

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	Sup. Ct. No 2010-0076
Plaintiff-Appellee,	:	Case No. C081257
Vs.	:	ON APPEAL FROM THE HAMILTON COUNTY
Shawn Gray,	:	COURT OF APPEALS, THE FIRST
Defendant-Appellant.	:	APPELLATE CA. NO. C-081257

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MEMORANDUM IN SUPPORT OF JURISDICTION OF THE  
APPELLANT SHAWN GRAY

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Shawn Gray, Int# 545-668  
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 P.O. Box 56 - 3791 State Rt. 63  
 Lebanon, Ohio 45036-0056  
 DEFENDANT-APPELLANT --- IN PRO SE

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- A.) Counsel was ineffective for failing to object to, or counter, testimony by Detective Pitchford that B.B. Gun can cause death if they use CO2, or if they are heavy enough to use as a bludgeon, when there was no evidence that the gun in question used CO2, was made of metal, or was ever used or intended for use as a bludgeon.
- B.) Counsel was ineffective for failing to object to a jury instruction that implied the B.B. Gun used by the Defendant was, by nature a deadly weapon
- C.) Counsel was ineffective for failing to argue for verdict of acquittal on all aggravated robbery counts, based on the failure of the state to present any evidence that the B.B. Gun used in the offense was capable of causing death.

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The State has the burden of establishing that any alleged waiver of Defendant's right to counsel and to silence was voluntary rather than a product of coercion, and that burden was not met in the instant case.

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THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE WHEN IT DENIED COUNSEL'S MOTION FOR A VERDICT OF ACQUITTAL, AND AGAIN WHEN IT ACCEPTED AND JOURNALIZED VERDICTS OF GUILTY WHICH WERE NOT SUPPORTED BY RELEVANT AND CREDIBLE EVIDENCE. 7-8

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

This case is quite unusual as it is one wherein an older brother "confesses" to a string of robberies he did not commit in order to protect his younger brother. This is not an uncommon event in history, as older brothers have protected younger brothers since time immemorial, ("I am my brother's Keeper.") The police knew the appellant was not guilty but accepted his confession anyway.

The Police and the Hamilton County Prosecutor had DNA Evidence collected at two (2) of the businesses that were allegedly robbed by the Defendant, evidence which did not match the Defendant. Nevertheless, the Prosecutor continued on and prosecuted the case. Almost nothing else about the Defendant's "confession" matched the evidence Police knew to be true from the crime scenes. The Prosecutor knew that several of the crimes the defendant confessed to, it would have been impossible for him to commit. There was incontrovertible proof he was elsewhere at the time.

It would appear that the Hamilton County Prosecutor, in order to get a conviction, will do whatever necessary, even if it means convicting an innocent person. In this case it did not matter whether the defendant was guilty or not, the fact was he confessed to the crime, and they could convict him of the crime. No one seemed to be interested in what the truth was, all that seemed important to the Prosecutor was the fact that the Defendant Confessed to the crime. He could have also confessed to shooting President Kennedy, but we know that isn't true. The bottom line here is, the prosecutor was concerned with nothing else but winning, with tacking another skin to the wall. With the help of an uncaring judge, that is exactly what this prosecutor did. And why not, most of the judges presiding over cases now are ex-prosecutors, who came to the bench with the same attitude as the prosecutors now pushing cases through the courts.

The Prosecutor's motto should be, "convict them all, let the appeals court sort them out." The Court should not stand for this type of justice, the convict them all attitude. -Shotgun convictions. -- It should accept this case, and send a clear message to the courts in the First District and the Prosecutor's in Hamilton County, Ohio. They should be ordered to refrain from this type of prosecutions, so it is an insult to the American system of Jurisprudence, and a slap in the face to the authors of the United States and Ohio Constitutions.

#### STATEMENT OF CASE AND FACTS

Defendant was stopped while driving a vehicle which had been connected to a robbery at Kroger's in the Kenwood Towns Center in Cincinnati, Ohio.

ON May 7th, 2008, he was taken to the Hamilton County Sheriff's Patrol Headquarters, where he was placed in an interrogation room and questioned by relays of officers from multiple jurisdictions about a series of robberies throughout the Cincinnati area. (Tp. 5-12). Some three (3) hours later a taped statement was made in which the Defendant detailed his involvement with his brother Ezekiel in a number of offenses. At some point before the taping, his younger brother Nephthali, the owner of the car was brought in. Although Officers denied threatening to charge Nephthali if the Defendant did not confess, Nephthali was released without charges once the Defendant made a taped statement.

At trial, the State presented witnesses and security camera videotape from each of the locations robbed. The video and the testimony often contradicted the Defendant's taped account of the crimes, and his description of clothing, methods and conversations. None of the witnesses could positively identify defendant because the robbers faces were always covered. The only physical evidence recovered with identification potential were surgical gloves, recovered from two locations, DNA on the gloves excluded the Defendant in both cases. (Tp. 417-18).

Defendant was charged with one (1) count of Kidnapping, nine (9) counts of Aggravated Robbery, all First Degree felonies, and Nine (9) counts of Robbery in the Second Degree. (Td 1 Indictment). The Defendant filed a pre-trial motion to suppress on November 29th, 2008, and Defendant went to trial, and was found guilty on December 1st, 2008, and sentenced to a term in prison of forty three (43) years on all the charges, except for the Kidnapping and one count of Aggravated Robbery, which he was acquitted of committing.

He filed a timely appeal to the First District Court of Appeals, and the case was remanded on the issue of the B.B. Gun. The Court re-sentenced the Appellant to 24 years. The Appellant then sought leave of the Court to file a delayed appeal, due to the fact he missed the filing deadline. He missed the deadline because he was being held in the County Jail, and was being re-sentenced. The Court granted leave to file the delayed appeal, and this appeal now follows.

PROPOSITION OF LAW NUMBER ONE:

DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

ISSUE PRESENTED FOR REVIEW:

- A.) Counsel was ineffective for failing to object to, or counter, testimony by Detective Pitchford that B.B. Gun can cause death if they use CO<sub>2</sub>, or if they are heavy enough to use as a bludgeon, when there was no evidence that the gun in question used CO<sub>2</sub>, was made of metal, or was ever used or intended for use as a bludgeon.
- B.) Counsel was ineffective for failing to object to a jury instruction that implied the BB Gun used by the Defendant was, by nature a deadly weapon.
- C.) Counsel was ineffective for failing to argue for verdicts of acquittal on all aggravated robbery counts, based on the failure of the state to present any evidence that the BB Gun used in the offense was capable of causing death.

(ARGUED TOGETHER)

Defendant asserts the argument raised in Proposition of Law Number One (1) as if restated here in full. Trial Counsel failed to object to the testimony of Detective Pitchford, even though it was clear that he was not testifying from personal knowledge or observation of the weapon involved in these cases. Counsel failed to cross examine the witness on this point, or to challenge his testimony in any way.

This amounted to a concession of the Officer's Opinion about the deadly nature of BB Guns in general. Counsel raised no objection to the jury instruction which only strengthened the concession, nor did he move for a verdict of acquittal or argue to the jury that the State's proof failed in this area.

This failure on the part of defense counsel to interpose an objection which would have barred damaging evidence, or to vigorously advocate a more favorable conclusion from the evidence presented, constitutes ineffective assistance of counsel. It is an error so severe that it undermines any confidence in the outcome of the trial. Without advice from his counsel, Defendant cannot be expected to raise this issue on his own. Nor should he be required to do so. Defense counsel had the duty to raise an objection to this damaging testimony and instruction, research the issue raised and challenge the State's proof on this element of aggravated robbery. Failure to do so renders his representation ineffective.

Reversal of judgment of conviction, or sentence, based upon ineffective assistance of counsel requires a defendant to meet a two prong standard set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 requires a showing of (a); deficient performance, or errors so serious that counsel was not functioning as the counsel guaranteed Defendant by the Sixth Amendment, and a showing of (b); prejudice by counsel's errors that deprived the Defendant of a fair trial --a trial whose result is reliable --. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. In this case it is a non acquitor, the Appellate Court reversed on this same issue, but failed to state counsel was inadequate.

Given the lack of any evidence that the BB Gun used by the Defendant was capable of causing death, either as intended to be used, or as actually used in these cases, Counsel's error must undermine, considering the opinion of the appellate court, confidence in the verdicts of the jury on all counts of aggravated robbery. Due process and the right to effective assistance of counsel requires reversal.

PROPOSITION OF LAW NUMBER TWO:

THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S  
MOTION TO SUPPRESS HIS TAPED STATEMENT TO POLICE

ISSUE PRESENTED FOR REVIEW:

The State has the burden of establishing that any alleged waiver of Defendant's right to counsel and to silence was voluntary rather than a product of coercion, and that burden was not met in the instant case.

At the outset, it must be observed that, in order for a confession to be considered involuntary and thus violative of the Due Process Clause, it must have been the product of state action. See: *Colorado v. Connelly* (1986), 479 U.S. 157, at 165, 107 S.Ct. 515, 93 L.Ed.2d 473. "As with other affirmative protections that the Bill of Rights confers, the Fifth Amendment right against self incrimination may be waived. However, the waiver must be voluntary. "A suspects decision to waive his privilege against self incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self determination was critically impaired because of police conduct." See: *State v. Pettigrew*, 140 Ohio App. 3d 517, 748 N.E.2d 133 (2000) quoting, *State v. Ohio* (1996), 74 Ohio St.3d 555, at 562, 660 N.E.2d 711, at 719; *Connelly*, Supra; *State v. Dailley* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459; *Dickerson v. United States*, 530 U.S. at 434, 120 S.Ct. at 2331, 147 L.Ed.2d at 413.

Once a certain threshold requirement is met, the court must then determine "whether the confession following these remarks was voluntary." A statement is voluntary if it is "the product of an essentially free and unconstrained choice by its maker." *State v. Wilcox* (1991), 59 Ohio St.3d 71, at 81, 571 N.E.2d 97; See also: *Colomba v. Connecticut* (1961), 367 U.S. 568, at 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037.

In evaluating the voluntary nature of a confession, the court must consider the totality of the circumstances. *State v. Edwards*, 49 Ohio St.2d 31, at 40, 358 N.E.2d 1051, at 1059 *Wiles*, at 81. See also: *Dickerson v. United States*, 530 U.S. at 434, 120 S.Ct. at 2331. "The United States has continued to measure confessions against the requirements of due process." *Miller v. Fenton* (1985), 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405. In *Dickerson* the Court stated, "We have never abandoned the due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily." *Id.* at 434, 120 S.Ct. at 2331, 147 L.Ed.2d at 413, citing *Malloy v. Hogen* (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Thus a confession may be involuntary even where Miranda warnings are given. further, even when Miranda warnings are not required, a confession may be involuntary if on the totality of the circumstances the "Defendant's will was overborne" by the circumstance surrounding the giving of a confession. *Dickerson*, *Supra* at 434.

Of great importance in the instant case is the implicit threat to Defendant's younger brother, the owner of the car driven in at least one of the robberies. The officer's actually brought the brother into the same station where Defendant was being questioned to underscore the threat. "If all the attendant circumstances indicate the confession was coerced or compelled, it must not be used to convict a Defendant. *Stein v. New York*, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953).

Additionally, Defendant was worn down by a lengthy interrogation. Relays of Officers were involved in this process. Interrogations of this nature can overcome Defendant's will and coerce statements. Since the Defendant's statements were not the product of free and voluntary waiver of his constitutional rights, and since state actions was affirmatively involved in coercing the statements from the Defendant, the trial court acted in refusing to suppress them. *State v. Pettitjean*, *Supra*, at 520.

PROPOSITION OF LAW NUMBER THREE:

THE TRIAL COURT ERRED TO DEFENDANT'S PREJUDICE WHEN IT DENIED COUNSEL'S MOTION FOR A VERDICT OF ACQUITTAL, AND AGAIN WHEN IT ACCEPTED AND JOURNALIZED VERDICTS OF GUILTY WHICH WERE NOT SUPPORTED BY RELEVANT AND CREDIBLE EVIDENCE.

ISSUE PRESENTED FOR REVIEW:

The evidence presented below was insufficient, as a matter of law, to establish Defendant's guilt beyond a reasonable doubt.

The evidence presented by the State was insufficient as a matter of law to support the verdict. Counsel preserved this error by moving for a verdict of acquittal at the close of the State's case. (T.p. 498). "A motion pursuant to rule 29(A) is a challenge to the sufficiency of the evidence" *State v. Ringkob*, 9th Dist. No. 18484, unpublished, 1998 WL 159015 at 3 (March 25, 1998).

Defendant also contends that his convictions were against the manifest weight of the evidence:

"When a defendant argues that his convictions are contrary to the manifest weight of the evidence, this Court must review and weigh all the evidence that was before the trial court: An appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E. 2d 1009.

In the instant case, Defendant contends that the jury lost its way, in part because it considered testimony from Det. Pitchford relating to generalities about BB guns and pellet guns when the detective had never seen nor examined the weapon used by the Defendant, and in part because the jury instruction suggested that a BB gun was a deadly weapon as a matter of law. Defendant also contends that the jury failed to give sufficient weight to the discrepancies between Defendant's statement and the actual evidence of how the crimes were committed. Had they done so it should be obvious that the defendant simply made up the confession to protect his younger brother as the defense contended. Also the descriptions given by various witnesses match the obvious characteristics of the Defendant and his brother.

Although appellate courts do not sit as a second jury, reviewing and reweighing the evidence, this court may "examine the record with a view of determining whether the proper rules as to the weight of the evidence and the degree of proof have been applied" See *State v Martin* (1955), 164 Ohio St. 54, 128 N.E. 2d 7.

The Court must examine the record in order to determine whether the evidence is sufficient probative force to support a finding of guilt beyond a reasonable doubt. See *State v Sage*(1987) 31 Ohio St. 3d 173, 510 N.E. 2d 345. If the State fails to present substantial evidence which would convince the average mind of the Defendant's guilt beyond a reasonable doubt, the court has a duty to reverse Defendant's conviction. See *State v Eley* (1978) 56 Ohio St. 2d 169, 383 N.E. 2d 132.

Furthermore, a conviction obtained without proof beyond a reasonable doubt of every element of the offense violates the Federal and State constitutional right to due process of law. See *In Re Winship* (1970) 387 US 358, 90 Sct. 1068, 25 L. Ed 2d 368 and *Jackson v Virginia* (1979) 443 US 307, 99 Sct 2781, 61 L. Ed 2d 560.

In the instant case, the state's proof does not rise to the level of substantial evidence sufficient to convince a reasonable person of the Defendant's guilt. For that reason, the Court should reverse the Defendant's convictions immediately.

CONCLUSION

The Defendant did not receive a fair trial or a just result in the instant case. The refusal of a reasonable continuance to permit either retained or appointed counsel to adequately prepare for trial, when combined with the delays in supplying discovery, denied the Defendant the effective assistance of counsel. Denial of the motion to suppress evidence allowed introduction of inadmissible and highly prejudicial matter. Considering all these facts and circumstances, due process requires that the Defendant's conviction be reversed.

Respectfully submitted,



Shaun Gray, Int# 595-668

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CERTIFICATE OF SERVICE

I Shaun Gray hereby certify that a true and correct copy of the foregoing has been forwarded via First Class U.S. Mail to opposing counsel on this 2<sup>nd</sup> day of April, 2010.

Respectfully submitted,



Shaun Gray, Int# 595-668

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Lebanon, Ohio 45036-0056

**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 "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.

*I. 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 CO<sub>2</sub> 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 state 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 CO<sub>2</sub> 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 CO<sub>2</sub> 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.