[Cite as *State v. Brime*, 2009-Ohio-6572.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-491 (C.P.C. No. 08CR-09-7086)
Ozie M. Brime,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 15, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} This is an appeal by defendant-appellant, Ozie M. Brime, from a judgment of the Franklin County Court of Common Pleas, following a jury trial in which appellant was found guilty of felonious assault.

{¶2} On September 25, 2008, appellant was indicted on one count of felonious assault, in violation of R.C. 2903.11. Appellant entered a plea of not guilty, and the court set an initial trial date of November 18, 2008. On joint motion of the parties, the trial court continued the trial until December 17, 2008. Appellant filed a pro se motion to dismiss on

December 16, 2008, asserting that he never signed a waiver of the right to a speedy trial. On December 18, 2008, on motion of defense counsel, the trial court continued the trial until February 2, 2009. The trial court subsequently continued the trial until March 2, 2009, on joint motion of the parties. On February 20, 2009, appellant filed a second pro se motion to dismiss, again asserting a violation of his right to a speedy trial. On motion of the state, the trial court continued the trial until March 30, 2009. The court further continued the trial until April 9, 2009, on the court's own motion.

{¶3} On April 9, 2009, prior to voir dire, the trial court considered appellant's motions to dismiss. The court denied the motions, finding that discovery had been requested on behalf of appellant, and that "[h]is counsel did waive for him." (Tr. 7.)

{¶4} At trial, the state presented the following evidence. On August 27, 2008, appellant was an inmate at the Franklin County Corrections Center. At the time, Scott Cowgill and Jeremy Cahill were also inmates in the same cell block as appellant. At the facility, coffee is delivered to inmates in plastic cups made of a hard plastic material. That morning, Cowgill and Cahill got up from their bunk area and went to get coffee. When they returned, appellant was upset because he believed some of the inmates had taken too much coffee. Appellant then began arguing with Cahill. Cowgill heard appellant state to Cahill: "We're going to fight today. * * * This is going down. This is going down." (Tr. 53-54.) Cahill "tried to diffuse the situation and just go to my rack, go to sleep." (Tr. 88.)

{¶5} Later, Cahill was lying on his bunk with a shirt covering his eyes. Appellant came over to Cahill and told him to "[w]ake up." (Tr. 56.) Cahill responded, "We'll fight later." Appellant exited the area, but about ten minutes later Cowgill heard appellant state: "He's trying to play me like a bitch." (Tr. 57.) Cahill eventually fell asleep in his

bunk. A short time later, Cowgill observed appellant grab a coffee cup, place his thumb through the handle, and then smash the cup into Cahill's face, striking Cahill "six to seven times." (Tr. 61.) Cahill jumped to his feet, and Cowgill observed a large gash on Cahill's face, and "a large puddle of blood smack the concrete." (Tr. 58.) Cahill and another individual were "pounding on the door to get him out of there," and a deputy pulled Cahill from the room. (Tr. 58.)

{¶6} Corporal Thad Lookabaugh was on duty at the facility the morning of the incident, and responded to the report of an inmate fight. Lookabaugh observed a laceration above Cahill's left eye, and blood on his hands and face; he took pictures of Cahill's injuries, which were admitted at trial. He also took pictures of appellant, and Lookabaugh testified he did not observe any visible injuries on appellant.

{¶7} Cahill was transported to Mount Carmel West Hospital, where he was treated for a laceration to his forehead; he received approximately 20 stitches to close the wound. Cahill testified that a scar remains on his forehead.

{¶8} Following deliberations, the jury returned a verdict finding appellant guilty of felonious assault. The trial court, by entry filed April 17, 2009, sentenced appellant to four years incarceration, and five years of post-release control.

{¶9} On appeal, appellant sets forth the following four assignments of error for this court's review:

> ASSIGNMENT OF ERROR #1
>
> THE TRIAL COURT ERRED IN NOT CONSIDERING THE CONSTITUTIONAL ASPECT OF APPELLANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS AND IN DENYING SAID MOTION IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS AND RIGHT TO A SPEEDY TRIAL

UNDER R.C. § 2945.71 AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #2

THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE THE JURY AN AUGMENTED UNANIMITY INSTRUCTION AS TO THE STATUTORY DEFINITION OF SERIOUS PHYSICAL HARM IN VIOLATION OF RULE 31 OF THE OHIO RULES OF CRIMINAL PROCEDURE AND APPELLANT'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 16, OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #3

APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR #4

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

{¶10} Under the first assignment of error, appellant contends the trial court's denial of his motion to dismiss resulted in a violation of his statutory and constitutional rights to a speedy trial. Appellant's statutory argument is premised upon his refusal to sign continuance entries, as well as the fact that, despite representation of counsel, he filed pro se motions to dismiss with the trial court. Regarding his constitutional argument, appellant contends that his case was prejudiced because he waited nearly seven months to be tried on an assault case involving only two fact witnesses.

{¶11} In *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶31-32, 38, the Supreme Court of Ohio discussed both statutory and constitutional speedy-trial requirements, stating as follows:

> Under R.C. 2945.71(C)(2), the state is required to bring a defendant to trial on felony charges within 270 days of arrest. Each day that the defendant is held in jail in lieu of bail counts as three days in computing this time. R.C. 2945.71(E). The time may be tolled by certain events delineated in R.C. 2945.72(E) and (H), including continuances granted as a result of defense motions and any reasonable continuance granted other than upon the request of the accused.
>
> In addition, an accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.
>
> * * *
>
> In *Barker v. Wingo* (1972), 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101, the Supreme Court set forth a balancing test that considers the following factors to determine whether trial delays are reasonable under the Sixth and Fourteenth Amendments to the United States Constitution: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

{¶12} At the outset, we note that appellant contends he should have been tried within 90 days from the time of his arrest, based upon the triple-count provision of R.C. 2945.71(E), rather than the 270-day period under R.C. 2945.71(C). The state, however, noting that appellant was already incarcerated at the time the instant case arose, raises doubt as to whether he would have been entitled to the benefit of the triple-count provision. See, e.g., *State v. Dankworth,* 172 Ohio App.3d 159, 2007-Ohio-2588, ¶32 ("an accused is entitled to the triple-count provision only when he is held in jail *solely* on the pending charge," and "days will not be counted triply if he is also being held for

additional charges") (emphasis sic); *State v. Davenport,* 12th Dist. No. CA2005-01-005, 2005-Ohio-6686, ¶9 ("[e]ven where an accused is held in jail on pending charges, he will not receive triple credit if he is also being held for additional charges"). The state further maintains that, even if the triple-count provision of R.C. 2945.71(E) is applied, appellant was brought to trial within 90 days after taking into consideration the applicable tolling events.

{¶13} As noted under the facts, appellant was indicted on September 25, 2008. On October 14, 2008, defense counsel requested discovery, which the state provided on November 7, 2008, resulting in a 24-day tolling period. A defendant's request for discovery is a tolling event pursuant to R.C. 2945.71(E). *State v. Brown,* 98 Ohio St.3d 121, 2002-Ohio-7040, ¶18. On November 18, 2008, both defense counsel and the state requested a continuance until December 17, 2008, for purposes of additional discovery, resulting in a 29-day period of delay. On December 18, 2008, defense counsel requested a second continuance, and the trial court continued the trial until February 2, 2009 (a 46-day delay period).

{¶14} On February 2, 2009, defense counsel and the state requested a continuance for trial preparation. On March 2, 2009, the state requested a continuance until March 30, 2009, citing the fact that the prosecutor was in trial; this continuance resulted in a 28-day delay period. A continuance granted on the state's motion will toll the running of the speedy trial time "if the continuance is reasonable and necessary under the circumstances of the case." *State v. Williamson,* 5th Dist. No. 2005 CA 00046, 2005-Ohio-6198, ¶32. A continuance granted because a prosecutor is in trial "states a valid reason" for continuing a trial date. *State v. Miller,* 10th Dist. No. 06AP-36, 2006-Ohio-

4988, ¶12. On March 30, 2009, the trial court, on its own motion, ordered a continuance until April 9, 2009, resulting in a ten-day delay. See *Miller* at ¶13 (trial court may sua sponte continue a trial beyond the statutory time limit).

{¶15} The state notes that, after deducting the above tolling events (totaling 165 days), only 32 speedy trial days elapsed, well within even the 90-day triple-count provision. Upon review, we agree with the state's argument that, based upon the calculation of days from appellant's indictment to trial, including the tolling periods noted above, the statutory time limit under R.C. 2945.71 had not expired.

{¶16} Appellant, while acknowledging that a defendant is generally bound by his counsel's waiver of speedy trial rights, argues that the continuances should not be charged to him because the waiver was executed without his consent. In *Taylor*, the defendant made a claim similar to appellant in the instant case. Specifically, the defendant asserted a violation of his statutory and constitutional right to a speedy trial on the grounds that he continually asserted his right to a speedy trial, and that his counsel lacked the ability to waive it for him because he had effectively discharged his counsel and elected to represent himself several months prior to the beginning of trial.

{¶17} The Supreme Court of Ohio rejected this argument, relying in part upon its earlier decision in *State v. McBreen* (1978), 54 Ohio St.2d 315, in which the court held in the syllabus: "A defendant's right to be brought to trial within the time limits expressed in R.C. 2945.71 may be waived by his counsel for reasons of trial preparation and the defendant is bound by the waiver even though the waiver is executed without his consent." The court in *Taylor,* in applying the holding in *McBreen,* held that "counsel could validly waive defendant's right to a speedy trial without his consent." *Taylor* at ¶36.

{¶18} Based upon the holdings in *Taylor* and *McBreen,* we find unpersuasive appellant's contention that the waiver was ineffective in the instant case. See also *State v. Pilgrim,* 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶43 ("[a]lthough defendant did not personally agree to a continuance or waive his right to [a] speedy trial for that period of time, his attorney did so on his behalf"); *State v. Matthews,* 1st Dist. No. C-060669, 2007-Ohio-4881, ¶30 (despite defendant's contention he did not sign any of the entries granting continuances, and did not agree to the continuances, defense counsel's waiver "binds the defendant even if it was executed without the defendant's consent").

{¶19} We also find unpersuasive appellant's contention that the submission of his own pro se filing affected his retained counsel's waiver of speedy trial. See *State v. West,* 3d Dist. No. 2-06-04, 2006-Ohio-5834, ¶30 (affirming trial court's rationale that a trial court does not have to permit such "hybrid representation" whereby a defendant, despite being represented by counsel, seeks to submit his own personal filing disclaiming any speedy trial waivers); *State v. Kroesen* (Nov. 16, 2000), 10th Dist. No. 00AP-48 (despite appellant's filing of his own pro se motion to quash hearing, as well as objecting to continuance and refusing to sign waiver, speedy trial time was tolled).

{¶20} In addition to his statutory argument, appellant argues that his constitutional right to a speedy trial was violated. As previously noted, the factors to be considered by a court in determining whether a delay is reasonable are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) whether prejudice resulted to the defendant. *Taylor* at ¶32. The United States Supreme Court has held that the first factor actually involves a "double enquiry," and that "to trigger a speedy trial analysis, an accused must allege that the interval between accusation and

trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett v. United States* (1992), 505 U.S. 647, 651-52, 112 S.Ct. 2686, 2690. See also *State v. Triplett*, 78 Ohio St.3d 566, 569, 1997-Ohio-182 ("[t]he first factor, the length of the delay, is a 'triggering mechanism,' determining the necessity of inquiry into the other factors"). A delay of "one year is generally considered enough." Id., citing *Doggett*.

{¶21} In the present case, the delay between the filing of the indictment and appellant's trial was a little more than six months. As noted by the state, Ohio courts have declined to find presumptive prejudice in cases involving similar periods of delay. See *State v. Pinson*, 4th Dist. No. 00CA2713, 2001-Ohio-2423 ("[t]he six and a half month delay alleged here does not come close to approaching this threshold for presuming prejudice"); *State v. Webb,* 4th Dist. No. 01CA32, 2002-Ohio-3552, ¶26 ("[w]e find that the one hundred eighty six day delay, just over six months, from * * * arrest until trial is not presumptively prejudicial"); *State v. Carter* (Apr. 1, 1998), 9th Dist. No. 97CA006703 (nine-month delay "does not constitute a 'presumptively prejudicial' delay for speedy trial purposes").

{¶22} As noted above, a significant portion of the delay between the indictment and trial in the instant case was due to defense counsel's own motions requesting time for trial preparation, and the length of delay at issue was not "presumptively prejudicial." As such, the record is insufficient to trigger examination of the remaining *Barker* factors. Finding no merit to appellant's claim that his statutory or constitutional right to a speedy trial was violated, the first assignment of error is overruled.

{¶23} Under his second assignment of error, appellant asserts the trial court erred in failing to give the jury an augmented unanimity instruction as to the statutory definition

of serious physical harm, in violation of Crim.R. 31. Appellant notes that, during jury deliberations, the jury submitted a question to the trial court regarding whether "we all have to agree" as to the type of disfigurement as defined under R.C. 2901.01(A)(5)(d); specifically, whether some jurors can "believe a permanent disfigurement and some believe temporary serious as long as all 12 of us believe one or the other?" (Tr. 151.) The trial court then gave the following instruction: "No, you need not agree on one clause or the other in order to reach a unanimous verdict. Some may believe the permanent disfigurement while others believe the temporary, serious disfigurement portion of Number 2." (Tr. 155.) Appellant objected to the trial court's instruction.

{¶24} Appellant argues he could have been convicted by less than a unanimous jury since some of the jurors could have found that he caused permanent disfigurement to the victim, while others could have found that he caused temporary, serious disfigurement to the victim. Appellant, citing *State v. Johnson* (1989), 46 Ohio St.3d 96, 104, maintains that the different types of disfigurement (characterized by a temporal variable and a seriousness variable) constitute two "distinct conceptual groupings" of facts that warrant an answer from the trial court that all jury members had to agree on the type of disfigurement allegedly caused by appellant.

{¶25} In *State v. Gardner,* 118 Ohio St.3d 420, 2008-Ohio-2787, ¶35, 38, a case decided subsequent to *Johnson,* the Supreme Court of Ohio held:

> In the court of appeals and in the parties' briefs before this court, there seems to be at least an assumption that due process guarantees a criminal defendant the right to a unanimous verdict in a state court. No such guarantee exists. The Sixth Amendment guarantee of a jury trial requires unanimity in a federal criminal trial, but the high court has never held that this requirement applies to the states through

> the Fourteenth Amendment. *Apodaca v. Oregon* (1972), 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184; *Johnson v. Louisiana* (1972), 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152. In Ohio, unanimity is required by court rule, not by the Constitution. Crim.R. 31(A). Therefore, this opinion will proceed on the understanding that unanimity in a juror verdict in state courts is not protected by the federal Constitution.
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> * * *
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> Although Crim.R. 31(A) requires juror unanimity on each element of the crime, jurors need not agree to a single way by which an element is satisfied. *Richardson v. United States* (1999), 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985. Applying the federal counterpart of Crim.R. 31(A), the *Richardson* court stated that a "jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime."

{¶26} The *Gardner* court noted that its earlier decision in *Johnson* held "that if a single count of an indictment can be divided into two or more ' "distinct conceptual groupings," ' the jury must be instructed specifically that it must unanimously find that the defendant committed acts within one conceptual grouping in order to reach a guilty verdict." Id. at ¶52, quoting *Johnson* at 104-05. However, "if the single count can be divided into a 'single conceptual grouping of related facts,' no specific instruction is necessary, because in such a case, the alternatives presented to the jury are not conceptually distinct, and a 'patchwork' verdict is not possible." Id. at ¶52, quoting *Johnson* at 105.

{¶27} The *Gardner* court, while acknowledging "criticism of the 'distinct conceptual groupings' rubric," still found "multiple-acts analysis" viable. *Gardner* at ¶52. In

discussing the distinction between "alternative means" cases and "multiple acts" cases, the court in *Gardner* at ¶48-50 held:

> In determining whether the state has impermissibly interfered with a defendant's Crim.R. 31(A) right to juror unanimity and the due process right to require that the state prove each element of the offense beyond a reasonable doubt, the critical inquiry is whether the case involves "alternative means" or "multiple acts."
>
> " ' "In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.
>
> " ' "In multiple acts cases, on the other hand, several acts are alleged and any one of them could constitute the crime charged. In these cases, the jury must be unanimous as to which act or incident constitutes the crime. To ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." ' " (Footnote omitted.) *State v. Jones* (2001), 96 Hawaii 161, 170, 29 P.3d 351, quoting *State v. Timley* (1994), 255 Kan. 286, 289-290, 875 P.2d 242, quoting *State v. Kitchen* (1988), 110 Wash.2d 403, 410, 756 P.2d 105.

{¶28} The indictment in the present case charged that appellant "did knowingly cause serious physical harm" to the victim, in violation of R.C. 2903.11, Ohio's felonious assault statute. R.C. 2901.01(A)(5)(d) provides that: "Serious physical harm to persons" means "[a]ny physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement."

{¶29} The state argues that the different forms of serious physical harm presented to the jury in the instant case, as well as the definitions of those forms, involved alternative means of committing a single offense, and do not constitute two or more "distinct conceptual groupings." We agree with the state's contention that the jury was presented with a "single conceptual grouping of related facts," and we therefore reject appellant's reliance upon multiple acts analysis. See, e.g., *State v. Carey* (May 4, 2000), 10th Dist. No. 99AP-517 (jury, which was instructed that offense of patient abuse may be committed by either knowingly causing physical harm to a person or recklessly causing serious physical harm to a person, "was faced with a single conceptual grouping of related facts, rather than two or more distinct conceptual groupings"). Thus, while the jurors in the instant case were required to find evidence of serious physical harm as a necessary element of the offense of felonious assault, unanimity was not required as to the type of disfigurement (provided substantial evidence supported those alternative means). *Gardner*.[1]

{¶30} Appellant's second assignment of error is without merit and is overruled.

{¶31} Under the third assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence. Appellant, while arguing that the greater amount of credible evidence would have permitted a finding that the victim suffered physical harm necessary to have supported an assault charge, maintains that there was a

[1] We note that appellant's unanimity argument focuses solely upon the definition of serious physical harm with respect to R.C. 2901.01(A)(5)(d). However, in addition to the instruction as to R.C. 2901.01(A)(5)(d), the trial court also instructed the jurors as to the definitions of serious physical harm under R.C. 2901.01(A)(5)(c) ("[a]ny physical harm that involves some permanent incapacity"), and under R.C. 2901.01(A)(5)(e) ("[a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain").

lack of credible evidence of "serious" physical harm necessary to support a conviction for felonious assault.

{¶32} In *State v. Presar,* 10th Dist. No. 09AP-122, 2009-Ohio-5127, ¶13-14, this court discussed the manifest weight standard as follows:

> A manifest weight of the evidence claim concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id*.
>
> A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶33} Pursuant to R.C. 2903.11(A), a person commits felonious assault if he or she "knowingly" causes "serious physical harm to another." In the jury instructions, the trial court defined "serious physical harm" as set forth under R.C. 2901.01(A)(5)(c), (d), and (e), which states as follows:

> (A) As used in the Revised Code:
>
> * * *
>
> (5) "Serious physical harm to persons" means any of the following:
>
> * * *
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;
>
> (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶34} At trial, the state presented testimony that appellant took a cup made of hard plastic, walked over to the bunk where Cahill was sleeping, and smashed the cup against Cahill's face five to seven times, resulting in a laceration to his forehead. Witnesses observed profuse bleeding from the victim at the time of the incident. Cowgill described the injury as "a large gash all the way down," and that it appeared to be "to the bone." (Tr. 58.) Cahill was transported to a hospital for treatment, where he received approximately 20 stitches to close the wound. Cahill testified that he suffered a

permanent scar as a result of the attack. The state also introduced photographs of the victim's injuries taken shortly after the incident.

{¶35} Upon review, we find that the weight of the evidence supported a finding of serious physical harm. See *State v. Reckers,* 1st Dist. No. C-060451, 2007-Ohio-3679, ¶16 (evidence sufficient to support finding of serious physical harm involving some permanent disfigurement or some temporary, serious disfigurement where victim suffered numerous cuts and abrasions to head and face, necessitating treatment at hospital, including staples, and resulting in a scar or indentation); *State v. Brown,* 9th Dist. No. 04CA008510, 2005-Ohio-2141, ¶16-17 (weight of evidence supported finding that victim suffered permanent disfigurement and, therefore, serious physical harm, where defendant hit victim over head with handgun causing cut and profuse bleeding, necessitating staples, and resulting in "lingering scar"); *State v. Jamhour,* 10th Dist. No. 06AP-20, 2006-Ohio-4987, ¶11 ("[s]carring is a permanent disfigurement," and evidence supported finding of serious physical harm); *State v. Edwards* (1992), 83 Ohio App.3d 357, 360 (where victim received cut above eye, resulting in permanent scar, jury could reasonably find that victim "sustained some permanent disfigurement constituting 'serious physical harm' ").

{¶36} Appellant also attempts to cast doubt as to evidence regarding the actual perpetrator, citing the fact that inmates were unwilling to give statements shortly after the incident. Specifically, at trial, Franklin County Deputy Sheriff Matt Cline testified that he prepared a report indicating that inmates refused to give any statements at the time. Cowgill explained, however, that he was reluctant to give a statement in front of the other inmates, for fear of his safety, but that he freely gave an account to authorities after he

was removed from the cell. Deputy Cline testified that it was common for inmates to be reluctant to report on other inmates. Here, the jury was free to believe Cowgill's account, as well as the victim's testimony regarding appellant's actions, and we find there was competent, credible evidence upon which the jury could find that appellant was the assailant.

{¶37} Upon review of the record, we find that the jury did not lose its way and commit a manifest miscarriage of justice in convicting appellant of felonious assault. Accordingly, we find no merit to appellant's claim that his conviction was against the manifest weight of the evidence. Appellant's third assignment of error is overruled.

{¶38} Under the fourth assignment of error, appellant raises a claim of ineffective assistance of counsel. Specifically, appellant argues that his trial counsel was ineffective in signing or authorizing continuances waiving his right to a speedy trial; appellant maintains he would prevail on a claim that his constitutional right to a speedy trial was violated.

{¶39} A reversal based upon a claim of ineffective assistance requires a defendant to "show, first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, ¶137, citing *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶40} In addressing appellant's first assignment of error, we rejected the contention that he was deprived of his constitutional right to a speedy trial. Accordingly, appellant cannot show prejudice based upon the assertion he would prevail on such a

claim. We also find no merit to appellant's assertion that his counsel was ineffective in signing the continuances. As noted, trial counsel sought continuances for purposes of trial preparation. In general, "waiver of the right to a speedy trial, including a motion for continuance, can be considered trial strategy." *State v. Shepherd,* 11th Dist. No. 2003-A-0031, 2004-Ohio-5306, ¶31. Thus, there is a presumption that waiver is a sound trial strategy, "especially when the purposes of the waiver are for trial preparation." Id. See also *State v. Green,* 7th Dist. No. 01 CA 54, 2003-Ohio-3074, ¶13 ("[t]here are a plethora of reasons why a delay in the trial date might be beneficial to an accused, i.e. purposes of adequate trial preparation and/or trial strategy"). In the present case, appellant has failed to demonstrate either deficient performance or prejudice as a result of defense counsel's actions.

{¶41} Accordingly, appellant's fourth assignment of error is without merit and is overruled.

{¶42} Based upon the foregoing, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

McGRATH and CONNOR, JJ., concur.

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