[Cite as *State v. Rogers*, 2015-Ohio-2093.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, PLAINTIFF-APPELLEE, VS. ALTERIK ROGERS, AKA BRIAN MAC NEIL, DEFENDANT-APPELLANT.	)))))))))	CASE NO. 14 JE 26 OPINION

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 14CR12
JUDGMENT:	Conviction and sentence for felonious assault with the attendant firearm specification is affirmed. Conviction for having a weapon under disability is reversed and the sentence is vacated.
APPEARANCES:	
For Plaintiff-Appellee:	Jane M. Hanlin Prosecuting Attorney 16001 State Route 7 Steubenville, Ohio 43952
For Defendant-Appellant:	Eric M. Reszke Suite 810 Sinclair Bldg. 100 North 4th St. Steubenville, Ohio 43952
JUDGES:	
Hon. Carol Ann Robb Hon. Gene Donofrio Hon. Cheryl L. Waite	Dated: May 29, 2015

ROBB, J.

{¶1} Defendant-Appellant Alterick Rogers ("Appellant") appeals from his conviction and sentence entered in Jefferson County Common Pleas Court for felonious assault with an attendant firearm specification and having a weapon while under disability. Four issues are raised in this appeal. The first is whether the convictions for felonious assault and having a weapon while under disability are against the manifest weight of the evidence. The second is whether the trial court complied with the mandates of the Ohio Revised Code when it imposed a maximum consecutive sentence. The third issue is whether Appellant was denied effective assistance of counsel. The fourth issue is whether the "true copy" of a prior felony drug conviction from New Jersey was proper evidence for proving that Appellant was under disability during the commission of the felonious assault.

{¶2} For the reasons expressed below, the first three assignments of error lack merit; however, the fourth assignment of error has merit. Accordingly, the conviction and sentence for felonious assault with the firearm specification is hereby affirmed. The conviction and sentence for having a weapon while under disability is hereby reversed and vacated. The evidence submitted at trial was insufficient to prove Appellant was the person who committed the felony drug conviction from New Jersey.

Statement of the Case

{¶3} On January 4, 2014 at approximately 6:30 in the evening multiple shots were fired at the driver's side of a Jeep Cherokee driven by Robert Washington in the Pleasant Heights section of Steubenville, Ohio. Tr. 112, 116. Washington stated he had just left Pleasant Food Mart, drove up Maxwell Street towards State Street, and upon turning left onto Lawson Avenue multiple shots were fired at his vehicle by Appellant, Washington's former neighbor. Tr. 118, 130, 139. According to Washington, Appellant parked his white Acura on State Street, exited the vehicle, stood on the curb of the street, and fired the shots towards Washington's vehicle. Tr.

138-139. Washington immediately drove to his house on Lawson Avenue and called the police.

{¶4} The vehicle was riddled with 8 bullet holes, all on the driver's side. One bullet traveled through the vehicle, bruised Washington's left thigh, and landed in his jacket pocket along with glass from the windows. Fortunately, Washington sustained no other injuries.

{¶5} Two witnesses at the scene testified that after firing multiple shots, the gunman got into a white car parked on State Street and sped off down the alley between Lawson Avenue and Maxwell Street. Tr. 185, 190. Neither witness could identify the shooter. Tr. 187, 193.

{¶6} As a result of this incident, Appellant was questioned. He gave multiple accounts of his whereabouts during the shooting. A gunshot residue test was performed on his hands and his clothing was taken into evidence.

{¶7} Thereafter, he was indicted on one count of felonious assault in violation R.C. 2903.11(A)(2), a second-degree felony, and one count of having a weapon while under disability in violation of R.C. 2923.13(A)(3), a third-degree felony. The felonious assault charge contained an attendant firearm specification, a violation of R.C. 2941.145. There was a third charge in the indictment, Menacing by Stalking. However, it was severed at the request of Appellant and tried separately.

{¶8} The trial on the remaining two charges occurred on June 4, 2014. The jury found Appellant guilty of the two charges and the firearm specification. Sentencing occurred on July 2, 2014; Appellant was sentenced to an aggregate term of 14 years. 7/2/14 J.E. He received an 8 year sentence for the felonious assault conviction, a mandatory 3 year sentence for the firearm specification, and a 3 year sentence for the weapons under disability conviction. All sentences were ordered to be served consecutive to each other. 7/2/14 J.E.

{¶9} Appellant timely appealed his conviction and sentence.

First Assignment of Error

"The jury verdict of guilty to the offenses of felonious assault and having a weapon while under a disability was against the manifest weight of the evidence."

{¶10} A claim that a verdict is against the manifest weight of the evidence requires a reviewing court to examine the entire record and weigh the evidence, including witness credibility, and determine whether, "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reversal on weight of the evidence is ordered only in exceptional circumstances. *Id.* This is because the trier of fact is in the best position to determine the credibility of the witness and the weight due to the evidence. *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶11} Appellant argues the convictions are against the manifest weight because there is no competent credible evidence that he is the gunman. He contends no gunshot residue was found in his vehicle or on his clothes, and no witness, other than Washington, identified him as the shooter. Appellant claims Washington's testimony established Washington has a personal animus towards Appellant. This, according to Appellant, negates Washington's credibility.

{¶12} Appellant is correct that Washington was the only witness able to identify Appellant as the shooter. However, Washington was adamant that the shooter was Appellant. His testimony established the two used to be neighbors. That testimony easily provides a basis to establish that Washington would be able to identify Appellant.

{¶13} Admittedly, Washington's testimony also indicates that the two were not on good terms. Testimony and evidence established that in 2012, when the two were neighbors, Washington called the police because Appellant allegedly pulled a gun on him after the two got into a fight over a parking space in front of their houses. State's Exhibit 6. This resulted in Appellant being charged with aggravated menacing. Tr. 233. At the resolution of that case Appellant received a 20 day sentence and a No Contact Order was issued for Washington and his family. State's Exhibits 9 and 10. Also, two days prior to the shooting, there was another incident at McDonald's. Washington testified he was in his car going through the drive-thru with his family

when Appellant exited the restaurant and made a hand gesture of a gun with the trigger being pulled at Washington. Tr. 135.

{¶14} Given the evidence, the jury was faced with a credibility determination of whether to believe Washington's identification. Because the jury was in the best position to judge Washington's credibility and whether his personal issues with Appellant affected his ability to correctly identify the shooter, we will not second-guess their determination.

{¶15} Furthermore, the jury had before it circumstantial evidence which linked Appellant to the shooting. Two eye witnesses did avow that after the shooting, the shooter got into a white car and sped off up the alley between Lawson Avenue and Maxwell Street. Tr. 185, 190. An officer testified a white Acura registered to Appellant was found in the alley between Maxwell Street and Lawson Avenue, which is close to Appellant's house on Park Street. Tr. 236, 237. Another officer investigating the scene stated that footprints, that showed a long stride, were found in the snow going away from the white Acura toward Park Street. Tr. 349. This testimony would support the conclusion that someone was running from the white Acura toward Park Street. The officer that located and interviewed Appellant shortly after the shooting stated Appellant said he had been inside the residence. Tr. 204. However, the officer noticed that Appellant was sweating profusely; the "sweat was rolling off his face and off of his head." Tr. 204. The jury concluded, given all the above testimony, that the reason Appellant was sweating profusely was because he had ran from his car to the house on Park Street after the shooting.

{¶16} Furthermore, a recorded phone call from Appellant and his girlfriend while he was in jail was played for the jury. During this phone call, Appellant tells his girlfriend to go to a boat that is located near their home and to get something out of it. He describes the item as grey and black. He tells her to hurry and make sure no one is watching. He also says to hurry because "they" may be listening. Once she finds it he tells her to give it to someone to keep.

{¶17} The state's position is that this grey and black item that he wants her to quickly find is the gun. This is a plausible conclusion given his instructions for her to

hurry, to make sure no one is watching her, and considering that the item is described as black and grey.

{¶18} Considering all of that evidence and the logical conclusions that can be drawn from that evidence, it was logical for the jury to conclude that Appellant was the shooter.

{¶19} However, the above evidence was not the only evidence that Appellant was the shooter. A gunshot residue test was also performed on Appellant's hands, clothing, and his white Acura. The car, clothing, and sample from his left hand came back negative for gunshot residue. However, the sample taken from Appellant's right hand came back positive, meaning that particles were found that are highly indicative of gunshot primer residue. Tr. 299, 301. On cross-examination it was brought to light that the least amount of particles that could be found were found on Appellant's right hand. Tr. 307.

{¶20} Considering all of the above, the jury was in the best position to determine Washington's credibility. Furthermore, when considering all the evidence, it cannot be concluded that the jury clearly lost its way and created a manifest miscarriage of justice; given the evidence it is plausible and believable to conclude that Appellant was the shooter and thus, he did commit felonious assault and he did have a weapon in his possession.

{¶21} This assignment of error is meritless.

Third Assignment of Error

"The Appellant was denied effective assistance of counsel."

{¶22} We review a claim of ineffective assistance of counsel under the two-part test articulated in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, (1984). Specifically, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and prejudice arose from the lawyer's deficient performance. *State v. Bradley,* 42 Ohio St.3d 136, 142–143, 538 N.E.2d 373 (1989). When evaluating the performance of counsel, "courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance.'" *State v. Wesson,* 137 Ohio St.3d 309, 2013–Ohio–4575, 999 N.E.2d 557, ¶ 81. To demonstrate 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." *Strickland* at 694.

{¶23} Appellant directs this court to multiple examples of what he claims is ineffective assistance of counsel. He contends open ended questions were asked on cross examination about other incidents that occurred between Washington and Appellant. He also contends counsel should have filed suppression or in limine motions regarding Appellant's phone call from the jail to his girlfriend and admission of the BCI report on gunshot residue.

{¶24} These allegations do not amount to ineffective assistance of counsel. In reviewing the cross-examination, it appears counsel's trial strategy was to show the ill feelings between Appellant and Washington. Counsel was attempting to elicit past confrontations where Washington was at fault. It can be gleaned from the sentencing transcript that Appellant alleges Washington threatened his family and poisoned his dog. It seems Appellant's counsel was attempting to have this information disclosed to the jury through Washington's testimony. It has been explained that a reviewing court will not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith,* 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel even if, in hindsight, it looks as if a better strategy was available. *State v. Cook,* 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992). Moreover, debatable strategy very rarely constitutes ineffective assistance of counsel. *See State v. Thompson,* 33 Ohio St.3d 1, 10, 514 N.E.2d 407 (1987).

{¶25} As to the motions for suppression and in limine, Appellant claims these motions would have possibly excluded the gunshot residue report and the jail phone call. Counsel did not file suppression or in limine motions; however, at trial, Appellant's counsel objected to the admission of the phone call to his girlfriend and

the admission of the BCI report on gunshot residue. The objections were overruled; the trial court indicated the time to object was prior to trial.

{¶26} The "[f]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." (Internal quotations and citations omitted.) *State v. Madrigal,* 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown,* 115 Ohio St.3d 55, 2007-Ohio-483, 873 N.E.2d 858, ¶ 65. "'Where the record contains no evidence which would justify the filing of a motion to suppress, the appellant has not met his burden of proving that his attorney violated an essential duty by failing to file the motion.'" *State v. Logan,* 8th Dist. No. 88472, 2007–Ohio–2636, ¶ 66, quoting *State v. Gibson,* 69 Ohio App.2d 91, 95, 430 N.E.2d 954 (8th Dist.1980). This same analysis could apply to motions in limine.

{¶27} Here, as aforementioned, counsel objected to the admission of both the BCI report and the phone call. As to the BCI report, counsel argued the full BCI file was not provided to him in discovery. Regarding the phone call, although counsel stated he knew about the phone call, counsel claimed it was not included in the discovery packet. The state claims the phone call was in the discovery packet, although it may not have been listed on the inventory sheet. With both pieces of evidence, the trial court indicated the proper time to bring this to the court's attention was prior to trial. Specifically for the BCI file, the court indicated if a motion had been filed the court would have required BCI to deliver the entire file. Likewise, the court would have ensured the recording of the phone call had been disclosed to counsel. There is nothing in the record to indicate any reason to suppress either piece of evidence or for the trial court to grant an in limine motion.

{¶28} Furthermore, Appellant does not cite this court to any authority to demonstrate that any of the suggested motions would have had a reasonable probability of success. *State v. Hillman*, 10th Dist. No. 14AP-252, 2014-Ohio-5760, ¶ 56. Therefore, there is no indication counsel's performance was deficient.

{¶29} Even if counsel's performance could be characterized as deficient, it still must be shown that prejudice resulted. The gunshot residue test and the phone call did provide some evidence that Appellant was the shooter. However, that was not the only evidence. As discussed above, there was testimony from Washington that Appellant was the shooter; there was testimony that Appellant drove a white Acura; there was testimony from other witnesses that the shooter got into a white car and drove up an alley where Appellant's white Acura was found; and there was testimony concerning footprints going from the white Acura towards Park Street where Appellant lives. There was also testimony that Appellant gave the police differing accounts of where he was during the shooting, which goes to his credibility. For instance, at one point he claimed to be with his child making tacos and then changed his story to making spaghetti. Another time he said he was at the store when the shooting occurred and he thought someone was shooting at him, so he went home and then went outside with his child. All of these facts, without consideration of the gunshot residue test and the phone call, could lead to the conclusion Appellant was the shooter. It is not clear that the outcome would have been different and, therefore, Appellant was not prejudiced by any alleged deficient performance.

{¶30} In fact, counsel was given time to review the entire BCI file and to hear the phone call prior to their admission. Counsel on cross examination of the gunshot residue test, clearly brought to light that the particles found on Appellant right hand were the least amount of particles that would register for gunshot residue, even though the test was taken less than an hour after the shooting. Counsel was prepared and attacked the evidence in a manner best available.

{¶31} Consequently, there is no basis to find trial counsel's performance was deficient in this instance and/or that Appellant was prejudiced by counsel's performance. This assignment of error lacks merit.

Fourth Assignment of Error

"The trial court committed reversible error in admitting an alleged prior conviction of the Appellant into evidence."

{¶32} Appellant was convicted of having a weapon while under disability pursuant to R.C. 2923.13(A)(3). For our purposes, that provision provides that unless relieved from the disability, the person shall not knowingly use a firearm if the person has previously been convicted of any felony offense involving illegal sale or trafficking in any drug. R.C. 2923.13(A)(3). In order to prove that Appellant was under disability at the time of the offense, the state offered into evidence a "True Copy" of a conviction for an "Aherice Rahman" from New Jersey for possession of cocaine with intent to distribute, a third-degree felony. State's Exhibit 18. The state offered evidence of Appellant's aliases and contended that "Aherice Rahman" is Appellant.

{¶33} Appellant contends this evidence does not comply with R.C. 2945.75(B)(1), which states:

> (B)(1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

R.C. 2945.75(B)(1).

{¶34} Appellant contends the "True Copy" of the prior conviction from New Jersey is not a certified copy, and thus, it fails to comply with the mandates of R.C. 2945.75(B)(1). Furthermore, he contends the record does not support the conclusion that he is "Aherice Rahman," the person who was convicted in New Jersey of felony drug possession/trafficking. These arguments are sufficiency of the evidence arguments.

{¶35} Starting with the first issue of whether the judgment entry complies with R.C. 2945.75(B)(1), the Ohio Supreme Court has elucidated that R.C. 2945.75(B)(1) permits the state to prove a prior conviction by submitting a judgment entry of the conviction, but the statute does not restrict the manner of proof to that method alone." *State v. Gwen,* 134 Ohio St.3d 284, 2012–Ohio–5046, ¶ 1. "For example, an offender may, and often does, stipulate to a prior conviction to avoid the evidence

being presented before a jury." *Id.* at ¶ 14. That said, if the State "chooses to prove a prior conviction by using a judgment entry, that entry must comply with Crim.R. 32(C)." (Emphasis omitted.) *Id.* at ¶ 1. For a judgment entry to comply with Crim.R. 32(C), it "must set forth (1) the fact of a conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk." *Id.* at ¶ 23.

{¶36} Here, there is no stipulation. The issue is not whether the judgment entry complies with Crim.R. 32(C), but rather does it qualify as a certified copy. The judgment is stamped "TRUE COPY." When a judgment is certified in Ohio it is sworn to be a true copy of the judgment. Although, this "True Copy" stamp is unlike a certified copy stamp that occurs in Ohio courts, the state swore that this copy is what it received from New Jersey when it asked for a certified copy. Tr. 362.

{¶37} We do not need to decide whether this "True Copy" complies with the certified copy requirements in R.C. 2945.75(B)(1), because the bigger issue in this case is evidence of identity. R.C. 2945.75(B)(1) mandates that along with producing a certified copy of conviction the state must provide sufficient evidence to identify the defendant named in the entry as the offender in the case at bar. Thus, the state was required to prove that "Aherice Rahman," who was convicted of a felony drug offense in New Jersey, is Appellant Alterik Rogers.

{¶38} Ohio appellate courts have indicated identical names alone are insufficient to establish the requisite connection between a defendant and a previous conviction. *State v. Lumpkin*, 10th Dist. No. 05AP-656, 2006-Ohio-1657, ¶ 16, citing *State v. O'Neil* (1995), 107 Ohio App.3d 557, 669 N.E.2d 95 (6th Dist.1995) ("Names alone are not very reliable, and it appears that the legislature recognized the problem in adopting R.C. 2945.75(B), which speaks of 'sufficient evidence to identify the defendant named in the entry.' The legislative intent was to require identity evidence, not merely name evidence.") and *State v. Newton,* 3d Dist. No. 2-83-20, 1984 WL 8033. However, when the state presents documentary evidence of appellant's prior criminal history from a BCI report, a "slate sheet" printed from the county jail, and a police identification photo of appellant that were all authenticated by testimony it was

deemed sufficient for identification. *Lumpkin* at ¶ 18. Those exhibits demonstrated a common name, race, sex, and date of birth with the prior conviction. *Id*. at ¶ 19. Consequently, if there is more than one identifier then it is sufficient to prove identity. *State v. Greene*, 6th Dist. No. S-01-015, 2001 WL 1606831 (Dec. 14, 2001) (name, social security number, and birthdate is sufficient to prove identity); *State v. Lewis*, 4th Dist. No. 99CA2523, 2000 WL 33226193 (Dec. 15, 2000) (evidence is sufficient where state introduced a prior judgment entry with appellant's name, a photograph that resembled appellant, and corresponding inmate and offender numbers).

{¶39} Here, attached to the New Jersey conviction for "Aherice Rahman" is a search for aliases of "Altereq Rahmen." This list does not include the name "Aherice Rahman." It does, however, include the names "Brian MacNeil," "Brian McNeil," and "Alterick Rogers." The "Brian MacNeil" and "Brian McNeil" names are listed on cases out of Jefferson County. One is on the municipal court cases and the other is listed as an alias on the judgment of conviction in the instant case. The alias "Alterick Rogers" name is spelled differently than Appellant's name Alterik Rogers. The list attached to the New Jersey conviction for "Aherice Rahman" does not indicate that "Atereq Rahmen" is an alias for "Aherice Rahman" or that "Aherice Rahman" is an alias for Appellant Alterik Rogers.

{¶40} This list of aliases for "Altereq Rahmen" also contains multiple social security numbers and dates of birth. One of the social security numbers listed does match a social security number found in the file for Appellant Alterik Rogers. The judgment entry for "Aherice Rahman," however, does not list a social security number so it is difficult to discern that "Alterik Rogers" is an alias for "Aherice Rahman," or vice versa.

{¶41} As to date of birth, the New Jersey conviction indicates that the date of birth for "Aherice Rahman" is July 21, 1975. One document in the file before us indicates that Appellant Alterik Rogers' birthdate is July 21, 1975. The alias list attached to that conviction identifies two different birth dates for the alias "Alterick Rogers," July 21, 1975 and September 29, 1973. Thus, Appellant Alterik Rogers, alias "Alterick Rogers," and "Aherice Rahman" do use/have the same birthdate.

{¶42} The list of aliases also identifies tattoos. However, in this case, there was no evidence presented concerning whether Appellant had any tattoos. Furthermore, the New Jersey conviction does not contain a photograph of "Aherice Rahman;" therefore, it could not be compared to Appellant.

{¶43} Considering the above, there was not sufficient evidence produced to prove Appellant and "Aherice Rahman" (the name on the New Jersey conviction) are the same person. The documents submitted to the jury demonstrate that "Altereq Rahmen" is an alias for "Brian MacNeil," "Brian McNeil," and "Alterick Rogers." Yet, it does not indicate that "Aherice Rahman" is an alias for "Brian MacNeil," "Brian McNeil" or "Alterik Rogers." Likewise, there is no social security number for "Aherice Rahman" that could link that name to Appellant. Although one birthdate listed for alias "Alterick Rogers" may be the same birth date listed for Appellant Alterik Rogers and "Aherice Rahman", this alone is not sufficient to prove identity.

{¶44} It is acknowledged that Appellant admitted at the sentencing hearing that he was incarcerated in New Jersey three times for drug offenses. 6/30/14 Sentencing Tr. 11. For purposes of showing sufficient evidence at trial of disability, i.e. Appellant was previously convicted of a felony drug offense, that information is inconsequential. We can only consider the evidence that was submitted to the jury. Appellant did not take the stand and was not asked about his prior convictions. The state was required to prove disability and chose to do so through a "True Copy" of Appellant's alleged New Jersey conviction. However, as stated above, the state did not provide sufficient evidence that "Aherice Rahman" (the name on the New Jersey conviction) and Appellant Alterik Rogers are the same person.

{¶45} This assignment of error has merit. The conviction and sentence for having a weapon while under disability is reversed and vacated for lack of sufficient identity evidence.

Second Assignment of Error

"The trial court committed reversible error in sentencing the Defendant to fourteen (14) years in prison."

{¶46} Appellant's argument under this assignment of error focuses on the trial court's decision to impose consecutive sentences. The sentences for felonious assault, the attendant firearm specification, and having a weapon while under disability were ordered to run consecutive to each other.

{¶47} Pursuant to R.C. 2929.14(C)(1)(a) firearm specifications are mandated to run consecutive and prior to the primary offense. There is no discretion for the trial court to run a gun specification concurrent to the primary offense. Consequently, there is no basis in law to conclude that the trial court should have run the felonious assault and attendant firearm specification concurrent to each other.

{¶48} Therefore, the issue before this court under this assignment of error is whether the trial court erred when it ordered the sentences for the felonious assault and having a weapon while under disability to be served consecutive to each other. In the fourth assignment of error we reverse and vacate the conviction and sentence for having a weapon while under disability. Hence, as there is no conviction or sentence for having a weapon while under disability, there is no consecutive sentencing issue to review. Therefore, this assignment of error is moot.

Conclusion

{¶49} The first three assignments of error lack merit. However, the fourth assignment of error has merit. Appellant's conviction and sentence for felonious assault with the attendant firearm specification is affirmed. Appellant's conviction for having a weapon while under disability is reversed and the sentence is vacated.

Donofrio, P.J., concurs.

Waite, J., concurs.