived and "you know what's crazy, I forgot that it [the gun] was there." (State's Exh. 12, 2:27.) Appellant's statement suggests that he realized the gun was in the car around the time the police arrived. Don-Don told Appellant that someone claimed to have seen him with the gun and Appellant responded that he was trying to get rid of it, presumably due to his weapons disability. (State's Exh. 12, 5:15.) This statement constitutes an admission that he possessed the gun. Based on Appellant's belt which had a kind of holster, it appears that he kept the gun on his person.

{¶80} The record reflects that there is ample evidence Appellant exercised dominion and control over the firearm. As such, Appellant's arguments regarding his conviction for weapons disability are without merit and are overruled.

Tampering With Evidence

{¶81} Pursuant to R.C. 2921.12:

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation.

{¶82} Appellant appears to argue that he did not place the gun underneath the seat, and so, could not have concealed it. Again, the state relied on testimony from his girlfriend, his makeshift holster, and his jail call to Don-Don to rebut Appellant's claim.

{¶83} As previously discussed, the record contains ample evidence to prove that Appellant purchased the gun, possessed it, and placed it underneath the seat of the vehicle. The act of placing the gun underneath the seat and outside the presence of the officer's view constitutes tampering with evidence. Thus, there is competent and credible evidence to support Appellant's conviction for tampering with the evidence.

Improper Handling of a Firearm in a Motor Vehicle

{¶84} Appellant again argues that there is no evidence that he placed the firearm underneath the seat of the SUV, thus his conviction for improper handling a firearm in a motor vehicle is against the manifest weight of the evidence.

{¶85} Pursuant to R.C. 2923.16(B), "[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." The statute does not define the term "loaded," however, it does define the term "unloaded." A firearm is considered to be "loaded" where the firearm does not meet the definition of "unloaded." *State v. New,* 197 Ohio App.3d 718, 2012-Ohio-468, 968 N.E.2d 607, ¶13 (10th Dist.). Pursuant to R.C. 2923.16(K)(5)(a), unloaded is defined as when

> * * * no ammunition is in the firearm in question, no magazine or speed loader containing ammunition is inserted into the firearm in question, and one of the following applies:

(i) There is no ammunition in a magazine or speed loader that is in the vehicle in question and that may be used with the firearm in question.

(ii) Any magazine or speed loader that contains ammunition and that may be used with the firearm in question is stored in a compartment within the vehicle in question that cannot be accessed without leaving the vehicle or is stored in a container that provides complete and separate enclosure.

{¶86} The firearm in this case was found underneath the passenger seat of the SUV and the bullets were found in the center console. As such, the firearm is considered "loaded" pursuant to R.C. 2923.16(B). Appellant does not contest this fact. He argues that the firearm did not belong to him and that he did not place it underneath the seat. We have already determined the record contains a plethora of evidence that Appellant owned the gun, including his own admissions, and that he placed the firearm underneath the seat of the SUV.

{¶87} Appellant's improper handling of a firearm conviction is supported by competent and credible evidence.

Receiving Stolen Property

{¶88} Appellant asserts that in order to be convicted of receiving stolen property, the state must prove that he knew or had reason to know that the firearm was stolen. While there was evidence to establish that the firearm was, in fact, stolen, there is nothing to suggest that Appellant knew it had been stolen. Appellant points out that there is no evidence to establish where he got the firearm, how much (if anything) he paid for it, or whether he had any reason to know that it was stolen. Appellant urges that although the

record included his conversation with Don-Don, nowhere in that conversation did he suggest that he knew it was stolen at the time he purchased the weapon.

{¶89} The elements of receiving stolen property are outlined within R.C. 2913.51(A), which provides: "[n]o person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶90} There is no direct evidence in the record that Appellant stole the gun. In fact, he denied involvement in the theft during his phone call with Don-Don. Although much of Appellant's conversation with Don-Don in inaudible, the following excerpts can be gleaned:

> Don-Don: In the paper it said that the gun was stolen the night before right out of someone's house.
>
> Appellant: Yeah. Well, we know for sure I wouldn't do nothing like that.
>
> Don-Don: Well, they are gonna try to put that on you. You know that.
>
> [Inaudible]
>
> Don-Don: They say you got it from somewhere. Somebody got it from somewhere.
>
> [Inaudible]
>
> Appellant: Okay then, the guy that I bought it from, he got to deal with that. That ain't my problem.

(State's Exh. 12, 1:55-2:20.)

{¶91} There is nothing within this statement to suggest Appellant knew or had reason to know that it was stolen at the time he obtained the weapon. He clearly denied stealing the firearm. He did not name the person who sold it to him, how much he paid for it, or whether there were any facts or circumstances that would have led him to believe that it was stolen.

{¶92} The state contends that absent a logical explanation as to how a defendant comes into possession of a stolen item, an inference must be drawn that the defendant knew the item was stolen. In reviewing the question Ohio courts, including this Court, have applied the factors found in *State v. Davis,* 49 Ohio App.3d 109, 550 N.E.2d 966 (8th Dist.1988). These factors include: (a) the defendant's unexplained possession of the item or items, (b) the nature of the merchandise, (c) the frequency with which such objects are stolen, (d) the nature of the defendant's commercial activities, and (e) the relatively limited time between the thefts and the recovery of the item or items. *Id.* at 112. We note that in this matter, Appellant did not sell the gun, even though he had reason to, given his concerns about his weapons disability. Further, Appellant designed a makeshift holster on a belt, further suggesting an intent to keep the weapon. There appears to be no indication of any fact or circumstance in this matter that shows Appellant knew the firearm had been stolen.

{¶93} In the cases cited by the state, facts or circumstances existed to permit an inference to be drawn that the defendant knew the item(s) were stolen. *See State v. Riser,* 10th Dist. Franklin No. 90AP-603, 1991 WL 38206 (Mar. 21, 1991). In *Riser,* the state presented evidence the appellant obtained the items in question and sold them less

than twenty-four hours after the items were stolen. The appellant had no logical reason for the quick sale of the items. The *Riser* court found that, based on the surrounding circumstances and without any reasonable explanation as to how the appellant came into possession of the property, an inference existed that he must have known it was stolen. *Id.* at *1.

{¶94} The Twelfth District has also acknowledged that an inference may exist in these cases, but emphasized that such inference must be based on some facts or circumstances in the record. *State v. Pangburn,* 12th Dist. Clermont No. CA2015-11-095, 2016-Ohio-3286. In *Pangburn,* the appellant was suspected of receiving stolen property when a surveillance video showed him and his stepfather using a stolen credit card at a Meijer store. *Id*. at ¶ 4. The appellant admitted he knew the credit card did not belong to him when he used it and he was convicted of receiving stolen property. On appeal, the *Pangburn* court found that there was no evidence to allow the jury to infer that the appellant knew or reasonably should have known the credit card had been stolen. *Id.* at ¶ 17. The fact that he knew the credit card was not his when he used it was irrelevant to a determination of whether he knew it was stolen. It may have simply been lost by its owner and found by the appellant.

{¶95} Similarly, in a First District case, the court emphasized that a reviewing court must examine whether the circumstances surrounding a defendant's possession of a stolen item suggests that the defendant had knowledge of its stolen nature. *State v. Gerth,* 1st Dist. Hamilton No. C-120392, 2013-Ohio-1751, ¶ 14. The *Gerth* court found that the evidence supported an inference the appellant knew the vehicle he was driving was stolen because he refused to pull over after the officers attempted a traffic stop,

attempted to elude police and caused an accident where two people died, fled on foot after the accident, and on arrest voluntarily stated that his passenger did not know the vehicle was stolen.

{¶96} In the matter before us, there are no facts on the record tending to demonstrate Appellant knew or should have known the gun was stolen. In fact, during his phone call to Don-Don Appellant denied having any knowledge of the theft. During that same phone call, Appellant made other several incriminating statements, but at no time even hinted that he knew the gun was stolen. Although Appellant was in possession of the gun mere days after its theft, there is nothing of record to suggest that Appellant knew when or where his seller obtained the gun. In fact, unlike the appellant in *Riser,* this record is completely devoid of any evidence concerning the manner in which Appellant obtained the gun. There is no evidence with which to even begin to apply the *Davis* factors.

{¶97} Throughout the investigation and trial, Appellant's explanation was that he was entirely innocent of knowledge that there was a gun in the SUV. Although the phone call to Don-Don shows that Appellant clearly lied about possessing the firearm, this lie appears to be due to his weapons disability, as demonstrated by his statements to officers at the scene.

{¶98} The state failed to establish any surrounding circumstances that would allow a jury to infer Appellant knew or had reason to know the gun was stolen. Although the state had great latitude in proving that such an inference existed, the law does not completely remove from the state the duty to present at least some evidence. The law does not place the initial burden to the defendant to prove he did not know the gun was

stolen. For all of the foregoing, Appellant's seventh assignment of error has merit as it pertains to his conviction for receiving stolen property and is sustained. The decision of the trial court is reversed, and Appellant's conviction and sentence on this count are vacated.

Conclusion

{¶99} Appellant argues that his convictions for failure to comply, weapons disability, improper handling, tampering with evidence, and receiving stolen property are against the manifest w+eight of the evidence. He also raises several claims of ineffective assistance of counsel. For the reasons provided, Appellant's argument in regard to his receiving stolen property conviction has merit. His remaining arguments are without merit. Accordingly, the trial court's decision on this sole issue is reversed and Appellant's conviction for receiving stolen property and his corresponding sentence are vacated. The remaining aspects of his convictions and sentence are affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's seventh assignment of error is sustained and all of his remaining assignments are overruled. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed in part. Appellant's receiving stolen property conviction is reversed and vacated and the sentence that corresponds to this conviction is also hereby vacated. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.