[Cite as *State v. Howard*, 2010-Ohio-501.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 09CA0002**
vs.	**:**	**T.C. CASE NOS.07CR1215 08CR0776**
JESSE JAMES HOWARD	**:**	
Defendant-Appellant	**:**	

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O P I N I O N

Rendered on the 12th day of February, 2010.

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GRADY, J.:

{¶ 1} Defendant, Jesse James Howard, appeals from his conviction and sentence for receiving stolen property, attempted burglary, burglary, and aggravated burglary.

{¶ 2} On December 8, 2007, Springfield police received reports of multiple burglaries that occurred during the early morning hours

in an area of Springfield. Defendant was arrested that same day for offenses that occurred at a residence on Hillside Avenue, on the same occasion. On December 17, 2007, Defendant was indicted in Case No. 07CR1215 on one count of attempted burglary, two counts of aggravated burglary, and three counts of receiving stolen property. On September 22, 2008, Defendant was indicted in Case No. 08-CR0776 on one count of attempted burglary, two counts of aggravated burglary, and two counts of burglary. The cases were consolidated for trial.

{¶ 3} Defendant was found guilty following a jury trial of two of the three receiving stolen property charges in Case No. 07CR1215. In Case No. 08CR0776, Defendant was found guilty of all charges except the burglary charge. Defendant was instead found guilty of the lesser included offense of criminal trespass. The trial court sentenced Defendant to prison terms totaling nineteen years.

{¶ 4} Defendant timely appealed to this court from his convictions and sentences.

FIRST ASSIGNMENT OF ERROR

{¶ 5} "THE TRIAL COURT ERRED IN NOT DISMISSING THE INDICTMENT FOR VIOLATION OF MR. HOWARD'S STATUTORY RIGHT TO A SPEEDY TRIAL."

{¶ 6} The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section

10 of the Ohio Constitution. Ohio's speedy trial statutes, R.C. 2945.71 et seq., constitute a rational effort to implement the constitutional right to a speedy trial and will be strictly enforced. *State v. Pacha* (1980), 64 Ohio St.2d.

{¶ 7} R.C. 2945.71(C)(2) requires that a person against whom a charge of felony is pending be brought to trial within two hundred and seventy days after his arrest. Each day the accused is held in jail in lieu of bail on the pending charges shall be counted as three days. R.C. 2945.71(E). Pursuant to R.C. 2945.73, Defendant is entitled to a discharge if he is not brought to trial within the time required by R.C. 2945.71, subject to any extension authorized by R.C. 2945.72. That section provides, in relevant part:

{¶ 8} "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:

{¶ 9} "* * *

{¶ 10} "(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

{¶ 11} "(C) 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;

{¶ 12} * * *

{¶ 13} "(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;

{¶ 14} * * *

{¶ 15} "(H) 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."

{¶ 16} When a motion is filed by a defendant, there is a period of delay necessitated, at the very least, for a reasonable amount of time until the motion is ruled upon by the court. ***State v. Sanchez*****, 110 Ohio St.3d 274, 2006-Ohio-4478. What constitutes a reasonable amount of time depends upon the facts and circumstances of the particular case.** ***State v. Saffell*** **(1988), 35 Ohio St.3d 90. Various Ohio appellate courts have found the one hundred and twenty day limit for ruling on motions found in Ohio Sup.R. 40 to be a useful guide in determining reasonableness.** ***State v. Staffin,*** **Ross App. No. 07CA2967, 2006-Ohio-338;** ***State v. Fields*****, Guernsey App. No. 05CA17, 2006-Ohio-223.**

{¶ 17} Defendant was arrested on December 8, 2007, and remained incarcerated in jail in lieu of bail on these charges until his

trial which eventually commenced December 8, 2008. Applying the three for one provision in R.C. 2945.71(E), the State was required to bring Defendant to trial within ninety days after his arrest. Defendant's trial was originally set to begin On February 26, 2008, eighty days after his arrest and well within the ninety day limit. However, on February 25, 2008, seventy-nine days after his arrest, Defendant requested a continuance. The court granted Defendant's request and rescheduled the trial for March 18, 2008.

{¶ 18} On March 12, 2008, the State requested a continuance of the trial because some of its witnesses would be out of town on the March 18 trial date. The court granted the State's request and rescheduled the trial for April 1, 2008. This was a reasonable continuance, per R.C. 2945.72(H), that tolled the time for trial until April 1, 2008.

{¶ 19} On March 31, 2008, Defendant requested a continuance of the trial, which the trial court granted. Trial was rescheduled for April 22, 2008. Pursuant to R.C. 2945.72(E), time for trial was tolled until April 22, 2008.

{¶ 20} On April 22, 2008, Defendant requested appointment of a new attorney and a continuance of the trial. Defense counsel asked to withdraw. The trial court informed Defendant that this would result in a further delay of his trial to give new counsel time to become familiar with Defendant's case. The trial court

granted Defendant's request, appointed new counsel for Defendant, and rescheduled the trial for June 16, 2008. Time for trial remained tolled until June 16, 2008, pursuant to R.C. 2945.72(C) and (E).

{¶ 21} On June 9, 2008, Defendant's counsel asked to withdraw. On June 16, 2008, Defendant's counsel filed a motion requesting both a competency and sanity evaluation of Defendant. On July 23, 2008, the trial court granted Defendant's request for a competency and sanity evaluation. Defendant argues that the thirty-seven days it took the trial court to grant his motion for a competency and sanity evaluation constituted an unreasonable delay, and that thirty days of that time should count against the State for speedy trial purposes. We disagree.

{¶ 22} Reasonableness is measured by the facts and circumstances of the particular case. *Sanchez; Saffell*. Given the procedural history of this case, the plethora of pretrial motions filed by both Defendant and the State, including four in the month of June alone, thirty-seven days was not an unreasonable amount of time to rule upon Defendant's motion for a competency and sanity evaluation. We further note that thirty-seven days is far less than the one hundred and twenty days in Ohio Sup.R. 4 that some courts use as a general guide in determining reasonableness.

{¶ 23} The trial court received the results of Defendant's mental evaluations on August 19, 2008, and Defendant was declared competent to stand trial. As a result, the trial court rescheduled trial for September 23, 2008. Pursuant to R.C. 2945.72(B), time for trial remained tolled until September 23, 2008.

{¶ 24} On September 12, 2008 and again on September 22, 2008, a new attorney filed a notice of appearance as Defendant's newly retained counsel and requested a continuance of the trial of at least five or six weeks duration. On September 25, 2008, the trial court granted the continuance requested by Defendant's new retained counsel in order to give counsel time to prepare for trial. Pursuant to R.C. 2945.72(E), time for trial remained tolled.

{¶ 25} On September 26, 2008, this case was transferred to a different trial court judge, who scheduled a pretrial conference for October 24, 2008, the earliest date Defendant's newly retained counsel was available. At that pretrial conference Defendant's counsel asked for time to file pretrial motions. The court granted that request and set November 5, 2008, as the hearing date for any such motions. On November 5, 2008, counsel for Defendant indicated that the earliest date she could agree to was December 8, 2008. The trial court rescheduled trial for that date. As a result of the motions and requests of Defendant and his counsel, time for trial remained tolled until December 8, 2008, pursuant

to R.C. 2945.72(C)(E).

{¶ 26} On December 4, 2008, Defendant filed a motion to dismiss the indictments based upon a violation of his speedy trial rights. On December 8, 2008, the day trial commenced, the trial court overruled Defendant's motion to dismiss, noting that the majority of the continuances and tolling events per R.C. 2945.72 were at the behest of Defendant or his counsel.

{¶ 27} The record demonstrates that the vast majority of the delay that occurred in bringing Defendant to trial was attributable to the motions, requests, and conduct of Defendant and his counsel. Because of those matters, trial was rescheduled at least five times, and the speedy trial time was tolled virtually the entire time from February 25, 2008, until trial commenced on December 8, 2008. Only seventy-nine days elapsed for speedy trial purposes in this case, well within the allowable ninety day limit. Defendant's speedy trial rights were not violated.

{¶ 28} Defendant's first assignment of error will be overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 29} "THE JURY'S VERDICT OF GUILTY TO AGGRAVATED BURGLARY AT THE HILLSIDE RESIDENCE WAS INCONSISTENT WITH ITS VERDICT OF NOT GUILTY OF BURGLARY AT THE SAME PLACE."

{¶ 30} In Case No. 08CR0776, Defendant was charged in count

four with aggravated burglary of the residence on Hillside Avenue, in violation of R.C. 2911.11(A)(1). In count five, Defendant was charged with burglary of the same residence, on the same occasion, in violation of R.C. 2911.12(A)(1). The jury found Defendant guilty of the aggravated burglary charge. The jury found Defendant not guilty of the burglary charge, but guilty of the lesser included offense of criminal trespass.

{¶ 31} Defendant argues that, having found him not guilty of burglary, the jury could not logically also find him guilty of aggravated burglary, because he necessarily committed the lesser included offense of burglary in order to commit aggravated burglary, and that this constitutes an impermissible inconsistent verdict because count five, burglary, is a lesser included offense of count four, aggravated burglary, and involves the same facts. Defendant's argument ignores the fact that each count in an indictment constitutes a separate, distinct offense that is independent of and unaffected by the jury's finding on the other counts.

{¶ 32} The Ohio Supreme Court has stated that a verdict will not be held as inconsistent and set aside because there are two different conclusions on two separate counts, even when there is no material difference between the two counts. *Browning v. State* (1929), 120 Ohio St.62. In *State v. Hawkins*, Montgomery App. No.

21691, 2007-Ohio-2979, at ¶23, this court stated:

{¶ 33} "[C]ourts in Ohio have held on numerous occasions that an

{¶ 34} inconsistency in a verdict cannot arise from inconsistent responses to different counts. *State v. Brown* (1984), 12 Ohio St.3d 147, 12 OBR 186, 465 N.E.2d 889, syllabus; *State v. Hayes,* 166 Ohio App.3d 791, 2006-Ohio-2359, 853 N.E.2d 368, at ¶ 35. Instead, an inconsistency only arises when a jury gives inconsistent responses to the same count. *State v. Washington* (1998), 126 Ohio App.3d 264, 276, 710 N.E.2d 307. The Ohio Supreme Court has explained that 'each count in an indictment charges a distinct offense and is independent of all other counts. Following that reasoning, the court found that a jury's decision as to one count is independent of and unaffected by the jury's finding on another []count.' *Id.* See, also, *Browning v. State* (1929), 120 Ohio St. 62, 165 N.E.2d 566, paragraph three of the syllabus."

{¶ 35} The inability to rationalize or reconcile inconsistent responses to different counts does not justify overturning a jury verdict. *State v. Howard*, Franklin App.No. 06AP-1273, 2007-Ohio-5659; *State v. Handcock*, Clark App. No. 2008CA85, 2009-Ohio-4327.

{¶ 36} Although counts four and five concern the same residence and the same set of facts, the two counts represent separate and

distinct offenses that are independent of one another. The inability to reconcile the jury's inconsistent responses to these different counts is not a sufficient basis to overturn an otherwise valid conviction. *Howard; Handcock; Hawkins*.

{¶ 37} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 38} "THE TRIAL COURT ERRED IN INQUIRING ABOUT THE JURY'S VERDICT OF GUILTY TO AGGRAVATED BURGLARY AT THE HILLSIDE RESIDENCE WHICH WAS INCONSISTENT WITH ITS VERDICT OF NOT GUILTY OF BURGLARY AT THE SAME PLACE."

{¶ 39} After the jury returned its verdicts, the trial court discovered the contrary verdicts on counts four and five finding Defendant guilty of aggravated burglary but not guilty of burglary of the same Hillside Avenue residence on the same occasion. After first consulting with counsel about the matter, the trial court indicated, without objection from either party, that it intended to inquire of the jury about the verdicts, but that it needed to be careful not to breach the privacy of their deliberations. The court stated its intention as follows:

{¶ 40} "THE COURT: I guess probably my goal at this point is to address what appears to an inconsistence to see if there was a mistake, or from what Ms. Cushman said, it may warrant some more attention. I don't know whether I need to send them back on that

to deliberate some more on those counts.

{¶ 41} "There's an apparent inconsistency on the face and I need to at least see if I can find out why there would be that inconsistency because it sort of suggests that the proper verdict on the burglary should have been not guilty or vice versa. If it's vice versa, that's one thing.

{¶ 42} "I've never had this happen, so I'm not entirely sure how – I've seen inconsistent verdict in civil cases, but this is a little unusual. So I think I'll at least inquire further and then ask counsel how they want to proceed." (T. 872-873).

{¶ 43} The trial court conducted a colloquy with the jury that included the following:

{¶ 44} "You returned a verdict of guilty as to the greater offense of aggravated burglary. The jury has returned a verdict of not guilty as to the charge of burglary. The elements of burglary all would have to be found for purposes of finding a guilty verdict on the charge of aggravated burglary. This particular scenario is new to this Court and I've never seen that in all the jury trials I've tried.

{¶ 45} "I want to be careful of how I ask this question. Did the jury understand that the elements were essentially the same for burglary as aggravated burglary plus the one additional element in aggravated burglary?

{¶ 46} "MS. HOHLMAYER: I think when we were reading through the definitions of both, there were a few differences, and I think that's why some all of us chose the criminal trespassing instead of burglary and the aggravated burglary. They had the fight, so that's why we chose aggravated burglary.

{¶ 47} "THE COURT: What I'm going to do right now, because of this irregularity, I'm going to send the jury back in so you have a few minutes to again consult on this. I'm not asking you to change your verdict. I guess at this point I'm going to have you consult to see if you have any questions for the Court or if you understand specifically what the Court's concerns are without deliberating doubt changing any verdict form. I'm not asking you to do that at all.

{¶ 48} "MS. HOHLMAYER: You have a question?

{¶ 49} "THE COURT: I guess at this point before you bring it to the Court's attention, I'd ask you to put in writing, I suppose, what your thoughts are, and then as part of that writing to advise the Court that indeed this is the result that you want the court to accept, this is the verdict that you want this court to accept.

{¶ 50} "And again, that's a charge – and this is specifically with these two counts – the charge of aggravated burglary and the charge of burglary with respect to the Hillside property, and that's the Raby family property.

{¶ 51} "I want you to advise the Court whether you want the Court to accept this verdict of guilty with respect to aggravated burglary, not guilty with respect to burglary, guilty with respect to criminal trespass. In light of the fact that the charge of aggravated burglary incorporates all the elements of burglary and of criminal trespass.

{¶ 52} "If you'll answer that and let Mr. Finnegan know when you're ready. Reduce that to writing and let him know where you're ready for the Court to review that, just so I clear up any potential issues here on the record before I discharge this jury. Very well. Counsel step up for a moment." (T. 874-876).

{¶ 53} The jury returned to the deliberation room, and when the jurors returned to the courtroom they presented the court with a written explanation of the verdicts returned by the jury as to the aggravated burglary and burglary of the Hillside Avenue residence. The jurors believed that aggravated burglary occurred when Defendant entered the residence with a purpose to commit a theft offense. With respect to the burglary charge, the jurors understood the court's instructions to mean that Defendant had to complete the act of theft before they could return a verdict of guilty of burglary. Because nothing was removed from the Hillside Avenue residence, the jury returned a verdict of not guilty on the burglary charge, but guilty of criminal trespass. After

reading the jury's explanation, the verdict on the burglary charge, trial court commented:

{¶ 54} "The matter specifically, however, addresses the Court's concern and the Court's concern was specifically that the jury had not found all of the elements of aggravated burglary. Again, I'm reassured.

{¶ 55} "And, Ms. Hohymayer, is it correct that this jury did return this verdict of guilty and did find all of the elements of aggravated burglary?

{¶ 56} "MS. HOHLMAYER: Yes." (T. 877).

{¶ 57} After polling the jury on its verdict on all of the counts, at Defendant's request, the trial court accepted the jury's verdicts in this case.

{¶ 58} By inquiring about the jury's seemingly inconsistent verdicts concerning aggravated burglary and burglary of the same residence, the trial court sought to ensure that the verdicts were what the jury intended in light of the fact that aggravated burglary, R.C. 2911.11(A)(1), contains all of the elements of burglary, R.C. 2911.12(A)(1). Nevertheless, Defendant argues, and the State concedes in its brief, that although it was well-intentioned, the court's inquiry of the jury concerning its verdict was improper and violates long-standing precedent that ordinarily prohibits inquiry into the jury's verdict by the court or the

parties. *Howard*. We agree. The State argues that the trial court's error in inquiring of the jury concerning its verdict did not affect Defendant's substantial rights and was therefore harmless, Crim.R. 52(A), because it did not affect or change the jury's verdicts.

{¶ 59} In *Howard*, the defendant was charged with aggravated menacing, R.C. 2903.21. The court instructed the jury on the elements of aggravated menacing and on the elements of menacing, R.C. 2903.22, as a lesser-included offense. The jury returned signed verdicts finding the defendant guilty of aggravated menacing and not guilty of menacing. The court inquired of the jury why it did that, when the court had instructed the jury that if it found the defendant guilty of aggravated menacing it need not consider the offense of menacing. The foreperson replied, "We just thought that was the process." After confirming that the jury intended to find the defendant guilty of aggravated menacing, the court convicted the defendant of that offense.

{¶ 60} On appeal, the Franklin County Court of Appeals held that the trial court erred in convicting the defendant in *Howard* of aggravated menacing. The court reasoned that because the lesser-included offense of menacing of which the jury found the defendant not guilty contains the same elements as the greater offense of aggravated menacing, save but one, the two verdicts

the jury returned were fatally inconsistent regarding the jury's finding the defendant guilty of aggravated menacing. The *Howard* court further found that the trial court improperly invaded the jury's deliberative process when, after inconsistent verdicts were returned, the court attempted to avoid the defect by inquiring of the jury why it had returned inconsistent verdicts.

{¶ 61} In the present case, the court's inquiries of the jury were far more extensive than the court's inquiries in *Howard*. Nevertheless, and unlike in *Howard*, the two verdicts the jury returned in the present case were not inconsistent. The finding of guilty was made with respect to the charge of aggravated burglary in count four. The finding of not guilty was made with respect to the charge of burglary in count five, as a predicate to the verdict of guilty with respect to the lesser-included offense of criminal trespass. As we explained regarding the prior assignment of error, verdicts are not inconsistent when they involve charges in different counts. *State v. Brown*. There was no need for the inquiries the court made, therefore. Any error in that regard is nevertheless harmless, because it did not affect the jury's deliberative processes in returning the verdicts of guilty for the offenses of aggravated burglary and criminal trespass of which Defendant was convicted.

{¶ 62} The third assignment of error is overruled. The

judgment from which the appeal is taken will be affirmed.

DONOVAN, P.J. And FAIN, J., concur.

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