[Cite as *State v. Woods*, 2003-Ohio-7337.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 02CA22
	:	
v.	:	
	:	
TICO A. WOODS,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	**RELEASED 12/30/03**

APPEARANCES:

COUNSEL FOR APPELLANT[1]:
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COUNSEL FOR APPELLEE:
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EVANS, P.J.

{¶1} Defendant-Appellant Tico A. Woods appeals the judgment of the Lawrence County Court of Common Pleas, which found him guilty of burglary, a second-degree felony in violation of R.C. 2911.12(A)(2). Appellant argues that the trial court erred by not dismissing the

[1] Appellant was represented by other counsel below.

charges against him because his right to a speedy trial under R.C. 2945.71 was violated. Appellant also asserts that he was denied the effective assistance of counsel because his trial attorney failed to move for an acquittal under Crim.R. 29. Finally, appellant argues that his conviction for burglary was against the manifest weight of the evidence.

{¶2} For the reasons that follow, we disagree with appellant and affirm the judgment of the trial court.

Lower Court Proceedings

{¶3} On April 14, 2002, appellant was arrested and charged with burglary, a second-degree felony in violation of R.C. 2911.12(A)(2); resisting arrest, a second-degree misdemeanor in violation of R.C. 2921.33(A); and falsification, a first-degree misdemeanor in violation of R.C. 2921.13(A)(3). The facts leading up to appellant's arrest were as follows.

{¶4} At approximately 3:30 a.m., the morning of April 14, 2002, Ironton Police Officer James Akers was dispatched to the residence of Tammie Gullet. Gullet had called 9-1-1 after observing a black male wearing a white-striped shirt and baggy jeans attempting to enter her home through the front window. The man whom Gullet observed was no longer at the scene when Officer Akers arrived. Gullet spent the remainder of the night at her mother's home and returned home the next day. Upon her return, Gullet's neighbor inquired about the incident earlier that morning. During the conversation, Ms. Gullet's

neighbor informed her that there was a group of black males congregating at a park within plain view of Gullet's home. Gullet again called the Ironton Police Department and Officer Akers was dispatched to the scene.

{¶5} Officer Akers approached appellant at the park and attempted to engage him in a conversation. Ultimately, appellant attempted to flee but was apprehended and placed under arrest. Gullet observed the entire interaction between Officer Akers and appellant. Shortly thereafter, a photo lineup was compiled for Gullet's viewing, and she identified appellant as the man whom she observed entering her home through the front window.

{¶6} Subsequently, appellant was bound over to the grand jury, which indicted appellant on the aforementioned charges.[2] On July 15, 2002, immediately before trial, appellant moved for a dismissal of the charges on the basis that the speedy trial limitations of R.C. 2945.71 had run. The trial court denied that motion. Appellant then proceeded to enter guilty pleas on the resisting arrest and falsification charges. A jury trial was had on the remaining burglary charge, where the state presented the testimony of Tammie Gullet and Officer Akers. The jury returned a guilty verdict.

{¶7} Appellant was subsequently sentenced to imprisonment for eight years on the burglary charge, one month on the resisting arrest

[2] Appellant was also charged with sexual imposition, a violation of R.C. 2907.06(A)(1). However, this charge arose from an incident wholly unrelated to the

charge, and six months on the falsification charge, with all sentences to be served concurrently. In addition, appellant was ordered to pay a fine of $10,000.

The Appeal

{¶8} Appellant timely filed his notice of appeal and presents the following assignments of error for our review.

{¶9} First Assignment of Error: "The trial court abused its discretion by not granting Defendant-Appelant's [sic] motion to dismiss based on a violation of his right to a speedy trial as required by Ohio Revised Code §2945.71."

{¶10} Second Assignment of Error: "Defendant-Appelant's [sic] trial counsel provided ineffective assistance insofar as he failed to move the court for acquittal pursuant to Criminal Rule 29 based on the insufficiency of the evidence when such a motion would have been granted had it been made."

{¶11} Third Assignment of Error: "The jury's verdict in the case sub judice is against the manifest weight of the evidence."

I. Speedy Trial

{¶12} In his First Assignment of Error, appellant asserts that the trial court should have dismissed the charges against him because the time limitations within which to bring him to trial, as found in R.C. 2945.71, had expired.

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charges involved in the case sub judice. This charge was eventually dismissed by the trial court.

{¶13} R.C. 2945.71(C)(2) provides in pertinent part as follows: "A person against whom a charge of felony is pending *** [s]hall be brought to trial within two hundred seventy days after the person's arrest." However, R.C. 2945.71(E) states, "For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." Accordingly, if a person against whom a felony charge is pending is held in jail from the time of his arrest, the state has ninety days to bring him or her to trial. See R.C. 2945.71(E).

{¶14} In reviewing the trial court's decision overruling a motion for dismissal on speedy trial grounds, we must determine if "there is sufficient evidence demonstrating that the trial court's decision was legally justified and supported by the record." *State v. Brown* (1992), 64 Ohio St.3d 476, 597 N.E.2d 97, syllabus. A speedy trial issue raises a mixed question of fact and law. See *State v. Eldridge*, Scioto App. No. 02CA2842, 2003-Ohio-1198, citing *State v. Brown* (1998), 131 Ohio App.3d 387, 391, 722 N.E.2d 594. An accused establishes a prima facie case for discharge pursuant to R.C. 2945.73 once he demonstrates that the time limit imposed by the statute has been exceeded. See *State v. Butcher* (1986), 27 Ohio St.3d 28, 500 N.E.2d 1368. The burden then shifts to the state to demonstrate that the time limit was validly exceeded in accordance with R.C. 2945.72. See *State v. Butcher*, 27 Ohio St.3d at 31. Our first task is to

simply count the days as directed by R.C. 2945.71. See *Oregon v. Kohne* (1997), 117 Ohio App.3d 179, 690 N.E.2d 66.

{¶15} In the case sub judice, appellant was arrested on Sunday, April 14, 2002, and his trial commenced on Monday, July 15, 2002. For purposes of computing the days between appellant's arrest and trial, we do not include the day of his arrest. See Crim.R. 45(A); *State v. Jones* (1997), 119 Ohio App.3d 59, 694 N.E.2d 505; *State v. Steiner* (1991), 71 Ohio App.3d 249, 593 N.E.2d 368. By counting the days between appellant's arrest date and trial date, we conclude that appellant was brought to trial on the ninety-second day after his arrest. The date by which appellant should have been brought to trial was July 13, 2002. However, careful review of the 2002 calendar reveals that July 13, 2002 was a Saturday. Crim.R. 45(A) provides that when the last day to be included in the computed time period falls on a Saturday, Sunday, or legal holiday, "the period runs until the end of the next day which is not Saturday, Sunday, or legal holiday."

{¶16} Accordingly, the date by which appellant had to be brought to trial was in fact July 15, 2002. Therefore, appellant's statutory right to a speedy trial was not violated and the trial court did not err in overruling his motion to dismiss.

{¶17} Appellant's First Assignment of Error is hereby overruled.

II. Ineffective Assistance of Counsel

{¶18} In his Second Assignment of error, appellant asserts that he was denied the effective assistance of counsel because his trial counsel failed to make a motion for acquittal pursuant to Crim.R. 29.

{¶19} In *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369, the Supreme Court of Ohio stated that "[r]eversal of a conviction or sentence based upon ineffective assistance requires (a) deficient performance, 'errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment'; and (b) prejudice, 'errors *** so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" Id., quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Furthermore, "[a]s to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Ballew*, 76 Ohio St.3d at 255, quoting *Strickland v. Washington*, 466 U.S. at 689. Additionally, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. at 689. Finally, the United States Supreme Court has noted that "there can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial." *United States v. Hasting* (1983), 461 U.S. 499, 508-509, 103 S.Ct. 1974.

{¶20} Appellant was convicted of burglary, a violation of R.C. 2911.12(A)(2), which provides: "No person, by force, stealth, or deception, shall do any of the following: *** Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense." Appellant specifically argues that the state failed to present evidence that he entered Gullet's home with the intent to commit a crime therein. Consequently, appellant contends that counsel should have moved for an acquittal pursuant to Crim.R. 29.

{¶21} However, the law has long recognized that intent is not discernable through objective proof. "The intent of an accused person dwells in his mind. Not being ascertainable by the exercise of any or all of the senses, it can never be proved by the direct testimony of a third person, and it need not be. It must be gathered from the surrounding facts and circumstances under proper instructions from the court." *State v. Huffman* (1936), 131 Ohio St. 27, 1 N.E.2d 313, paragraph four of the syllabus. "The purpose with which a person does an act is determined from the manner in which it is done, the means used, and all the other facts and circumstances in evidence." *State v. Hardin* (1984), 16 Ohio App.3d 243, 245, 475 N.E.2d 483.

{¶22} The record in the case sub judice reveals that appellant was discovered by Gullet entering her home through a window at approximately 3:30 a.m. The record also reveals that items of value, including a television and videocassette recorder, were visible from the window through which appellant was attempting to gain entry into the home. Thus, appellant's intent behind entering Gullet's home may be gathered from the facts surrounding appellant's actions. His intent could easily have been determined to be less than noble under the current circumstances.

{¶23} Therefore, we find that appellant's trial counsel was not deficient in his performance by not moving for an acquittal under Crim.R. 29. Accordingly, appellant was not denied the effective assistance of counsel. We overrule appellant's Second Assignment of Error.

III. Manifest Weight of the Evidence

{¶24} In his Third Assignment of Error, appellant asserts that his conviction for burglary was against the manifest weight of the evidence.

{¶25} "In determining whether a criminal conviction is against the manifest weight of the evidence, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction

must be reversed and a new trial granted." *State v. Warren*, Athens App. No. 02CA29, 2003-Ohio-1196, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 (citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717). When making this determination, we sit as a thirteenth juror. *State v. Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211. Nevertheless, "[t]he 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. Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d at 172.

{¶26} Appellant's conviction rests almost exclusively on Gullet's testimony. Accordingly, appellant asserts that his conviction was against the manifest weight of the evidence because her testimony was not credible. However, our review of the entire record leads us to conclude that the jury did not clearly lose its way and create a manifest miscarriage of justice by finding appellant guilty of burglary. The credibility of Gullet's testimony was readily challenged during the course of the trial, especially as it pertained to her identification of appellant as the individual whom she observed entering her home through the window. Nevertheless, the jury believed Gullet's testimony.

{¶27} Accordingly, we overrule appellant's Third Assignment of Error.

Conclusion

{¶28} Since appellant's rights to a speedy trial and the effective assistance of counsel were not violated, and his conviction was not against the manifest weight of the evidence, we overrule his assignments of error in toto. Therefore, we affirm the judgment of the trial court.

Judgment affirmed.

Abele, J.: Concurs in Judgment and Opinion.
Kline, J.: Concurs in Judgment and Opinion as to the First Assignment of Error; Concurs in Judgment Only as to the Second and Third Assignments of Error.

FOR THE COURT

BY: _____
David T. Evans
Presiding Judge