[Cite as *State v. Lemons*, 2010-Ohio-3807.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0032**
- vs -	:	
CHARLES L. LEMONS, III,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2007 CR 806.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Charles L. Lemons, III, appeals from a judgment of the Trumbull County Court of Common Pleas entered upon a jury verdict, which convicted him of felonious assault, kidnapping, attempted rape, and rape. The court sentenced him to 58 years in prison for his convictions. For the following reasons, we affirm the judgment.

{¶2} **Substantive Facts and Procedural History**

{¶3} Mr. Lemons ("appellant"), 53, was charged with felonious assault, kidnapping, attempted rape, and two counts of rape for allegedly attacking his 22-year-

old cousin with a hammer and forcing her to engage in sexual conduct with him multiple times in the evening of October 29, 2007. Each of the five counts carried a Repeat Violent Offender specification pursuant to R.C. 2941.149.

{¶4} At trial, the state presented eleven witnesses. The victim, A.B., testified that in the evening of October 29, 2007, she was alone at the apartment of a friend, Kristen Thompson, when appellant, who is her aunt's stepson and who she had known for three years, came over to the apartment between 8:00 p.m. and 9:00 p.m. to ask her to make a music CD for him. They used a computer in a bedroom upstairs to select the songs for the CD. Appellant left half way through, supposedly to get a cassette player. He returned twenty minutes later, but without the cassette player. They went back to the bedroom upstairs and she again sat in front of the computer with him behind her.

{¶5} Then, as she testified, "[j]ust out of no where, I like feel this pain and I fall out of the chair and he just got on top of me and kept hitting me [in the head]." She was hit more than five times with an object. She attempted to get away, but he pulled her back and tried to choke her. Blood started to drip down her face. Appellant then stood up and said to her: "I know how to get what I want." He told A. B. to clean herself up; he pushed her into the bathroom, took her clothes off, and made her get into the shower. A.B. went along for fear of her life. He told her he had brought her beer and took her places and she never did anything for him, so she had to "give him sex because [she] owe[d] him." She pled with him, saying: "I don't want to do that, we're cousins, that's weird, and I just want to go to the hospital." She asked him not to kill her and let her leave. When appellant tried to clean up the blood on the floor with a mop, she noticed a

hammer on the floor and realized for the first time she had been hit with a hammer. She grabbed it and hid it in the closet when he had his back towards her.

{¶6} After A.B. finished showering, she put a towel on her head to soak up the blood. Trying to find a way to escape, she pulled the sheets off the bed and told appellant she was going to put them in the washing machine in the kitchen downstairs. Appellant, however, followed her, repeating that she owed him and she had to "give him sex." She continued to resist him, saying "[n]o, I don't want to do that."

{¶7} While downstairs, her cell phone rang, and she went upstairs to answer the call because of a lack of signals downstairs. Appellant allowed her to talk to the caller, Ms. Thompson, but warned her not to say anything. Once they were upstairs, he pushed her to the bed. While she was still on the phone, appellant took her pants off, started to touch her, and performed oral sex on her. She was afraid to say anything to Ms. Thompson for fear that appellant would hurt her. When the telephone call ended, she got up and told appellant she did not want to do it.

{¶8} Ms. Thompson called her again, asking her to put a movie tape by the door for her to pick up. A.B. went downstairs to put the tape by the door, with appellant following her closely. While she was still on the phone with Ms. Thompson, he started to touch her again. She tried to push his hands off her, but could not say anything to him for fear that he would hurt her if Ms. Thompson heard anything over the telephone. As A.B. testified, "I couldn't say nothing because I was afraid that if I said something with her on the phone, he would hurt me."

{¶9} Once A.B. got off the phone, appellant pushed her on the couch and ordered her to "get on top of him." She pled with him not to kill her. He took his pants

off and attempted to penetrate her vaginally. She struggled, trying to "keep [herself] as tight as possible" to prevent penetration. He eventually stopped trying but then stood up in front of her and put his penis in her mouth. He grabbed the back of her head and forced her to perform oral sex on him. When he was about to ejaculate, he pulled his penis out and ejaculated on her lower stomach area. She handed him the blood-stained towel she had on her head to wipe himself. When asked at trial why she gave him the towel, she testified: "Because it had my blood all over it and just in case he did kill me, maybe they would know it was him."

{¶10} Afterward, A.B. found a shirt to put on herself, and, while appellant bent down to put on his pants, she bolted for the door and ran to the parking lot, screaming for people to help her. When she saw a car approaching, she banged on the car and tried to get inside. The car however drove off. A.B. then saw Ms. Thompson's brother in the parking lot. He gave her his coat to cover herself because she had no pants on. She called 911 and then called Ms. Thompson at work. Ms. Thompson's coworker, Ashley Raznoff, answered the call. A.B. could not recall at trial exactly what she told Ms. Raznoff. She thought she told her either that she was raped, or that appellant hit her. Ms. Thompson then came on the phone and A.B. told her an ambulance was on the way to take her to the hospital.

{¶11} While A.B. was being examined in the emergency room, appellant called her twice. The first time she did not answer the phone but knew the call was from him because of the unique ringtone. The second time he called, he told her he was on the way to Pennsylvania.

{¶12} Ms. Thompson testified that she knew appellant as "Chuckie." She received a telephone call from A.B. close to 11:00 p.m. that evening. Describing the phone call, Ms. Thompson testified: "She sounded really scared and frantic[;] she said Chuckie just beat me over the head with a hammer [and] I'm getting ready to call the ambulance. I said, okay, I'm on my way[.] I hung up the phone. That was it."

{¶13} Upon cross-examination, when asked about her telephone conversation with A.B. earlier that evening, she stated: "Honestly, she didn't sound very normal to me but I didn't think anything of it at the time." Asked if she remembered telling Detective Cole that A.B. sounded normal, she responded: "I don't remember that at all."

{¶14} Ashley Raznoff, Ms. Thompson's coworker, testified that while she was at work that evening, she answered a telephone call from A.B. between 10:30 p.m. and 11:00 p.m. A.B. was crying and said "Chuckie" had raped her.

{¶15} Daniel Hoolihan is Ms. Thompson's 18-year-old brother and lived with her at the time. He testified that on that night, he was dropped off by his friend's mother's boyfriend. When their car pulled into the parking lot, he saw A.B. "running out of the house and she was screaming, throwing her hands around, [saying] help me, help me, and she was bleeding from her face and her head, and all kinds of places, and she had on a shirt." He further testified:

{¶16} "She didn't have no pants on or anything, and she slammed on my window. *** She didn't realize it was me, so I got out of the car and asked her what was wrong, and she was still screaming, help me, help me, help me, and then she was running up to the other cars pounding on the windows, help me, help me. So, finally she got into my [friend's mom's] boyfriend's car, and they drove ten feet, and he said, I

can't have you in my car because you don't have no clothes on, so she got out of the car and she was screaming. So we [walked] down a couple of doors and used the phone and called the cops and what not."

{¶17} As Mr. Hoolihan walked toward his sister's house, he saw appellant walking out of the apartment with no shirt on. Mr. Lemons carried his shirt and boots in one hand while buckling his belt as he walked, yelling "call the cops, I'll turn myself in." He also shouted "I will kill you. I'll find you and kill you" at A.B., before driving away in his Grand Am. Mr. Hoolihan then went inside his sister's house. Describing what he saw, Mr. Hoolihan testified: "there was like blood marks on the wall by the front door and there was blood on the carpet in the living room *** walking towards the back door towards the stairs, and as you turn the corner on the stairs, there was blood smears on the wall and all up the hallway of the stairs[.] [T]here was blood on the hallways. And then when you got up the stairs, there was a big puddle of blood and a mop and a bucket, and when you walk into my sister's and [A.B.'s] room, there was blood on the bed, on the floor, on pretty much anything that was in the room."

{¶18} Sergeant Emanuel Nites of the Warren City Police Department investigated the crime scene. He testified there was blood on the couch downstairs and the kitchen area, where a dryer and washer were located, near which he found some bloodstained beddings. He also found a towel located near the entrance of the apartment. Upstairs he found a bucket of water mixed with blood and a mop, which looked as if someone had been wiping the floor with a mop. Inside the bathroom there was a blood soaked T-shirt on the counter top. In the bedroom, he saw a vast amount of blood on the floor, the walls, and a dresser by the stereo equipment. He discovered

a ball-peen hammer on top of a teddy bear in the closet. He also found panties in the bathroom area, also with bloodstains on it.

{¶19} Sergeant Merritt, a senior forensic officer at the City of Warren Police Department, testified that the steering covering in appellant's vehicle was covered in blood. Blood was also found on the center console and the radio.

{¶20} Andrea Padach, a Sexual Assault Nurse Examiner, testified regarding her administration of a rape kit while A.B. was at the emergency room. A. B. told her she was held down with appellant's hands around her neck for two minutes. She assessed her for strangulation and found some swelling on the right side of A.B.'s neck, which was bruised. A.B. told her she was sexually assaulted by her cousin, Charles Lemons. A.B. also told her that she was not penetrated in the vagina but was assaulted orally -- "assailant-to-victim" and "victim-to-assailant," and that he masturbated and ejaculated on her leg and her stomach. Nurse Padach noticed A.B. had white crusted material on her lower abdomen and on her thigh.

{¶21} Dr. Khoury testified that he treated A.B. at the emergency room. She was beaten on the head, shoulders, arms, hand, and face, apparently hit with a hammer. There was also an attempt of strangulation or suffocation. She also had bruising in her chest, back, and arm. She had pain in her hand, swelling on her face, and could hardly open her jaw due to the swelling. She also had a facture of her right metacarpal bone from the trauma.

{¶22} Detective Sergeant Cole of the Warren Police Department testified he interviewed appellant the next day, which was recorded on a DVD. The DVD was played for the jury at trial. During the interview, appellant initially told the police he went

to A.B.'s apartment only for a beer. When pressed, he "remembered" A.B. had masturbated him while she was on the phone, and he wiped himself off with a towel. He denied A.B. performed oral sex on him. He also denied calling her at the hospital that evening.

{¶23} Russell Edelheit, a forensic scientist with the Bureau of Criminal Identification and Investigation ("BCI") at the Ohio Attorney General's Office, identified semen in the samples contained in the rape kit, and blood on the center console in appellant's vehicle. He also identified sperm cells and blood on the towel retrieved from the scene.

{¶24} Brenda Gerardi, a DNA specialist, testified that the DNA profile from the semen stain on A.B.'s lower stomach near the pubic hair and on the towel indicated they were both from appellant. The DNA profile from the blood stain on the hammer, the center console on appellant's vehicle, and the towel indicated they were from A.B.

{¶25} The defense did not present any witnesses, resting its case on the theory that the sexual conduct between appellant and A.B. was consensual, and that it occurred before a "fight" between the two. The defense did not offer an account of how the evening's events unfolded leading to A.B.'s extensive injuries. Rather, it focused on the telephone calls between Ms. Thompson and A.B. and the seeming oddity of A.B.'s ability to carry on a "somewhat normal" conversation while appellant performed a sexual act on her.

{¶26} After trial, the jury found him guilty of all five counts and the trial court sentenced him to an aggregate term of 58 years.

{¶27} On appeal, appellant assigns the following errors:

{¶28} "[1.] The trial court erred, to the prejudice of appellant, by denying his repeated requests to offer extrinsic evidence for purposes of impeachment, where said evidence relates to the state of mind of the alleged victim.

{¶29} "[2.] The Appellant's convictions for rape, attempted rape, and kidnapping, and their accompanying specifications, are against the manifest weight of the evidence.

{¶30} "[3.] The trial court abused its discretion by imposing maximum and consecutive terms of incarceration upon appellant.

{¶31} "[4.] The trial court erred to the prejudice of appellant by overruling appellant's motion to dismiss the indictment in violation of his statutory speedy trial rights under R.C. 2945.71 and 2941.401.

{¶32} **Alleged "Prior Inconsistent Statement"**

{¶33} Appellant's first assignment of error relates to a statement Ms. Thompson made when interviewed by Detective Cole. When describing the telephone conversation she had with A.B., Ms. Thompson stated: "I didn't hear there was something wrong, she was talking normally, you know."

{¶34} The defense sought to introduce Detective Cole's testimony at trial regarding this statement by Ms. Thompson, on the ground that the statement constituted a prior statement inconsistent with her testimony at trial, where she stated: "Honestly, she didn't sound very normal to me but I didn't think of it at the time."

{¶35} The state filed a motion in limine to exclude the detective's testimony. The court held an in-chamber hearing during trial over this motion. The defense counsel argued it should be able to use Ms. Thompson's prior statement to impeach her, on the ground that Evid.R. 613(B) permits a party to introduce extrinsic evidence of a witness's

prior inconsistent statement to impeach the witness's credibility under certain circumstances.[1]

{¶36} After reviewing Ms. Thompson's trial testimony, which showed that she testified on cross-examination that she did not recall telling Detective Cole that A.B. sounded normal over the telephone, the court granted the state's motion in limine, finding that the extrinsic evidence regarding Ms. Thompson's prior statement cannot be used to impeach her. The court explained that it did not find the prior statement to be inconsistent, because, when asked about the statement at trial, she stated she had no recollection of making it.

{¶37} The trial court's decision to grant or deny a motion in limine is reviewed under an abuse of discretion standard. *Hores v. Weaver*, 11th Dist. Nos. 2004-T-0045, 2004-T-0047, and 2004-T-0048, 2005-Ohio-6076, ¶17.

{¶38} In *State v. Reed*, 155 Ohio App.3d 435, 2003-Ohio-6536, the Second District, interpreting Evid.R. 613(B), stated:

{¶39} "If the witness admits making the conflicting statement, then there is no need for extrinsic evidence. If the witness denies making the statement, extrinsic evidence may be admitted, provided the opposing party has an opportunity to query the witness about the inconsistency, and provided the 'evidence does not relate to a collateral matter[.] ***' However, if the witness says he cannot remember the prior

1. Evid.R. 613(B) states: "Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply: (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require; (2) The subject matter of the statement is one of the following: (a) A fact that is of consequence to the determination of the action other than the credibility of a witness; (b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), 616(B) or 706; (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence."

statement, 'a lack of recollection is treated the same as a denial, and use of extrinsic impeachment evidence is then permitted.'" Id. at ¶29, quoting *State v. Harris* (Dec. 21, 1994), 2d Dist. No. 14343, 1994 Ohio App. LEXIS 5763.

{¶40} Therefore, on the authority of *Reed*, it would appear that the trial court should have allowed the extrinsic evidence, i.e., Detective Cole's testimony regarding Ms. Thompson's prior statement, to impeach her, *provided* "the evidence does not relate to a collateral matter."

{¶41} On appeal, appellant argues the extrinsic evidence is not collateral but rather "go[es] to the heart of four of the five charges against Appellant." We disagree. Ms. Thompson's statement to the police regarding A.B.'s tone during the telephone calls does *not* relate to the material issue in this case, i.e., whether A.B. voluntarily engaged in sexual conduct with appellant. This is because A.B. *herself* testified that she *tried* to sound as normal as possible and that she could not let on the sexual assault taking place during the telephone calls for fear that appellant may hurt her. Given her account of the events, her attempt to sound normal would be based on a very legitimate fear and completely understandable -- appellant had viciously attacked her with a hammer without provocation just moments ago. Under the circumstances of this case, the extrinsic evidence regarding the victim's tone would not relate to the material issue but only to a collateral matter, and therefore the trial court did not abuse its discretion in excluding it.

{¶42} In any event, we note the court in *Reed*, after determining the trial court should have allowed the extrinsic evidence regarding a witness's prior inconsistent statement to the police for impeachment purposes, held that the court's failure to do so

was harmless error, because "there is no reasonable possibility that the error contributed to the defendant's conviction." Id. at ¶31, citing *State v. Bayless* (1976), 48 Ohio St.2d 73, 106. The court explained that the defense counsel was able to bring in the witness's prior statement in its cross-examination of her, and therefore the presentation of the extrinsic evidence regarding the prior statement would have had minimal impact on the witness's credibility. Id. at ¶41.

{¶43} Similarly here, even if we were to conclude the trial court should have allowed appellant to introduce the testimony of Detective Cole regarding Ms. Thompson's prior statement, the alleged error would have been harmless. This is because the jury *was* made aware that she had made a statement to Detective Cole that A.B. sounded normal during the telephone calls. The transcript reflects the following colloquy during the defense counsel's cross-examination of Ms. Thompson:

{¶44} "Q. And would it be fair to say that [A.B.] at that time, it was a normal conversation, she sounded normal as –

{¶45} "A. Honestly, she didn't sound very normal to me but I didn't think anything of it at the time.

{¶46} "Q. Now, do you recall giving a statement to Detective Cole later on that evening?

{¶47} "A. Yes.

{¶48} "Q. Do you recall telling Detective Cole that you had called [A.B.] and she sounded normal?

{¶49} "A. I don't remember that at all."

{¶50} "Q. You don't remember saying that? Are you denying that you said that or –

{¶51} "A. I don't remember.

{¶52} "Q. You just don't remember saying that?

{¶53} "A. Uh-huh, I don't remember."

{¶54} From this colloquy, the jury was made aware that Ms. Thompson had made a prior statement somewhat inconsistent with her trial testimony that A.B. did not sound normal. Therefore, even if the trial court had erred in not allowing Detective Cole to testify regarding her prior statement, the error would have been harmless. The first assignment of error is overruled.

{¶55} **Manifest Weight**

{¶56} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶57} Moreover, issues concerning the weight given to the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶58} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

State v. Fritts, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "A finding on review that the jury's verdict was against the manifest weight of the evidence must be reserved for those extraordinary cases where, on the evidence and theories presented, and taken in a light most favorable to the prosecution, *no reasonable jury could have found the defendant guilty*." (Emphasis original.) *Higgins* at ¶37 (citations omitted).

{¶59} There were no eyewitnesses to the events that resulted in the bloodbath inside the apartment and appellant's semen on A.B.'s body. The defense posited the theory that the sexual conduct between appellant and A.B. was consensual and A.B. was injured in a subsequent "fight" between the two. The only evidence the defense pointed to in support of its version of the events is the fact that appellant apparently allowed A.B. to answer two telephone calls from Ms. Thompson during the sexual conduct and Ms. Thompson was never alerted to the alleged ongoing assault. The defense argued the circumstances supported the consensual nature of the sexual conduct. The defense also pointed out that A.B. used the word "fighting," a word suggestive of mutual combat, to describe what had occurred when examined by the nurse at the emergency room. The defense presented *no other* evidence before the jury for its claim that the sexual conduct was voluntary.

{¶60} In contrast, A.B.'s account of the events, that appellant attacked her with a hammer unprovoked and then forced her to engage in sexual conduct multiple times, was corroborated by ten witnesses and DNA evidence.

{¶61} The DNA evidence shows A.B.'s blood was on the hammer, a towel, and on appellant's vehicle, while his semen was found on her lower stomach and the blood-

stained towel. A.B. explained how the towel became stained by both her blood and appellant's semen, while appellant offered no explanation. Her testimony offered the *only* account of the particular sequence of events that took place that night, which was corroborated by testimony from the witnesses. Sergeant Nites found vast amounts of blood in the bedroom, where A.B. said the attack took place. He also found bloodstained beddings near the washer area, a blood-soaked T-shirt and blood-stained panties in the upstairs bathroom, a hammer in the closet, and the blood-and-semen-stained towel downstairs by the door – the locations of these items were exactly where A.B. said they were. Ms. Thompson's brother witnessed her running out of the house, partly naked, while screaming for help. He also saw appellant walking out of the house with no shirt on, buckling his belt. He was yelling "Call the cops. I will turn myself in" and shouting "I will find and kill you" at A.B. Ms. Thompson's coworker answered the telephone call from A.B. immediately after she escaped from the apartment, and A.B. told her she was raped.

{¶62} Given the state of the evidence and mindful that the weight given to the evidence and the credibility of the witnesses are primarily for the jury, we cannot say that the jury in this case clearly lost its way in resolving conflicts in the evidence and created such a manifest miscarriage of justice that appellant's convictions must be reversed and a new trial ordered. On the evidence and theories presented, and taken in a light most favorable to the prosecution, we cannot conclude a reasonable jury could have found appellant not guilty. Accordingly, we overrule appellant's second assignment of error.

{¶63} **Maximum and Consecutive Sentences**

{¶64} In his third assignment of error, appellant claims the trial court abused its discretion in sentencing him to maximum and consecutive sentence in light of the purposes of sentencing set forth in R.C. 2929.11.

{¶65} The record reflects the trial court sentenced appellant to the maximum term of eight years for his conviction of felonious assault, and added ten consecutive years for the RVO specification. For his conviction of kidnapping, the court sentenced him to the maximum of ten years, and added ten consecutive years for the RVO specification. For each rape count, the court sentenced him to the maximum of ten years, with ten additional consecutive years on the specification. For the attempted rape, the court sentenced him to the maximum of eight years, with ten years on the specification. The sentences for kidnapping and attempted rape are to run concurrently to each other and to the other counts, while the sentences for felonious assault and two counts of rape are to run consecutively to each other. Appellant received an aggregate term of 58 years.

{¶66} Appellant's main contention is that his sentence is not reasonable in light of his age. He was 53 years old at the time of his sentence and, therefore, unlikely to survive the long incarceration imposed by the court.

{¶67} Pursuant to *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856 to the existing statutes, appellate courts must apply a two-step approach in reviewing a sentence. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly

contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard. Id. at ¶4.

{¶68} The first prong of the analysis instructs that "the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. at ¶14.

{¶69} The court explained that the applicable statutes to be applied by a trial court include the felony sentencing statutes R.C. 2929.11 and R.C. 2929.12, which are not fact-finding statutes like R.C. 2929.14. Id. at ¶17. Therefore, as part of its analysis of whether the sentence is "clearly and convincing contrary to law," an appellate court must ensure that the trial court considered the purposes and principles of R.C. 2929.11 and the factors listed in R.C. 2929.12.

{¶70} If the first prong is satisfied, that is, the sentence is not "clearly and convincingly contrary to law," the appellate court must then engage in the second prong of the analysis, which requires an appellate court to determine whether the trial court abused its discretion in selecting a sentence within the permissible statutory range. Id. at ¶17. The *Kalish* court explained the effect of R.C. 2929.11 and 2929.12 in this regard:

{¶71} "R.C. 2929.11 and 2929.12 *** are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for [a] trial judge to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding

purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion." *Kalish* at ¶17.

{¶72} Appellant claims his sentence is not reasonable in light of the purposes of sentencing set forth in R.C. 2929.11. R.C. 2929.11(A) states: "The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both."

{¶73} Here, the sentencing entry stated: "the Court has considered the record, oral statements, and any victim impact statement, as well as the principles and purposes of sentencing under O.R.C. Section 2929.11, and has balanced the seriousness and recidivism factors of O.R.C. Section 2929.12."

{¶74} The sentencing transcript reflects that before sentencing appellant, the court noted his lengthy criminal record beginning in 1975, when he pled guilty to breaking and entering, for which he was sentenced to six months in jail. At the end of that year, he pled guilty to attempted robbery and was sentenced to four to 15 years of incarceration. He was released in 1977, and, in 1978 he was sentenced to serve 25 years in prison for his convictions of kidnapping, felonious assault, rape, abduction, having weapon while under disability, and aggravated menacing.

{¶75} Noting his extensive criminal record, the trial court stated:

{¶76} "It appears from the time you have been an adult, whenever you were not incarcerated, you were involved in some kind of criminal offense, and there is an old adage that some things don't mix, and a typical example they use is oil and vinegar [don't] mix, and in your case, I think it's you and life outside the prison walls don't seem to mix because every time you are out, there is a violent offense that occurs."

{¶77} In sentencing appellant, the court placed great weight on appellant's lengthy history of criminal offenses, demonstrated dangerousness to society, and his lack of rehabilitation. We find no abuse of discretion by the trial court in imposing the maximum and consecutive sentences on appellant in order to achieve the purposes set forth in R.C. 2929.11. The third assignment of error is overruled.

{¶78} **Speedy Trial**

{¶79} "The right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. The statutory speedy trial provisions set forth at R.C. 2945.71 et seq. are coextensive with the constitutional speedy trial provisions." *State v. Kist, Jr.*, 173 Ohio App.3d 158, 2007-Ohio-4773, ¶16.

{¶80} Pursuant to R.C. 2945.71(C)(2), a person charged with a felony shall be brought to trial within 270 days of the date of arrest. However, if a felony defendant is incarcerated on the pending charge instead of on bail, the triple count provision set forth in R.C. 2745.71(E) is triggered and the defendant must be tried within 90 days.

{¶81} "The standard of review of a speedy trial issue is to count the days of delay chargeable to either side, and determine whether the case was tried within the

time limits set by R.C. 2945.71." *Kist* at ¶17; see, also, *State v. Pierson*, 149 Ohio App.3d 318, 2002-Ohio-4515, ¶12.

{¶82} "Speedy trial issues present mixed questions of law and fact." *Kist* at ¶18, citing *State v. Hiatt* (1997), 120 Ohio App.3d 247, 261. When reviewing a defendant's claim that he or she was denied the right to a speedy trial, we apply a de novo standard of review to questions of law and the clearly erroneous standard to questions of fact. *State v. Evans*, 11th Dist. No. 2003-T-0132, 2005-Ohio-1787, ¶32.

{¶83} R.C. 2945.72 specifies the reasons for which a trial court may extend the limits of R.C. 2945.71. R.C. 2945.72 states, in relevant part:

{¶84} "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

{¶85} "***;

{¶86} "(E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

{¶87} "***;

{¶88} "(H) The period of any continuance granted on the accused's [**15] own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]"

{¶89} Here, the state concedes the triple count protection applies in this case because appellant was held in lieu of bond while awaiting trial. Appellant was arrested on October 30, 2007. Therefore, the state concedes his speedy trial time would have run 90 days after his arrest, on January 28, 2008. His trial, however, did not commence

until more than a year later, on February 3, 2009. The state contends that a myriad of events, all attributable to appellant, tolled the running of speed-trial time in this case.

{¶90} **State's Request for Reciprocal Discovery**

{¶91} The state points us to appellant's failure to respond to the state's "Request for Reciprocal Discovery," arguing that his delay in responding to the discovery request tolled the speedy trial time until he provided the discovery on January 30, 2009, just days before trial.

{¶92} Regarding this claim, the record does *not* reflect that appellant filed an *initial* request for discovery. The docket only reflects that on January 2, 2008, the state filed a document titled "State's Response to Defendant's Request for Discovery," and, on that same day, filed a document titled "Request for Reciprocal Discovery." Appellant did not respond to the state's request until more than a year later, on January 30, 2009.

{¶93} In *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, the Supreme Court of Ohio held that "[t]he failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D)." Id. at paragraph one of syllabus.

{¶94} In this case, *however*, the record does not reflect an *initial* request by appellant for discovery. In the absence of such a request in the record, we must assume no such request for discovery was made by appellant, despite the fact the state titled its motion as a "Response to Defendant's Request for Discovery."

{¶95} Crim.R.16 (C)(1)(a), (b) and (c) limits the right of the prosecution to discovery to situations where the defendant makes an initial request for discovery.[2] Specifically, subsection (C)(1)(c) provides:

{¶96} "If *on request or motion the defendant obtains discovery* under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial." (Emphasis added.)

{¶97} Thus, in the absence of an initial request or motion for discovery by appellant, a request by the prosecutor for discovery is not permitted under Crim.R. 16. See *State v. Davis* (Aug. 25, 1986), 2d Dist. No. 9472, 1986 Ohio App. Lexis 7970, *5.

{¶98} Because the record here does not evidence an initial demand made by appellant for discovery, the state cannot request discovery from appellant, and therefore, the state's January 2, 2008 filing of a request for discovery *cannot* be a tolling event for the purposes of speedy trial.

{¶99} The record reflects, however, several events all attributable to the defense which would toll the speedy trial period. These events fall into two categories: (1) the defense counsel's request on multiple occasions for additional time to adequately prepare for trial; and (2) appellant's filing of various motions.

{¶100} **Counsel's Waiver of Speedy Trial for Reasons of Trial Preparation**

2. We note a new version of Crim.R. 16 went into effect on July 1, 2010. The new rule maintains the requirement that the defendant must make an initial demand for discovery for the state to be entitled to discovery from the defendant. The new version of Crim.R. 16 states, in pertinent part:
"(A) Purpose, Scope and Reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts ***. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. *Once discovery is initiated by demand of the defendant*, all parties have a continuing duty to supplement their disclosures." (Emphasis added.)

{¶101} Regarding the defense counsel's waiver of speedy trial rights, the Supreme Court of Ohio held that, "for purposes of trial preparation, a defendant's statutory right to a speedy trial may be waived, with or without the defendant's consent, by the defendant's counsel." *State v. King* (1994), 70 Ohio St.3d 158, 160, citing *State v. McBreen* (1978), 54 Ohio St.2d 315, syllabus. A defendant is bound by the actions of counsel waiving the speedy trial right. *McBreen* at syllabus.

{¶102} Here, appellant's counsel appeared before the trial court on January 14, 2008, two weeks before the speedy trial time would have run. He informed the court he was just assigned to the case three weeks prior and needed additional time to adequately prepare for trial. Appellant, however, indicated to the court he did not want to waive his speedy trial rights. Despite appellant's lack of consent, the court granted an extension of time to March 17, 2008. The court emphasized the importance of counsel's ability to put forth a competent defense given the seriousness of the charges and the length of potential prison time faced by the defendant in this case.

{¶103} Thus, the speedy trial time was tolled during the time period between January 14, 2008 and March 17, 2008.

{¶104} The record then reflects that appellant appeared with his counsel in court on March 3, 2008, and executed a written speedy trial waiver for 210 days to toll the time until September 15, 2008.

{¶105} Thereafter, at a hearing held on September 5, 2008, to hear appellant's motion to suppress, the trial court noted that the defense counsel had filed a motion to continue because the defense's DNA expert had not rendered an opinion. At this hearing, the defense counsel reported to the court that appellant refused to sign a

second waiver of speedy trial to accommodate the completion of his own expert's report. The trial court tolled the time nonetheless to allow the completion of the expert report, again emphasizing the paramount importance of an adequately prepared defense in a case of this complexity. The court decided that it would grant an extension of approximately six weeks beyond September 15, 2008, the day when appellant's written speedy trial waiver would have expired, in order for the defense to complete its preparation for trial.

{¶106} Thereafter, on October 30, 2008, a joint motion for continuance was filed by the parties. On November 3, 2008, the court filed a judgment entry granting a joint motion for continuance and setting a pretrial for November 10, 2008. On November 6, 2008, however, another judgment entry was filed by the court stating that the pretrial was reset to November 17, 2008 and that speedy trial time would be tolled until that time.

{¶107} The docket next reflects that an entry dated on November 17, 2008, which stated: "The following event: PRE TRIAL scheduled for 11/17/2008 at 8:30 am has been rescheduled as follows: Event: JURY TRIAL. Date: 02/02/09. Time: 11:00 am."

{¶108} There is no indication on the docket that a hearing was held on November 17, 2008, or that the defense counsel filed a motion requesting additional time for trial.

{¶109} In *King*, the state alleged the defendant's counsel orally waived the speedy trial right. The court held that for a waiver "to be effective, an accused's waiver of his or her constitutional and statutory rights to a speedy trial must be expressed in

writing or made in open court on the record." Id. at 161. See, also, *State v. McLean*, 11th Dist. No. 2003-T-0115 and 2003-T-0116, 2005-Ohio-954, ¶12.

{¶110} Here, the record does not reflect that a waiver of speedy trial time beyond November 17, 2008, was either made in writing or made in open court. Therefore, pursuant to *King*, it would appear there was no further tolling of time beyond November 17, 2008.

{¶111} However, we note that "a trial court's issuance of a sua sponte continuance is a tolling event pursuant to R.C. 2945.72(H) as long as the continuance is reasonable and the court states its reason therefore." *State v. Stevens*, 8th Dist. No. 87693, 2006-Ohio-5914, ¶53, citing *State v. Mincy* (1982), 2 Ohio St.3d 6; *State v. Driver*, 7th Dist. No. No. 03 MA 210, 2006-Ohio-494; *State v. Barker*, 6th Dist. No. 1-01-1290, 2003-Ohio-5417. See, also, *Kist* at ¶35 (under R.C. 2945.72(H), a continuance granted other than on the accused's own motion, i.e., either on the state's motion or sua sponte by the court extends the time limits only if the continuance is reasonable).

{¶112} A review of the trial transcript here reflects that the further extension of the trial date from November 17, 2008 to February 3, 2009, a date apparently agreed to by both parties, was given by the trial court to allow the defense additional time for trial preparation. The transcript shows that immediately before the trial began, the defense moved for a dismissal alleging speedy trial violations. The trial court overruled the motion, stating:

{¶113} "*** I had made the rulings early on in the case indicating to the Defendant that when there are items that the counsel for the Defendant indicates are necessary in order to be adequately prepared, *** the defense attorney's ability to adequately prepare

for the case and be competent in his representation [] trump[s] any statutory right to speedy trial. The Court is replete with times within this case where there was a motion filed for a suppression, motion filed for expert witnesses that when we had status hearings there was a request by the defense to continue because they had not gotten experts one time and there were at least several other times where the report did not come back yet with respect to what they needed to do.

{¶114} "***.

{¶115} "In any event, when the bottom line is whether or not there is a statutory time frame that is run versus the attorney's ability to be adequately prepared, I believe the record is replete with the information. Mr. Keating [defense counsel], when I asked you on any number of times whether you were prepared to go forward, and the majority of the continuances, at least in the last half [of the occasions], dealt with having an expert, finding an expert, having them review it and come back with a report, and I asked on record, as I do in all of these cases, giving all of those factors, when you would be prepared to go forward, and the date that we're here today is the date that was agreed to by everyone. *** When your attorney said he's ready to go forward with this case and adequately prepared, that is when this Court is going to hear this case because the ability to adequately represent you takes preceden[ce] ***."

{¶116} The question becomes, therefore, whether the court's sua sponte continuance of trial from November 17, 2008 to February 3, 2009, is a tolling event pursuant to R.C. 2945.72(H). The answer to that question depends whether the extension of time is reasonable given the reasons the court provided for the extension.

{¶117} However, we need not determine whether the court's 77-day sua sponte continuance for trial preparation purposes was reasonable, because in this case the defendant filed several motions, the last one of which the trial court denied on the day of the trial.

{¶118} **Appellant's Motions Tolled Speedy Trial Time**

{¶119} On May 15, 2008, appellant filed a pro se "appeal" with this court, while his written waiver of speedy trial was *still* in effect, claiming that his speedy trial rights were violated. We dismissed the appeal on June 9, 2008. His filing of the "appeal" divested the trial court of its jurisdiction for 24 days.

{¶120} On August 11, 2008, the defense counsel filed a motion to suppress evidence, tolling the time further. See *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶25 (noting a motion to suppress tolls the speedy trial period). After hearing, the trial court denied the motion on October 30, 2008.

{¶121} On the same day, appellant filed a pro se "Motion to Dismiss All Charges" in his indictment. An appellant's motion to dismiss tolls the statutory time. In *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, the court held "a motion to dismiss acts to toll the time in which a defendant must be brought to trial" and that the time that elapsed while a motion to dismiss was pending would not be included for purposes of R.C. 2945.71. Id. at 67. See, also, *State v. Elliott*, 10th Dist. No. 03AP-605, 2004-Ohio-2134, ¶18 (motion to dismiss is a tolling event pursuant to R.C. 2945.72(E)).

{¶122} Here, the trial court ruled on appellant's motion to dismiss the indictment on February 3, 2009, the day of trial. In accordance with the case law, appellant's filing

of the motion to dismiss the indictment tolled the speedy time from October 30, 2008 to February 3, 2009, the day of trial.

{¶123} Accordingly, there is no speedy trial violations in this case. "The rationale supporting [the speedy trial statute] was to prevent inexcusable delays caused by indolence within the judicial system." *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, ¶24, quoting *State v. Ladd* (1978), 56 Ohio St.2d 197, 200. In this case, as the trial court repeatedly explained, the delay in bringing appellant to trial was caused by the defense's need for its DNA expert to complete the report and for counsel to adequately prepare for trial, as well as by several motions filed by appellant. The record before us does not suggest that indolence contributed to the delay in appellant's trial. The fourth assignment of error is overruled.

{¶124} For the foregoing reasons, we affirm appellant's convictions and sentence. The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.