

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN G. COMSA III,

Defendant-Appellant.

Case No. 07-2203

On Appeal from the Washington  
County Court of Appeals, Fourth  
Appellate District

Washington App. No. 06CA 21

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT JOHN G. COMSA III**

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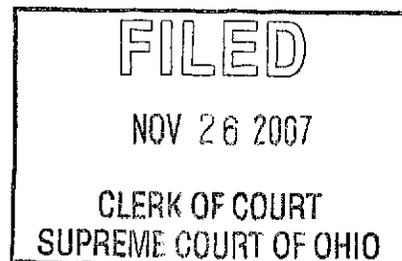


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*State of Ohio v. John G. Comsa, III*, Judgment Entry, Washington County Court of Appeals Case No. 06CA 21, (Oct. 12, 2007) ..... A-1

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This felony case presents a substantial constitutional question. It involves the constitutional mandate that a person be protected from conviction “except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Jackson v. Virginia* (1979), 443 U.S. 307, 316; *In re Winship* (1970), 397 U.S. 358, 364. Mr. Comsa was convicted for grand theft of a firearm and for having a weapon while under disability on entirely circumstantial evidence insufficient to prove, beyond a reasonable doubt, that the firearms were operable or that they could readily have been rendered operable at the time of the offense. This case illustrates that Ohio courts erroneously allow juries to apply diminished standards when determining whether the prosecution has proven, by sufficient evidence, every element of a crime beyond a reasonable doubt, and thus, is a case of “public or great general interest.”

Mr. Comsa’s case demonstrates that Ohio courts lack and require guidance for determining what evidence is legally sufficient to prove the operability of a firearm that was not recovered or produced as evidence, and was neither fired nor brandished in connection with the offense. Mr. Comsa’s case provides this Court with an opportunity to supply much-needed guidance to Ohio’s courts in ensuring that criminal convictions stand only when supported by legally sufficient evidence of every fact necessary to constitute the crime with which the defendant is charged.

For these reasons, Mr. Comsa respectfully requests the Court to grant review.

## **STATEMENT OF THE CASE**

On February 3, 2006 a Washington County Grand Jury issued a six-count indictment naming John G. Comsa III in connection with the crimes of Grand Theft of a Firearm, Having Weapons Under Disability, Burglary, and Petty Theft. Mr. Comsa pleaded not guilty to all charges, and his case proceeded to trial. After the close of the evidence, the trial court granted Mr. Comsa's motion for judgment of acquittal as to count two (Grand Theft of a Firearm), and count five (Having Weapons While Under Disability).

The jury entered its verdict finding Mr. Comsa guilty of the following charges: Burglary, as charged in Count One; Grand Theft of a Firearm, as charged in Count Three; and Having Weapons While Under Disability, as charged in Count Six. As to Count Two, the trial court granted a judgment of acquittal as to all but two of the firearms listed in the charge for grand theft. The remaining two firearms were listed as a "Thompson Contender" and a "Ruger Super Red Hawk." These firearms were also the firearms Mr. Comsa was accused of possessing for the purpose of the remaining Having Weapons While Under Disability charge.

The trial court sentenced Mr. Comsa on May 22, 2006. The court sentenced Mr. Comsa to five years for the Burglary charge, a second-degree felony. R.C. § 2911.12(A)(2)(c). The court sentenced Mr. Comsa to four-year terms for both the Grand Theft charge, a third-degree felony, and the Having Weapons While Under Disability charge, also a third-degree felony. R.C. 2913.02(A)(1)&(B)(4); 2923.13(A)(2)&(B). The trial court also ordered Mr. Comsa to pay restitution in the amount of \$2,350.00 to the owner of the guns.

On timely appeal to the Washington County Court of Appeals, Fourth Appellate District, Mr. Comsa assigned as error the sufficiency of the evidence, the trial court's decisions permitting the State to introduce inadmissible and prejudicial evidence, and the trial court's order of restitution. On October 12, 2007 the court of appeals affirmed Mr. Comsa's conviction and sentence, with one judge dissenting as to the sufficiency of the evidence assignment of error. Mr. Comsa now respectfully requests this Court to accept jurisdiction over his case, and reverse his conviction.

### **STATEMENT OF THE FACTS**

Mary Ann Janes and John G. Comsa, III, were neighbors. For a period of time, Mr. Comsa worked for Ms. Janes. Mr. Comsa took care of her many dogs while Ms. Janes was out of town. On December 19, 2005 Ms. Janes discovered that a Tech 22 firearm had been stolen from her home. On that same date, she also discovered that \$450.00 had been stolen from her purse. Ms. Janes suspected that Mr. Comsa was the person who had stolen her property. Ms. Janes told the police that Mr. Comsa had repeatedly asked to buy her Tech 22, but she had refused to sell it to him. On December 30, 2005, while Ms. Janes was out of town, an employee of Ms. Janes discovered that someone had broken into her home. When Ms. Janes returned to her home, she discovered that several of her firearms had been stolen. Once again, Ms. Janes suspected that Mr. Comsa committed the burglary. Ms. Janes told the police that Mr. Comsa was the only person who knew where she kept her firearms.

The police officers who conducted the crime-scene investigation discovered several muddy footprints outside a window of the house, as well as inside the house. This particular window was determined to be the burglar's point of entry. The police officers also discovered the tip of a knife inside the house, located under this window. The officers

believed that the burglar had broken off the tip of the knife in the process of prying open the window.

On January 4, 2005 Detective Brian Schuck spoke to a confidential informant who told him that he had seen Mr. Comsa with a "Tech 9" and a sawed-off shotgun within the preceding 10 days. The confidential informant said that he had seen these weapons in Mr. Comsa's home. Ms. Janes had indicated that one of the firearms stolen from her home was a Tech 22, which, according to Detective Schuck, looks very similar to a Tech 9. The confidential informant also told the officer that Mr. Comsa said that he wanted to get back into "gunrunning." Detective Schuck also knew that Mr. Comsa had prior convictions making him unable to possess firearms legally. Based on this information, Detective Schuck sought a warrant to search Mr. Comsa's residence. Detective Schuck was granted a search warrant, and during the course of his search, the Detective seized a knife and several pairs of shoes from Mr. Comsa's residence. Schuck seized the knife because its tip had been broken off and because it matched the knife tip found at the crime scene. Schuck also seized a pair of shoes, which had a tread that matched the muddy footprints found at the scene. Detective Shuck neither found nor recovered any weapons. Subsequently, Mr. Comsa was arrested.

## ARGUMENT

### PROPOSITION OF LAW

**Convictions for Grand Theft of a Firearm and Having Weapons While Under Disability must be supported by evidence sufficient to prove that a “firearm” was involved, as defined in R.C. 2923.11. When the State does not produce a gun, and fails to present any evidence that the gun was fired or brandished by the defendant, the State has not presented evidence sufficient to prove that the guns were operable or could readily be made operable at the time of the offense, and an ensuing conviction deprives an accused of the rights to due process and a fair trial. Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.**

A criminal defendant has a constitutional right to a fair trial. *Tumey v. Ohio* (1927), 273 U.S. 510, 523. Moreover, before the state can obtain a conviction for any offense, it must present evidence sufficient to prove every element of that offense beyond a reasonable doubt. *Sullivan v. Louisiana* (1993), 508 U.S. 275, 277-78; *Jackson v. Virginia* (1979), 443 U.S. 307, 316; *In re Winship* (1970), 397 U.S. 358, 361-64. A conviction based upon evidence insufficient to meet that standard constitutes a denial of due process of law and must be overturned. *Jackson*, 443 U.S. at 315-18; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, citing *Tibbs v. Florida* (1982), 457 U.S. 31, and *Jackson v. Virginia*, 443 U.S. 307.

Here, the evidence was insufficient to support Mr. Comsa’s convictions for Grand Theft of a Firearm and Having Weapons While Under Disability. Both charges contain a firearm element. R.C. 2913.02(A)(1)&(B)(4); 2923.13(A)(2)&(B). Thus, in order to sustain a conviction for either charge, the State must have proven beyond a reasonable doubt that the items stolen in this case were firearms, as defined in R.C. 2923.11. Under this statute, a firearm is defined as follows:

(B) (1) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.

R.C. 2923.11.

In this case, the alleged firearms were not recovered, and thus, were not produced for the jury to consider. In cases in which no shots were fired and the firearms are not recovered, the "representations and actions of the individual exercising control over the firearm are of crucial importance." *State v. McElrath* (1996), 114 Ohio App.3d 516, 519 (internal quotations omitted). The trier of fact may consider any implicit threat made by the individual in control of the firearm. *Thompkins*, 78 Ohio St.3d at 385, 1997-Ohio-52. And "the implicit threat of brandishing a firearm" will support an inference that the firearm was operable. *Thompkins*, Id.; *McElrath*, 114 Ohio App.3d at 519-520.

In Mr. Comsa's case, however, the State failed to present even circumstantial evidence supporting an inference of firearm operability. No shots were fired; no weapons were brandished. Nor was there any testimony concerning the operability of those guns. The victim in this case was a gun collector who owned dozens of weapons of every conceivable type, which she kept hidden in her home. When she testified about the firearms in this case, she spoke generally of the *type* of firearm, and rarely said anything specific about her own personal weapons. The State presented photographs of the *types* of firearms stolen from Ms. Janes' home, but did not present photographs of *Janes' firearms*. Janes never testified that she had personally shot any of the firearms at issue.

For example, in discussing a picture of a Thompson Contender, Ms. Janes says that “typically, the pictures I’ve seen, do not show the barrel, because there are so many barrels available for it. . . in another picture, they will show you and list the different barrels that are applicable to the pistol.” T 254. Concerning her gun, she said that its barrel “was marked for either a 45 caliber shell or a 410 shotgun shell,” but she did not indicate whether the gun had ever been fired. T 254. As to the Ruger Super Red Hawk, Ms. Janes described the picture presented to her by saying “that would be typical of a – a Ruger Super Red Hawk, stainless steel. The top picture is one without a scope. The one on the bottom right shows the scope.” T 258. The State then asked Ms. Janes to describe why a scope is useful. Ms. Janes’ answer was again of a general nature: “to sight in better on the object that you’re target practicing with or – or hunting with, and that is a 357 caliber gun.” T 258. Never did Ms. Janes indicate that she had gone hunting with her gun, or even used it for target practice.

Further, the operability of Janes’ firearms cannot be presumed merely from the fact that Janes possessed them. Indeed, Ms. Janes testified that she possessed firearms which she never used. Speaking of the Tech 22, Ms. Janes testified that “I’ve never shot it. . . you cannot buy a 21 clip anymore. They’re outlawed.” T 222. And Ms. Janes went even further concerning another firearm in her collection, testifying that “it’s never been shot...” T 311. At no time did Ms. Janes testify to ever firing either of the guns for which Mr. Comsa was convicted of stealing and possessing while under a disability. And most importantly, the State failed to elicit any other evidence concerning the operability of those two firearms.

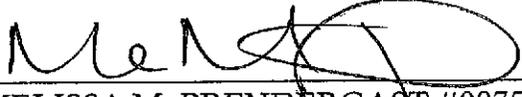
This Court has held that “proof of the operability of a firearm can be established by circumstantial evidence, which can consist of the brandishing of a firearm by the defendant and the implicit threat to shoot it.” *Thompkins*, 78 Ohio St.3d at 385. The *Thompkins* decision, however, turned on Thompkins’ act of brandishing the weapon in the course of committing the offense, and this Court held that the brandishing was an implicit threat. Here, there was no evidence that Mr. Comsa brandished or used any of the guns in connection with the offenses charged, and the State did not produce the guns, in contrast to *Thompkins*. Thus, the State failed to prove a necessary element of the charged offenses, and Mr. Comsa’s convictions violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *In re Winship*, 397 U.S. at 364. The trial court erred by failing to grant Mr. Comsa’s Crim. R. 29 motion for acquittal based upon insufficient evidence to support convictions for those two charges. Because the trial court entered Mr. Comsa’s convictions for Grand Theft of a Firearm and Having Weapons While Under Disability upon insufficient evidence, this Court should vacate his sentences and dismiss the charges against him.

### **CONCLUSION**

For the foregoing reasons, Appellant John G. Comsa III requests that this Court grant jurisdiction in his case and reverse the decision of the court of appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant John G. Comsa III** was served, by regular U.S. Mail, upon Susan L. Vessels, Assistant Prosecuting Attorney, Washington County Courthouse, 205 Putnam Street, Marietta, Ohio 45750, on this 26<sup>th</sup> day of November, 2007.

  
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FOURTH DISTRICT  
COURT OF APPEALS  
OHIO COURTS

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

2007 OCT 12 PM 12:10  
WASHINGTON CO. OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

JOHN COMSA,

Defendant-Appellant.

Case No. 06CA21

DECISION AND JUDGMENT ENTRY

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James E. Schneider, Washington County Prosecutor, and Susan L. Vessels, Assistant Washington County Prosecutor, Marietta, Ohio, for appellee.

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Harsha, J.

{11} John George Comsa, III, appeals his convictions for burglary, grand theft of a firearm, and having a weapon while under disability, all stemming from his theft of firearms from the residence of his former employer, Mary Ann Janes.

{12} Comsa first contends the state failed to prove the stolen firearms were operable and thus, did not present sufficient evidence to sustain his convictions for grand theft of a firearm and having a weapon while under disability. The state presented evidence that Janes was a gun collector and had held a federal firearms license; the two different types of ammunition that could be used in one of the firearms; that the purpose of the scope on the other firearm was for target practice or hunting; Janes had taken steps to hide the weapons in her home; and that Comsa stole the firearms to get back into "gunrunning." Viewed in the light most favorable to the prosecution, this

evidence is sufficient to establish the operability of the firearms.

{¶3} Comsa next argues the trial court should have sustained his objection to testimony about his incarceration and given a curative instruction. However, given the serious nature of the crimes charged, it is self-evident Comsa had been arrested and in custody at some point. The isolated comment during trial did not violate the presumption of innocence. Furthermore, the comment did not reveal that Comsa was in custody during trial. And the trial court fully explained the presumption of innocence during voir dire and the jury instructions. This assignment of error is meritless.

{¶4} Finally, Comsa argues the trial court erred when it ordered him to pay restitution in the amount of \$2,350. Because, in ordering restitution, the trial court considered the value of weapons Comsa was not convicted of stealing, this assignment of error has merit.

## I. FACTS

{¶5} Janes hired Comsa to assist in caring for her purebred dogs and to look after her property while she was away from home for extended periods. Janes had an extensive collection of firearms and had formerly held a federal firearms license. Janes had firearms hidden throughout her home and Comsa became aware of this. Because Comsa proved to be an unreliable employee, Janes fired him in October 2005.

{¶6} On December 19, 2005, someone stole an Intra-Tech .22 from Janes' home. On December 29, 2005, someone broke into Janes' home by prying open a dining room window and stole a blued Colt .380, a stainless steel Colt .380, a Rossi .38, a Thompson Contender, and a Ruger Redhawk with scope. Janes was out of town at the time and Janes' employee, Priscilla Hansen discovered the crime the next morning.

Hansen called the Washington County Sheriff's office, which investigated. Deputies recovered the tip of a knife near the pried-open window and discovered distinctive muddy shoe imprints in the home.

{¶7} Subsequently, Comsa's friend, Robert White, told detectives he had been in Comsa's apartment and Comsa had shown him a "Tech 9" and a "sawed-off shotgun." White also testified Comsa had made statements about getting back into gunrunning.

{¶8} Detectives searched Comsa's apartment and seized a knife with a broken tip that matched the knife tip found in Janes' home. Detectives also found a pair of shoes with tread that matched the muddy prints found in Janes' home.

{¶9} Comsa was indicted on the following charges: Count 1, burglary, R.C. 2911.12(A)(2) and (C); Count 2, grand theft, R.C. 2913.02(A)(1) and (B)(4), of an Intra-Tech .22; Count 3, grand theft, R.C. 2913.02(A)(1) and (B)(4) of the following firearms: a Thompson Contender, a stainless steel Colt .380, a blued Colt .380, a Ruger Redhawk, and a Rossi .38; Count 4, petty theft, R.C. 2913.02(A)(1) and (B)(1) and (2); Count 5, having a weapon while under a disability, R.C. 2923.13(A)(2) and (B); and Count 6, having a weapon while under a disability, R.C. 2923.13(A)(2) and (B).

{¶10} The matter proceeded to a jury trial. Upon Comsa's Crim.R. 29 motion, the court found the state presented sufficient evidence to prove the operability of only two of the firearms, the Thompson Contender and the Ruger Redhawk. Thus, the court granted Comsa's motion as to Counts 2 and 5 and ordered that references to all weapons except the Thompson Contender and Ruger Redhawk be stricken from Count 3 and Count 6. The jury convicted Comsa on Count 1, and Counts 3 and 6 as modified.

The jury found him not guilty of Count 4. The trial court sentenced Comsa and ordered him to pay restitution of \$2,350.

{¶11} Comsa filed this appeal and asserts the following assignments of error:

I. THE TRIAL COURT VIOLATED JOHN COMSA'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THE TRIAL COURT ALLOWED THE JURY TO FIND MR. COMSA GUILTY OF GRAND THEFT OF A FIREARM, AND HAVING WEAPONS WHILE UNDER DISABILITY. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT VIOLATED JOHN COMSA'S RIGHTS TO THE PRESUMPTION OF INNOCENCE, DUE PROCESS AND A FAIR TRIAL WHEN IT OVERRULED HIS OBJECTION TO HIGHLY PREJUDICIAL TESTIMONY CONCERNING THE FACT THAT MR. COMSA WAS IN JAIL. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

III. THE TRIAL COURT'S ORDER OF RESTITUTION WAS UNSUPPORTED BY ANY COMPETENT, CREDIBLE EVIDENCE AND ITS IMPOSITION UPON JOHN COMSA WAS CONTRARY TO LAW. R.C. 2929.18.

## II. SUFFICIENCY OF EVIDENCE

{¶12} A claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally adequate to support the jury verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. This is a question of law that we review de novo. In analyzing the sufficiency of evidence to sustain a criminal conviction, an appellate court must construe the evidence in a light most favorable to the prosecution. *State v. Hill* (1996), 75 Ohio St.3d 195, 205, 661 N.E.2d 1068. After construing the evidence in this manner, the test for determining sufficiency is whether any rational trier of fact considering the evidence could have

found all essential elements of the charged offenses proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

**{¶13}** R.C. 2913.02(A)(1) provides, "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: Without the consent of the owner or person authorized to give consent[.]" Whoever violates this section is guilty of theft. R.C. 2913.02(B)(1). If the property stolen is a firearm, a violation of R.C. 2913.02 is grand theft. R.C. 2913.02(B)(4).

**{¶14}** R.C. 2923.13 states:

"(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm \*\*\* if any of the following apply:

\*\*\*\*

"(2) The person is under indictment for or has been convicted of any felony offense of violence \*\*\*."

Whoever violates this section is guilty of having weapons while under disability. R.C. 2923.13(B).

**{¶15}** To obtain a conviction under these statutes, the state must prove a firearm was involved. R.C. 2923.11 defines a firearm as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable." R.C. 2923.11(B)(1).

**{¶16}** In *State v. Murphy* (1990), 49 Ohio St.3d 206, 551 N.E.2d 932, syllabus, the Ohio Supreme Court held the state can prove operability through the testimony of

lay witnesses who were in a position to observe the instrument and the circumstances surrounding the crime. Moreover, R.C. 2923.11(B)(2) provides:

"When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm."

{¶17} A court evaluates the evidence of a firearm's operability by examining the totality of the circumstances. *State v. McElrath* (1996), 114 Ohio App.3d 516, 519, 683 N.E.2d 430, citing *State v. Murphy* (1990), 49 Ohio St.3d 206, 208.

{¶18} Because none of the weapons stolen here were recovered, the state was limited to proving operability by circumstantial evidence. Comsa argues, and the state concedes, there is no evidence that the guns were fired or brandished. However, Comsa and the state disagree over whether the representations and actions of either person exercising control of the weapons was sufficient to prove operability. Comsa argues Janes never testified that she had fired either the Thompson Contender or Ruger Redhawk, but only testified in generalities about the weapons. The state relies on a telephone threat from Comsa that he would shoot Janes' dog, made after the weapons had been stolen; Janes' testimony concerning the ammunition that could be fired in the Thompson Contender, i.e., it could fire either .45 caliber handgun ammunition or .410 shotgun shells; and the scope mounted on the Ruger Redhawk, which Janes testified was used to sight in on a target for practice or hunting. The state also relies on White's testimony that Comsa intended to get back into gunrunning and that Comsa had shown him a sawed-off shotgun. (Janes testified the Thompson Contender could be mistaken for a sawed-off shotgun.)

{¶19} Considering the totality of the circumstances, and viewing the evidence in the light most favorable to the prosecution, we conclude the state presented sufficient evidence to establish the operability of the Thompson Contender and Ruger Super Redhawk. While Janes never directly testified that she fired either weapon, she did testify as to the type of ammunition that she could use in her Thompson Contender. She indicated the barrel on her gun could be loaded with either a .45 caliber pistol ammunition or a .410 shotgun shell. She described the former as carrying "a solid lead bullet in it," and the latter as one that "has your BB's in it . . ." She also testified about the use of the scope on the Ruger Super Redhawk, which she indicated was used for target practice or hunting. Both of these activities involve shooting the gun, not merely possessing it as a collector's item or some other nonfunctional purpose. She identified State's Exhibit B-6 as containing two photos of a Ruger Super Redhawk pistol like hers. The top photo showed the pistol without a scope, while the bottom one was the pistol with scope. She indicated her pistol was equipped with a scope which she previously indicated was used "to sight in better" on intended targets. It is also significant that Janes took steps to conceal the weapons in her home. Janes had an extensive firearms collection and had formerly been a federally licensed firearms dealer. Thus, a reasonable jury could conclude Janes would neither collect nor conceal inoperable firearms. Given the totality of the circumstances, we agree with the trial court, which diligently researched the issue during trial, that the state produced sufficient evidence of the two guns' operability. Comsa's first assignment of error is meritless.

## III. COMSA'S CUSTODY

{¶20} The state called Linda Walters, a friend of Comsa, to testify regarding telephone conversations she had with Comsa in January 2006. During the course of direct examination, the following exchange occurred:

"Q. Okay. When was the last time you spoke to John Comsa.

"A. Last time I spoke?

"Q. Uh-huh.

"A. When I visited him in jail It was probably --"

Comsa's counsel objected to Walter's reference to Comsa being in custody and the trial court overruled the objection. Comsa argues the trial court's ruling and failure to give a curative instruction eroded his presumption of innocence.

{¶21} In *State v. Williams* (2003), 99 Ohio St.3d 439, at 453, the Ohio Supreme Court rejected the argument Comsa makes, stating:

"When a defendant is being tried for aggravated murder, it is self-evident that he had been arrested. Evidence about a defendant's arrest and ensuing custody does not contravene the presumption of innocence. Further, the jury was not informed that Williams was in custody during the trial, only that he had been in custody when arrested. In any event, the presumption of innocence was fully explained in the voir dire and the jury instructions.

"Precedent, cited by Williams, relating to a defendant's being tried in prison clothing or appearing while shackled has no relevance here. Cf. *Estelle v. Williams* (1976), 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126. The fact that the jury knew that Williams had been arrested for the crimes for which he was being tried is simply not comparable to a jury's seeing a defendant in shackles. Nothing in the record suggests that the trial's result was affected by the disclosure that police had arrested Williams \*\*\*."

{¶22} While the defendant in *Williams* was charged with aggravated murder, there is no reason a different rule should apply in this case. Comsa was charged with serious crimes and it was self-evident he had been arrested. Walter's reference was

brief and did not indicate when she had visited Comsa and thus, did not inform the jury that Comsa was in custody at the time of trial. And, as in *Williams*, the trial court fully explained the presumption of innocence in voir dire and the jury instructions.

{¶23} The trial court did not err in overruling Comsa's objection or in failing to give a curative instruction.

#### IV. RESTITUTION

{¶24} The trial court ordered Comsa to pay \$2,350 in restitution to Janes. This sum included \$650 for the Thompson Contender, \$1000 for the Ruger Redhawk, \$400 for the stainless steel Colt .380, and \$300 for the Rossi .38. Comsa contends the court's restitution order was not supported by competent, credible evidence because the court ordered him to pay restitution for firearms he was not convicted of stealing, i.e., the stainless steel Colt .380 and the Rossi .38. The state counters that Comsa's burglary conviction supports the order of restitution for all four firearms.

{¶25} R.C. 2929.18(A)(1) allows a court to order a defendant to pay restitution to the victim for actual economic loss caused by the crime for which the offender was convicted. R.C. 2929.18(A)(1); *State v. Williams*, 3rd Dist. No. 8-03-25, 2004-Ohio-2801, ¶23. As a matter of law, a court may not order an offender to pay restitution for damages arising from a crime for which the offender was not convicted. Thus, the issue under this assignment of error is whether economic loss for the stainless steel Colt .380 and Rossi .38 resulted as a direct and proximate result of Comsa's commission of the burglary offense.

{¶26} Comsa was convicted under R.C. 2911.12(A)(2), which provides:

"(A)No person, by force, stealth, or deception, shall do any of the following:

\*\*\*\*

“(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense[.]”

{¶27} In this case, the burglary offense was completed when Comsa entered Janes' home with purpose to commit any criminal offense. Thus, Comsa's burglary conviction does not, in and of itself, support an order of restitution for economic damages for theft of firearms for which Comsa was not convicted. Therefore, the trial court erred in ordering Comsa to pay restitution for the stainless steel Colt .380 and Rossi .38. Thus, we reverse and remand for the sole purpose of entering a new order of restitution.

JUDGMENT AFFIRMED IN PART,  
REVERSED IN PART, AND  
CAUSE REMANDED.

Kline, J., dissenting in part.

{¶28} I respectfully dissent in part as to the first assignment of error involving the Ruger Redhawk firearm. I concur in judgment and opinion as to the first assignment of error involving the Thompson Contender firearm. In addition, I concur in judgment and opinion as to the second and third assignments of error.

{¶29} In my view, the state did not produce sufficient evidence to show that the Ruger Redhawk firearm was operable. The state showed the owner victim two pictures of the same model of firearm. The prosecutor then asked the owner about the scope in the picture. He asked the owner what that scope was useful for, not what the scope on her stolen Ruger Redhawk was used for. While the owner did testify that she bought her Ruger Redhawk with the scope already attached, I do not believe that this evidence is sufficient to show that the Ruger Redhawk was operable. Further, in my view, the fact that the owner hid her firearms in her home shows at best that the firearms were valuable, not that they were operable.

{¶30} Thus, I dissent in part as to the first assignment of error involving the Ruger Redhawk.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED and that the Appellee and Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

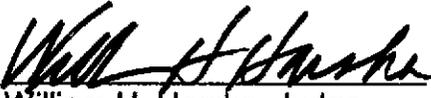
IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J.: Concurs in Judgment and Opinion.

Kline, J.: Concurs in Judgment and Opinion in part and Dissents in part, with Attached Opinion, as to Assignment of Error I; Concurs in Judgment and Opinion as to Assignments of Error II & III.

For the Court

BY:   
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**