[Cite as *State v. Willis*, 2019-Ohio-537.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107070

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

COURTNEY WILLIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-17-612954-A

BEFORE: Boyle, P.J., E.A. Gallagher, J., and Sheehan, J.

RELEASED AND JOURNALIZED: February 14, 2019

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MARY J. BOYLE, P.J.:

{¶1} Defendant-appellant, Courtney Willis, appeals his convictions. He raises two assignments of error for our review:

> 1. The trial court erred by failing to grant appellant's motion to sever the three separate burglary charges set forth in his indictment into separate trials.
>
> 2. The trial court violated appellant's right to speedy trial as set forth in Sixth and Fourteenth amendments to the United States Constitution as well as Section 10, Article [I] of the Ohio Constitution.

{¶2} Finding no merit to his arguments, we affirm.

I. Procedural History and Factual Background

{¶3} In January 2017, a Cuyahoga County Grand Jury indicted Willis on eight counts, including three counts of burglary in violation of R.C. 2911.12(A)(1) and (2), second-degree felonies; three counts of criminal damaging in violation of R.C. 2909.06(A)(1), second-degree misdemeanors; one count of theft in violation of R.C. 2913.02(A)(1), a fifth-degree felony; and

one count of petty theft in violation of R.C. 2913.02(A)(1), a first-degree misdemeanor. The burglary charges carried notice of prior conviction and repeat violent offender specifications and involved three separate victims on three separate dates in the fall of 2016. Willis pleaded not guilty to the charges, and the case proceeded to a jury trial. The specifications were tried to the bench.

{¶4} The state presented evidence at trial that Willis burglarized three homes on East 172nd Street in Cleveland, Ohio, over a two-month period, from September 15, 2016, to November 9, 2016. At each of the homes, Willis either damaged or altered a door or window to get in the home. At two of the homes, he took televisions. At one of the homes, in addition to the television, he stole an Xbox, video games, an iPad, tennis shoes, and $100. Willis did not take anything at the third home because he was chased away by the homeowner's dog before he could get into the house.

{¶5} Police recovered latent fingerprints matching Willis at two of the homes. An eyewitness, who identified Willis in a photo array, saw Willis run up the driveway of the third victim's home and soon after get chased away by the victim's dog.

{¶6} The jury found Willis guilty of all charges, and the court found him guilty of all specifications. The trial court sentenced Willis to an aggregate of 20 years in prison, including 8 years on each burglary count, plus 4 years for the repeat violent offender specification on one of the burglary counts.

{¶7} The trial court ordered the 4 years for the repeat violent offender specification be served consecutive to the 8 years for the base charge, and then ordered that those 12 years be served consecutive to 8 years for a second burglary offense, for a total of 20 years. The trial court ordered the sentences on all other counts be served concurrent to each other and the 20

years. The court further imposed court costs and notified Willis that he would be subject to a mandatory period of five years of postrelease control upon his release from prison. It is from this judgment that Willis now appeals.

II. Joinder

{¶8} In his first assignment of error, Willis argues that the trial court erred when it denied his motion to sever the three separate burglary charges into separate trials. In his motion to sever the charges, Willis argued (1) the facts regarding the different burglaries were complex and would confuse the jury, (2) the defenses as to each burglary "may differ," (3) he would be denied the right to a fair and impartial trial because "evidence on all counts would not be admissible if the offenses were tried separately," and (4) his right to remain silent may be jeopardized if he elected to testify regarding one burglary offense but not the other burglary offenses. Willis further argued that if the burglary offenses were tried together, it would unfairly prejudice him.

{¶9} In general, the law favors joining multiple offenses in a single trial if the offenses charged "are of the same or similar character." *State v. Lott*, 51 Ohio St.3d 160, 163, 555 N.E.2d 293 (1990), citing *State v. Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288 (1981). Crim.R. 8(A), regarding joining offenses, provides that two or more offenses may be charged in the same indictment if they "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Crim.R. 13 also permits a court to "order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment[.]" Consequently, joinder is appropriate where the

evidence is interlocking and the jury is capable of segregating the proof required for each offense. *State v. Czajka*, 101 Ohio App.3d 564, 577-578, 656 N.E.2d 9 (8th Dist.1995).

{¶10} Nonetheless, if it appears that a criminal defendant would be prejudiced by such joinder, then the trial court is required to order separate trials. Crim.R. 14. "It is the defendant, however, who bears the burden of demonstrating prejudice and that the trial court abused its discretion in denying severance." *State v. Saade*, 8th Dist. Cuyahoga Nos. 80705 and 80706, 2002-Ohio-5564, ¶ 12, citing *State v. Coley*, 93 Ohio St.3d 253,754 N.E.2d 1129 (2001), and *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166.

{¶11} The state may negate claims of prejudicial joinder in two ways. *Lott* at 163. Under the first method, the "other acts" test, the state may argue that it could have introduced evidence of the other crimes under the "other acts" portion of Evid.R. 404(B), if the other offenses had been severed for trial. *Id*., citing *Bradley v. United States*, 433 F.2d 1113 (D.C.Cir.1969). Evid.R. 404(B) recognizes that evidence of other crimes may be admissible for purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." If one offense could be introduced under Evid.R. 404(B) at the trial of the other offenses, had the offenses been tried separately, "any 'prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,' and a court need not inquire further." *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992), quoting *Drew v. United States*, 331 F.2d 85 (D.C.Cir.1964).

{¶12} "Under the second method, the 'joinder' test, the state is merely required to show that evidence of each crime joined at trial is simple and direct." *Lott*, 51 Ohio St.3d at 163, 555 N.E.2d 293, citing *State v. Roberts*, 62 Ohio St.2d 170, 405 N.E.2d 247 (1980); *Torres*, 66 Ohio

St.2d at 344, 421 N.E.2d 1288. The Ohio Supreme Court made it clear that "when simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid.R. 404(B)." *Id.*, citing *Roberts*; *Torres*; and *United States v. Catena*, 500 F.2d 1319 (3d Cir.1974).

{¶13} Evidence is "simple and direct" if (1) the jury is capable of readily separating the proof required for each offense, (2) the evidence is unlikely to confuse jurors, (3) the evidence is straightforward, and (4) there is little danger that the jury would "improperly consider testimony on one offense as corroborative of the other." *State v. Wright*, 4th Dist. Jackson No. 16CA3, 2017-Ohio-8702, ¶ 52, citing *State v. Freeland*, 4th Dist. Ross No. 12CA3352, 2015-Ohio-3410. Courts have held that evidence of multiple offenses is "simple and direct" where, for example, the offenses involved different victims, different incidents or factual scenarios, and different witnesses. *See State v. Dantzler*, 10th Dist. Franklin Nos. 14AP-907 and 14AP-908, 2015-Ohio-3641, ¶ 23 ("The evidence relating to each incident was simple and direct: the incidents occurred separately, involved different victims, and different eyewitnesses independently identified defendant as the shooter at each incident. As such, there was no concern that the jury would confuse the evidence, and defendant cannot establish that he was prejudiced by the joinder."); *State v. Lewis*, 6th Dist. Lucas Nos. L-09-1224 and L-09-1225, 2010-Ohio-4202, ¶ 33 ("Ohio appellate courts routinely find no prejudicial joinder where the evidence is presented in an orderly fashion as to the separate offenses or victims without significant overlap or conflation of proof.").

{¶14} If either the "other acts" test or the "simple and direct" test is met, a defendant cannot establish prejudice from the joinder.

{¶15} This court normally reviews a trial court's decision on joinder for an abuse of discretion. *State v. Banks*, 2015-Ohio-5413, 56 N.E.3d 289, ¶ 64 (8th Dist.), citing *State v. Grimes*, 8th Dist. Cuyahoga No. 94827, 2011-Ohio-4406. Where a defendant fails to renew a Crim.R. 14 motion for severance either at the close of the state's case or the close of all evidence, however, he or she "'waives all but plain error on appeal.'" *Lyndhurst v. Smith*, 8th Dist. Cuyahoga No. 101019, 2015-Ohio-2512, ¶ 32, quoting *State v. Howard*, 3d Dist. Marion No. 9-10-50, 2011-Ohio-3524.

{¶16} Here, Willis failed to renew his motion to sever at the end of the state's case (which was also at the close of all of the evidence). To demonstrate plain error, Willis must show "an error, i.e., a deviation from a legal rule" that was "an 'obvious' defect in the trial proceedings," and that the error "affected a substantial right," i.e., a "reasonable probability" that the error resulted in prejudice, affecting the outcome of the trial. *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22. "We recognize plain error 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Lyndhurst* at ¶ 32, quoting *State v. Landrum*, 53 Ohio St.3d 107, 559 N.E.2d 710 (1990).

{¶17} We find no error in this case, plain or otherwise. The offenses relating to the three burglaries were charged together under Crim.R. 8(A) because they were of the "same or similar character" and part of "a common scheme or plan" or "course of criminal conduct" occurring over a relatively short period of time. As we stated, Ohio law favors joining multiple offenses in a single trial if the requirements of Crim.R. 8(A) are satisfied. *State v. Williams*, 73 Ohio St.3d 153, 158, 652 N.E.2d 721 (1995); *State v. Ferrell*, 8th Dist. Cuyahoga No. 100659, 2014-Ohio-4377, ¶ 38.

{¶18} Although the state argues that the cases could be tried together under either test, there is no reason for us to look to the more stringent "other acts" test because the evidence here was simple and straightforward. Willis committed the three burglaries on the same street in Cleveland, Ohio between the dates of September 15 and November 9, 2016. The houses on the street were very close together. Each victim testified as to what occurred at his or her home. There was no complicated methodology to Willis's crimes. Willis broke into each home either by breaking or altering a door or window. Accordingly, we find that Willis was not prejudiced in any way by the trial court's denial of his motion to sever the offenses.

{¶19} Moreover, we presume that the jury followed the court's instructions. *State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 192, citing *State v. Loza*, 71 Ohio St.3d 61, 641 N.E.2d 1082 (1994). The trial court in this case instructed the jury as follows:

> Multiple counts. The charges set forth in each count in the indictment constitute a separate and distinct matter. You must consider each count and the evidence applicable to each count separately and you must state your findings as to each count uninfluenced by your verdict as to any other count. The defendant may be found guilty or not guilty of any one or all of the offenses charged.

{¶20} Further, a trier of fact is also considered "capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated." *State v. Lunder*, 8th Dist. Cuyahoga No. 101223, 2014-Ohio-5341, ¶ 33, citing *Torres*, 66 Ohio St.2d 340, 421 N.E.2d 1288. There is nothing in the record before us to suggest that the jury confused the evidence as to the various counts or was improperly "influenced by the cumulative effect of the joinder." *Banks*, 2015-Ohio-5413, 56 N.E.3d 289, at ¶ 66.

{¶21} Willis's first assignment of error is overruled.

III. Speedy Trial

{¶22} In his second assignment of error, Willis argues that his statutory speedy trial rights were violated under the Ohio and United States Constitutions.

{¶23} The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, made obligatory on the states by the Fourteenth Amendment. The Ohio Constitution, Article I, Section 10, guarantees an accused this same right. *State v. MacDonald*, 48 Ohio St.2d 66, 68, 357 N.E.2d 40 (1976). Although the United States Supreme Court declined to establish the exact number of days within which a trial must be held, it recognized that states may prescribe a reasonable period of time consistent with constitutional requirements. *Barker v. Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In response to this authority, Ohio enacted R.C. 2945.71, which designates specific time requirements for the state to bring an accused to trial.

{¶24} When reviewing a speedy trial question, an appellate court must count the number of delays chargeable to each side and then determine whether the number of days not tolled exceeded the time limits under R.C. 2945.71. *State v. Ferrell*, 8th Dist. Cuyahoga No. 93003, 2010-Ohio-2882, ¶ 20. Furthermore, this court must construe the statutes strictly against the state when reviewing the legal issues in a speedy trial claim. *Brecksville v. Cook*, 75 Ohio St.3d 53, 57, 661 N.E.2d 706 (1996).

{¶25} R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after the person's arrest. Once the statutory limit has expired, the defendant has established a prima facie case for dismissal. *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986). At that point, the burden shifts to the state to demonstrate that sufficient time was tolled pursuant to R.C. 2945.72. *Cook* at 55-56. If the

state has violated a defendant's right to a speedy trial, then the court must dismiss the charges against the defendant. R.C. 2945.73(B).

{¶26} For purposes of computing time under R.C. 2945.71(C)(2), each day the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. *See* R.C. 2945.71(E). This "triple-count" provision reduces a defendant's speedy trial time to 90 days if the defendant is incarcerated the entire time preceding trial. *State v. Dankworth*, 172 Ohio App.3d 159, 2007-Ohio-2588, 873 N.E.2d 902, ¶ 31 (2d Dist.). Willis was held in jail in lieu of bond during the pendency of his case. He therefore argues that the state should have brought him to trial in 90 days. We disagree.

{¶27} Willis was arrested on January 1, 2017. Although he was in jail while awaiting trial, a valid parole holder was issued against him on January 4, 2017. The triple-count provision does not apply when the accused is held in jail under a valid parole holder. *State v. Glover*, 8th Dist. Cuyahoga No. 89059, 2007-Ohio-5727, ¶ 3, citing *State v. Brown*, 64 Ohio St.3d 476, 597 N.E.2d 97 (1992). "'The triple-count provision of the speedy trial statute applies to an accused being held in jail solely on the pending criminal charges. A parole violation is a separate offense."' *Brown* at 479, quoting *State v. Dunkins*, 10 Ohio App.3d 72, 74-75, 460 N.E.2d 688 (9th Dist.1983). Thus, the state had 270 days to bring Willis to trial.

{¶28} The time to bring a defendant to trial, however, can be extended for any of the reasons enumerated in R.C. 2945.72, including (1) "[a]ny period of delay occasioned by the neglect or improper act of the accused," (2) "any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused," (3) "[a]ny period of delay necessitated by the accused's lack of counsel," (4) "[a]ny period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand

trial is being determined," or (5) "the period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion." R.C. 2945.72(B), (C), (D), (E), and (H).

{¶29} In this case, 422 days elapsed between the date of Willis's arrest on January 1, 2017, and the date of his trial, February 27, 2018. He therefore established a prima facie case of a speedy trial violation. The burden now shifts to the state.[1]

{¶30} Generally, when computing how much time has run against the state under R.C. 2945.71, we begin with the day *after* the accused was arrested. *State v. Broughton*, 62 Ohio St.3d 253, 260, 581 N.E.2d 541 (1991). Because Willis was arrested on January 1, 2017, his speedy trial time began to run on January 2, 2017.

{¶31} The first tolling event occurred on January 18, when Willis filed three motions, including a motion for bill of particulars, motion for discovery, and motion for "notice of prosecution's intention to use evidence." While the speedy-trial clock is not tolled indefinitely by such motions, it is tolled for a reasonable time. *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, ¶ 27. This court has held that 30 days is a reasonable time for the state to respond. *State v. Byrd*, 8th Dist. Cuyahoga No. 91433, 2009-Ohio-3283, ¶ 9, citing *State v. Barb*, 8th Dist. Cuyahoga No. 90768, 2008-Ohio-5877. Thus, as of January 18, 16 days of speedy trial time had passed until the first tolling event.

{¶32} The state should have responded to Willis's motions within 30 days, or February 17, 2017, but it did not do so until February 28. Within this time, however, the trial court held

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[1]Willis filed several pro se motions in his case relating to speedy trial. A defendant who is represented by counsel, however, is not permitted to file pro se motions. *State v. Lenard*, 8th Dist. Cuyahoga Nos. 96975 and 97570, 2012-Ohio-1636, fn. 1, citing *State v. Dudas*, 11th Dist. Lake Nos. 2007-L-140 and 2007-L-141, 2008-Ohio-3262.

three pretrials, on January 30, 31, and February 14, which were all continued at Willis's request. The February 14 pretrial was continued until March 1. Thus, as of March 1, only 16 days of speedy trial time had passed.

{¶33} The March 1 pretrial was continued until March 16 at Willis's request, specifically, for his attorney "to do further investigation." The trial court held pretrials on March 16 and 30, April 13, and May 1, all continued until the next pretrial at the request of Willis. On May 1, the trial court continued the pretrial until May 8, also at the request of Willis. But on May 8, the trial court issued a judgment entry stating that the pretrial was not held and that trial remained set for May 15, 2017, at the request of Willis. Thus, from May 8 until May 15, seven more days of speedy trial time had passed, for a total of 23 days of speedy trial time.

{¶34} On May 15, Willis moved to continue his trial due to his trial counsel being in trial in another case. The trial court continued it until June 7. On June 7, the docket indicates that the pretrial was continued again at Willis's request. Three more pretrials were held, on June 12, June 21, and June 28, all continued at Willis's request for his attorney to do further investigation. In the June 28 judgment entry, the trial court noted that trial was set for September 9, 2017. Although the June 28 pretrial was continued to August 2, there is nothing on the docket indicating that the August 2 pretrial was held. The next docket entry is August 14, 2017, when Willis's counsel moved to withdraw as his counsel. Thus, at this point, from August 2 until August 14, 12 more days of speedy trial time had passed, for a total of 35 days of speedy trial time as of August 14, 2017.

{¶35} At a hearing on August 14, 2017, the trial court explained that it had received a letter from Willis stating that he filed a grievance against his attorney and the court for "lack of speedy trial" with "the bar association in Columbus [and] in Cleveland." Willis's attorney

informed the court that Willis was refusing to talk to him and, thus, he was not able to communicate with his client. The trial court informed Willis that because he filed an ethical violation against his counsel, his counsel had an obligation to withdraw from the case. Willis responded, "[t]hat's cool." The trial court continued to ask Willis if he was sure that he wanted to follow through with his grievance. Willis responded that he did not believe that his counsel had been involved in another trial when counsel continued Willis's trial in May. The court explained to Willis that his counsel had been in trial before the same court in a trial that lasted over a week. The court told Willis that it schedules multiple trials every day, sometimes with the same attorneys on the same day because "we never know exactly for sure who's going to want to accept responsibility and take the plea."

{¶36} Willis's counsel interjected, stating that since a grievance had been filed against him, he thought it would be best to withdraw from the case. The state informed the court that the state and Willis's counsel had been trying to figure out a possible agreed sentence when Willis filed his grievance, which brought discussions "to a halt." Willis's counsel agreed that he and the state had been attempting to negotiate a plea deal, but said that when he went to discuss it with Willis, Willis walked away from him and would not communicate with him.

{¶37} At that point, the trial court discussed the state's plea offer with Willis. The trial court indicated to Willis that it would not punish him in any way if he wished to go to trial and said that sentencing would be the same either way. The court explained that if it had to appoint new counsel, it would delay matters further because counsel would need time to learn about the case.

{¶38} Willis complained to the trial court that he had never been to any pretrials. The court explained to Willis that the pretrials were set for the attorneys to meet, confer, and discover

evidence, and that his counsel and the state had been doing that. Willis told the court that he had all of the discovery that his counsel had given him and that he did not want to accept the state's plea offer. At that point, the court granted Willis's counsel's motion to withdraw and appointed new counsel.

{¶39} Speedy trial time is tolled by any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law. R.C. 2945.72(C). *Ferrell*, 8th Dist. Cuyahoga No. 93003, 2010-Ohio-2882, at ¶ 37. Thus, Willis's speedy trial time was further tolled by Willis's attorney's withdrawal from the case.

{¶40} The trial court held pretrials on August 16 and 31, which were continued at the request of Willis. On August 31, Willis's new counsel requested discovery from the state.[2] The August 31 pretrial was continued to September 6, which was continued to September 12 at Willis's request. The trial court then held a pretrial on September 12, which was also continued to September 20 at the request of Willis.

{¶41} At the September 20 and 26 pretrials, the court continued them due to "court in trial." "The record of the trial court must * * * affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose." *State v. Lee*, 48 Ohio St.2d 208, 209, 357 N.E.2d 1095 (1976). "[A] continuance due to the trial court's engagement in another trial is generally reasonable under R.C. 2941.401." *State v. Pirkel*, 8th Dist. Cuyahoga No. 93305, 2010-Ohio-1858, ¶ 17, citing *State v. Doane*, 8th Dist. Cuyahoga No. 60097, 1992 Ohio App. LEXIS 3579 (July 9, 1992). The trial court continued the September 26

[2]We only know this from the state filing a "notice of receipt of defendant's written demand for discovery," which the state received on August 31, 2017.

pretrial until October 3. The trial court's reason for continuing Willis's case for 13 days due to being in another trial was reasonable. Willis's speedy trial time was still 35 days as of October 3, 2017.

{¶42} At the October 3 pretrial, Willis's new counsel informed the court that Willis "might wish to represent himself pro se so as not to have to wait for me to get up to speed on these incidents and the reports and the evidence." Willis's counsel requested the court speak to Willis regarding his intentions to proceed pro se. Willis's counsel stated that he was "essentially up to speed" on the case, but that he needed to discuss a few more things with Willis. The trial court spoke to Willis, who said he was fully satisfied with his new counsel's representation. The trial court then continued the October 3 pretrial until October 24 at the request of Willis. The court set the trial date for November 29, 2017.

{¶43} There is nothing in the record to indicate that a hearing occurred on October 24. Thus, from October 24 to November 29, 38 days are counted against the state. Accordingly, Willis's speedy trial time totaled 73 days as of November 29, 2017, the day set for trial.

{¶44} At the beginning of the trial, the state placed the same plea offer on the record as it had previously. Willis declined to accept it for a second time.

{¶45} Defense counsel then informed the court that he was having difficulty finding trial appropriate clothing for Willis. Defense counsel requested a "short accommodation" to try to do so. The court responded that it was 2:10 p.m. and that it would continue the trial until the following day.

{¶46} Defense counsel then informed the court that he filed a motion that day for separate trials. The parties argued their respective positions to the trial court on this issue. The trial court did not issue its decision on this issue immediately.

{¶47} On November 30, Willis waived his right to a jury trial on the specifications. The trial court denied Willis's motion for separate trials. The trial court then began voir dire.

{¶48} On the second day of trial, December 1, 2017, Willis refused to get dressed for trial. Willis was upset because he did not want to wear the same shirt that he had worn the previous day. Defense counsel indicated that he obtained a new shirt for Willis, but Willis still refused to get dressed. Willis told his counsel that he was "okay" with wearing the orange jail jumpsuit in front of the jury "because that's what the truth" was. Willis then told the court that his "rights [had] already been violated," and he did not know why he had been cooperating at all. He argued to the court again that his speedy trial rights had been violated as well as his right to discovery.

{¶49} Defense counsel explained to the court that he had obtained all discovery from the state. Defense counsel also stated that he had talked to Willis about his speedy trial rights. Defense counsel stated, "I've also explained to [Willis] that as a defense attorney, as a representative of the bar, that I can't file frivolous motions." Defense counsel then stated, "I have reviewed the docket, I do not believe that he's close to any speedy trial violation due to this case." Defense counsel informed the court that based on his discussions with Willis that day and the previous day, he had concerns regarding Willis's competency to stand trial.

{¶50} The trial court indicated that it was going to go forward with trial despite Willis wearing his jail clothes. But Willis got angry, telling the trial court he never saw the police report regarding his arrest. When the court and defense counsel were explaining the discovery process to Willis, Willis stated, "I don't want to be in here. You can just let me out now." When the court attempted to proceed with voir dire, Willis said, "I'm not staying here for that."

{¶51} The trial court explained to Willis that he had a right to be present during his trial and that it would be extremely prejudicial to him if he was not in court. Willis refused to listen, telling the court, "I'm not staying in here, man. I didn't say that as a joke. I'm serious. I don't want to be in here, man." The court asked Willis if he had understood what it had just told him. Willis responded, "I heard everything you said clearly, and I still want to leave. I don't want to be in here, man. This shit ain't right, man. I said I want to leave. Can I leave? I don't have to be in here, man."

{¶52} The trial court took a short recess to research whether Willis had ever been evaluated for mental health issues, discovering that Willis had never been evaluated. The court expressed concerns that Willis was not "doing things that [were] in his best interest" or "actively participating in his defense." The court asked the state if it would object to the court referring Willis for a mental health evaluation. The state did not object.

{¶53} On December 1, 2017, the trial court indicated in a judgment entry that it referred Willis for a competency evaluation. Time remains tolled until the trial court determines competence. *State v. Blair*, 2d Dist. Montgomery No. 26256, 2015-Ohio-3604, ¶ 10, citing *State v. Palmer*, 84 Ohio St.3d 103, 702 N.E.2d 72 (1998). The court scheduled the next pretrial for January 3, 2018, and rescheduled the trial for January 8, 2018.

{¶54} On January 3, 2018, the docket indicates that the pretrial was continued at Willis's request because Willis's counsel was in trial on another case. On January 8, 2018, the trial was continued because the court was in trial on another case.

{¶55} At a January 11 pretrial, the court scheduled the trial for February 5, 2018, at the request of Willis. The transcript indicates that on February 5, the parties appeared for trial. Defense counsel placed on the record that the parties stipulated to the competency evaluation that

Willis was competent to stand trial. Once again, however, Willis refused to dress for trial. Defense counsel requested time to address the issue with Willis. The state did not object. The trial court stated that it would continue the matter until February 7 because it did not believe that there would be enough members of the jury pool on the following day.

{¶56} The trial court then asked Willis if he had any questions. Willis replied, "No. I don't want him to represent me. I don't care what y'all do. I don't even want him to represent me at all. I want to represent myself. He's being biased and prejudiced just like the rest of y'all. I don't want him to represent me at all." The court attempted to discuss what Willis would have to do to represent himself and what the court needed to place on the record for it to permit Willis to represent himself, but Willis refused to cooperate. Willis told the judge that he did not want to talk. The court attempted to discuss Willis's rights with him, but Willis got very angry and had to be restrained by the deputy. Willis continued to be extremely belligerent with the judge until finally, the judge instructed the deputy to remove Willis from the courtroom.

{¶57} The trial court and defense counsel discussed what to do next. The trial court told defense counsel to talk to Willis and tell him that if he wanted to represent himself, it needed to ask him a number of questions on the record. If he refused, the court would keep defense counsel on the case and begin trial on February 7, with or without Willis in the room. The court stated, "[a]t some point I have to save him from himself."

{¶58} At the beginning of trial, defense counsel informed the trial court that Willis voluntarily met with him after his outbursts on February 5, but then he got angry and left the meeting. Defense counsel explained to the court that he was prepared for trial and was willing to still represent Willis. The court asked Willis what he wished to do, and Willis responded that

he wanted defense counsel to represent him. Willis apologized to the court for acting "ignorant" and "offensive." The court then began voir dire.

{¶59} After the jury was chosen, but before the trial began, the prosecutor got sick. The court agreed to continue the trial until the following Monday, which was February 12. But the trial court issued a judgment entry on February 12 indicating that the trial was again rescheduled for February 26, 2018, due to the prosecutor still being ill.

{¶60} R.C. 2945.72(H) specifically provides that the time within which an accused must be brought to trial may be extended by "the period of any reasonable continuance granted other than upon the accused's own motion." With respect to this provision, the Ohio Supreme Court has held that "it is difficult, if not unwise, to establish a per se rule of what constitutes 'reasonableness' beyond the [time periods set forth in] R.C. 2945.71. Invariably, resolution of such a question depends on the peculiar facts and circumstances of a particular case." *State v. Saffell*, 35 Ohio St.3d 90, 91, 518 N.E.2d 934 (1988). The Supreme Court found a continuance to accommodate an arresting officer's appearance as a witness at trial was reasonable and tolled the speedy trial clock pursuant to R.C. 2945.71(H). *Id*. at 91-92.

{¶61} Reasonableness is determined by examining the purpose and length of the continuance, which must be affirmatively demonstrated by the record. *State v. Strauss*, 11th Dist. Portage No. 2010-P-0035, 2011-Ohio-869, ¶ 13; *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 34. Courts have held that a prosecutor's motion for a continuance due to the death of an immediate family member was reasonable. *See State v. Williamson*, 5th Dist. Licking No. 2005 CA 00046, 2005-Ohio-6198, ¶ 50 (Hoffman, J., concurring) (time was properly tolled because of the death of the prosecuting attorney's family member).

{¶62} Although the situation in this case is not directly on point with *Saffell* or *Williamson*, they are instructive. It is clear from the record in this case that on February 7, the prosecutor could barely talk. She informed the court that she believed she had a fever the previous night. She thought she was getting the flu. The court's granting the continuance was reasonable under these circumstances. Accordingly, the speedy trial time was tolled under R.C. 2972.71(H). The next available trial date for the court was February 26, 2018.

{¶63} After review, we conclude that the state only used 73 days of Willis's speedy trial time. The remaining days were tolled by tolling events, many of which were caused by Willis. He filed a grievance against his first attorney and would not communicate with him. And although he was originally "very satisfied" with his second attorney, he eventually wanted to fire him too. He was belligerent with the trial court. He refused to dress for trial multiple times. Finally, his hostile actions toward the court and his attorneys caused the trial court to refer him for competency, delaying his case even longer. After our independent counting of the record, the state was within the statutory time to bring Willis to trial.

{¶64} With respect to Willis's claim that "it stretches the bounds of credulity to believe that defense counsel requested 14 continuances in the matter to conduct further investigation," courts of appeal are bound by the record before them. *See State v. Coatoam*, 45 Ohio App.2d 183, 186, 341 N.E.2d 635 (11th Dist.1975), citing *Buckeye Union Cas. Co. v. Biete*, 10th Dist. Franklin No. 5701, 1958 Ohio App. LEXIS 915 (June 10, 1958) (an appellate court is bound by the record before it, and may not consider factual allegations which are not supported by the record).

{¶65} Willis's second assignment of error is overruled.

{¶66} Judgment affirmed.

It is ordered that appellee recover from appellant the 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 common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

MARY J. BOYLE, PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
MICHELLE J. SHEEHAN, J., CONCUR