

[Cite as *State v. Gray*, 2009-Ohio-5844.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-081257
	:	TRIAL NO. B-0803615
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	
SHAWN GRAY,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, Appellant Discharged  
in Part, and Cause Remanded

Date of Judgment Entry on Appeal: November 6, 2009

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*,  
Assistant Prosecuting Attorney, for Appellee,

*Elizabeth E. Agar*, for Appellant.

Please note: This case has been removed from the accelerated calendar.

**SYLVIA S. HENDON, Presiding Judge.**

{¶1} In a taped statement to police, defendant-appellant Shawn Gray admitted to robbing a Kroger's grocery store, three Walgreen's pharmacies, a K-Mart store, a Sunoco gas station, a Kentucky Fried Chicken restaurant, a Marathon gas station, and a Donato's pizza parlor. Gray told police that he had committed the robberies using a BB gun that he had modified to look like a real gun. The state subsequently charged Gray with, among other things, nine counts of aggravated robbery and nine counts of robbery. On each aggravated-robbery charge, Gray's indictment alleged that, while committing the robberies, Gray had had "a deadly weapon on or about his person \* \* \*, to wit: A BLUDGEON AND/OR BB GUN." Gray's BB gun was never recovered.

{¶2} Following a jury trial, Gray was found guilty of eight counts of aggravated robbery and nine counts of robbery. Before sentencing, the trial court merged eight of the robbery counts with their respective aggravated-robbery counts. For these eight counts of aggravated robbery, and for one unmerged count of robbery, Gray was sentenced to a total of 43 years in prison. This appeal followed.

*1. The Jury was Properly Instructed*

{¶3} In his first assignment of error, Gray initially argues that the court's jury instructions misled the jury into presuming that a BB gun was per se a deadly weapon. Since Gray failed to object to the instructions at trial, he has waived all but plain error.<sup>1</sup> An erroneous jury instruction does not constitute

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<sup>1</sup> Crim.R. 30(A).

plain error unless, but for the error, the outcome of the trial clearly would have been otherwise.<sup>2</sup>

{¶4} Gray takes issue with the following instruction: “Before you can find defendant guilty, you must find beyond a reasonable doubt that \* \* \* the defendant while purposefully committing or attempting to commit a theft offense \* \* \* or in fleeing immediately thereafter had a deadly weapon on or about his person or under his control and displayed, brandished, indicated that he possessed, or used the weapon, specifically a BB gun.”

{¶5} We are not convinced that this wording created an impermissible presumption. And even if it did, a single jury instruction should not be viewed in artificial isolation but, rather, in the context of the overall charge.<sup>3</sup> The trial court in this case went on to properly instruct the jury on the legal definition of “deadly weapon.” The court also stated that a “deadly weapon” determination was a question of fact for the jury to decide. Reading the instructions in their entirety, we hold that the trial court’s charge contained a proper and complete statement of the law.<sup>4</sup> Gray therefore can not demonstrate error, plain or otherwise. This argument has no merit.

## *II. The Sufficiency and Relevance of Pitchford's Testimony*

{¶6} Gray also claims in his first assignment of error that the trial court erred by admitting the testimony of state’s witness Detective Brian Pitchford. Pitchford testified concerning the deadliness of BB guns in general. Because our

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<sup>2</sup> *State v. Coley*, 93 Ohio St.3d 253, 2001-Ohio-1340, 754 N.E.2d 1129; *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus.

<sup>3</sup> *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772, paragraph four of the syllabus; *State v. Hobbs* (May 25, 2001), 1<sup>st</sup> Dist. No. C-000516.

<sup>4</sup> *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus; *State v. McCrary* 1<sup>st</sup> Dist. No. C-080860, 2009-Ohio-4390; see, also, *State v. Brown* (1995), 101 Ohio App.3d 784, 656 N.E.2d 741.

analysis of Pitchford's testimony is central to resolving Gray's fourth assignment of error, we address these assignments of error together.

{¶7} In his fourth assignment of error, Gray challenges the weight and sufficiency of the evidence to support his convictions. When reviewing the sufficiency of the evidence to support a criminal conviction, this court's function is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.<sup>5</sup> 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 proved beyond a reasonable doubt.<sup>6</sup> In this case, we hold that there was insufficient evidence to support the jury's finding that Gray's BB gun was a deadly weapon. There was, accordingly, no basis in law for Gray's eight aggravated robbery convictions.

*Deadly Weapon?*

{¶8} In relevant part, the elements of aggravated robbery include committing a theft offense while displaying a deadly weapon.<sup>7</sup> R.C. 2923.11(A) defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶9} The record is replete with evidence that Gray had displayed a BB gun "as a weapon" during the robberies at issue. But the state relied solely on Pitchford's testimony to prove that Gray's BB gun had been "capable of inflicting death." On this issue, Pitchford testified as follows: "BB guns, pellet guns which

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<sup>5</sup> *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

<sup>6</sup> *Id.*

<sup>7</sup> R.C. 2911.01(A)(1).

are fired off with a CO2 cartridge, they can cause death just like a firearm could. If it's a heavy type of BB gun or pellet gun, they could be used as a bludgeon-type instrument hitting someone in the head causing injury and death as well." On the basis of *State v. Brown*,<sup>8</sup> we hold that Pitchford's testimony was insufficient to prove that Gray's BB gun was "capable of inflicting death."

{¶10} In *Brown*, we reversed the defendant's conviction for felonious assault after determining that the stated had failed to prove that Brown's BB gun had been "capable of inflicting death," as set forth in R.C. 2923.11(A). The BB gun in that case, as here, had never been recovered. The only description of it was that it was long and had a pump. In reversing the defendant's conviction, we reasoned that there had been "no evidence adduced concerning the *particular* BB gun's capability of inflicting death, either as a bludgeon or otherwise."<sup>9</sup> Likewise, in this case, there was no evidence demonstrating how Gray's *particular* BB gun was capable of inflicting death. There was no evidence that his BB gun was heavy enough to be used as a deadly bludgeon. And even if we assume that a "BB gun" and a "pellet gun" are the same thing, there was no evidence that Gray's BB gun had a CO2 cartridge.

{¶11} We are aware of cases from this district where a BB gun or a toy gun has been held to be a deadly weapon. This case leaves those holdings undisturbed. In those cases, there was evidence that the attributes of the BB gun or toy gun at issue made it capable of inflicting deadly harm.<sup>10</sup> No such evidence was presented here.

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<sup>8</sup> (1995), 101 Ohio App.3d 784, 656 N.E.2d 741.

<sup>9</sup> Id. at 789, 656 N.E.2d 741.

<sup>10</sup> See *State v. Barnes* (Oct. 23, 1996), 1st Dist. Nos. C-950784 and C-950785 (jury could reasonably infer that BB gun was capable of inflicting death as a bludgeon where state introduced into evidence large, heavy, metal BB gun); *State v. Bonner* (1997) 118 Ohio App.3d 815, 694 N.E.2d 125 (toy gun made of

*Pitchford's Testimony was Irrelevant*

{¶12} Not only was Pitchford's testimony insufficient to prove that the BB gun was a deadly weapon, but it was also irrelevant since it did not tend to prove or disprove that Gray's BB gun was capable of inflicting death.<sup>11</sup> Irrelevant evidence is inadmissible.<sup>12</sup> We therefore sustain that part of Gray's first assignment of error challenging Pitchford's testimony. Our holding is largely based on the fact that Pitchford testified after all of the victims had testified. And the victims' testimony did not provide a basis for concluding that Gray's BB gun was heavy enough to be used as a deadly bludgeon, or that it had a CO2 cartridge. The lack of relevance in Pitchford's testimony, therefore, should have been readily apparent.

{¶13} But we caution that there is nothing inherently improper about testimony concerning the deadliness of a weapon that has never been recovered. Indeed, to hold otherwise would destroy the state's ability to effectively prosecute "deadly weapon" cases where no weapon has been found. But to sustain a conviction, there must be an evidentiary link between a weapon's capacity to inflict death and its particular characteristics or attributes.

{¶14} We note that Gray presents other challenges to the strength of the prosecutor's evidence in the balance of his fourth assignment error. They are without merit. Gray confessed to committing nine robberies.<sup>13</sup> And while Gray presented a version of events that, if believed, may have exonerated him, there is

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metal admitted into evidence, and state presented testimony that the toy could have bludgeoned a victim to death)

<sup>11</sup> Evid.R. 401; cf. *State v. Gaskins*, 9th Dist. No. 06CA0086-M, 2007-Ohio-4103; *State v. Boone*, 10th Dist. No. 05AP-565, 2006-Ohio-3809.

<sup>12</sup> Evid.R. 402.

<sup>13</sup> See *Jenks*, supra.

no indication that the jury “so lost its way” in choosing to believe the state’s version of events as to warrant a new trial.<sup>14</sup>

{¶15} In sum, Gray’s first and fourth assignment of error are sustained in part and overruled in part.

*III. No Ineffective Assistance of Counsel*

{¶16} In his second assignment of error, Gray claims ineffective assistance of counsel. To prevail on such a claim, Gray must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and was prejudicial.<sup>15</sup> Our review is highly deferential, and we indulge a strong presumption that counsel’s conduct fell within the wide range of reasonable professional assistance.<sup>16</sup>

{¶17} Here, Gray asserts that counsel (1) should have objected to Pitchford’s BB-gun testimony; (2) should have cross-examined Pitchford about his BB-gun testimony; (3) should have objected to the jury instructions; and (4) should have argued for an acquittal based on the state’s failure to present sufficient evidence on the issue of the deadliness of Gray’s BB-gun. None of these arguments has merit.

{¶18} We have already determined that the jury was correctly charged. Counsel, therefore, was not ineffective for failing to object to the court’s instruction. And while in hindsight, counsel’s decision not to challenge Pitchford’s BB-gun testimony may not have been the best choice, we will not second-guess counsel’s performance in this regard. Gray’s main claim at trial was

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<sup>14</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

<sup>15</sup> *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373, paragraph two of the syllabus.

<sup>16</sup> *Strickland* at 689, 104 S.Ct. 2052.

that his confession had been coerced, and that he did not commit the crimes charged. His defense had focused on drawing out the inconsistencies between his confession and the victims' testimony. Counsel's decision not to challenge the "deadliness" of the BB gun could have, therefore, been a trial tactic.<sup>17</sup> The same reasoning supports counsel's decision not to focus his Crim.R. 29 argument on this issue. We find no error. Gray's second assignment of error is overruled.

*IV. Gray's Motion to Suppress*

{¶19} In his third assignment of error, Gray contends that the trial court erred when it overruled his motion to suppress his confession. Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact.<sup>18</sup> We must accept the trial court's findings of fact as true if they are supported by competent and credible evidence.<sup>19</sup> With respect to the trial court's conclusions of law, however, we apply a de novo standard of review and decide whether the facts satisfy the applicable legal standard.<sup>20</sup>

{¶20} A confession is subject to suppression if it was involuntarily induced through "coercive police activity."<sup>21</sup> To make this determination, a court must consider the totality of the circumstances, including "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement."<sup>22</sup>

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<sup>17</sup> Cf. *State v. Marshall*, 175 Ohio App.3d 488, 2008-Ohio-955, 887 N.E.2d 1227, ¶86.

<sup>18</sup> *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8.

<sup>19</sup> *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583.

<sup>20</sup> *Burnside*, supra.

<sup>21</sup> *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515.

<sup>22</sup> *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3147.

{¶21} Gray claims that police coerced his confession through a lengthy interrogation process that included a “relay” of questioning officers, combined with an implicit threat that Gray’s brother would be criminally charged if Gray did not confess. The trial court found, however, no undue influence or coercion. The court pointed out that, on the recording of the confession, Gray had stated that no threats or promises had been made to him, and that Gray had sounded calm and responsive. The court also found that Gray was “an adult who has experience with the criminal justice system by his own account.” All of these findings were supported by the competent, credible evidence. And applying the applicable law, we hold that the trial court correctly denied Gray’s motion to suppress. Gray’s third assignment of error is overruled.

*V. Conclusion*

{¶22} Gray’s aggravated robbery convictions are reversed, and Gray is discharged from further prosecution for those offenses. But the findings of guilt on the robbery counts, and the one conviction for robbery, are affirmed. This case is remanded to the trial court for sentencing on the eight remaining robbery counts.

Judgment accordingly.

**DINKELACKER and MALLORY, JJ., concur.**

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.