

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-VS-	:	
	:	Case No. 2009-CA-25
KENNETH HILL	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2005CR0147
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	June 30, 2010
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Gwin, P.J.

{¶1} Defendant-appellant Kenneth L. Hill appeals his convictions and sentences entered by the Richland County Court of Common Pleas on one count of attempted murder, with a firearm specification, one count of felonious assault, with a firearm specification, and one count of having weapons while under a disability. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} At approximately 2:00 a.m. on October 8, 2004, Isaiah Dudley was walking from his residence at 644 Stocking Avenue in Mansfield, Ohio to his sister's residence at 298 Dudley Avenue in Mansfield, Ohio. As he was traveling east on an unnamed alley that runs between Longview Boulevard and Dudley Avenue, he was shot multiple times. At the time of the shooting, the only lead that police had was that the shooter was a black male who fled the scene in a burgundy or purple car.

{¶3} In December of 2004, James Darby, an inmate at the Richland County Jail, contacted Detective Eric Bosko to provide information regarding the shooting in exchange for release from jail. Darby reported that on the night of the shooting, he was planning to purchase crack cocaine from appellant, whom he knew as Nephew, and Curtis Courts, whom he knew as C-Man. Darby stated that he parked his car on Johns Avenue and walked up the alley toward the residence where they were staying on Stocking Avenue.

{¶4} When he was about halfway down the alley, he saw Isaiah Dudley in the alley near his sister's backyard. Darby indicated that he had known Isaiah Dudley for almost twenty years because they got high and drank alcohol together. At the same

time that Darby noticed Isaiah Dudley, he saw appellant and C-Man walking toward him from the direction of Stocking Avenue. C-Man asked Isaiah Dudley if he had the money that he owed him. When Dudley said no, C-Man took a swing at him. Darby then reported that appellant pulled out a gun and shot Dudley multiple times. He described the gun as a black .40 caliber that he had seen appellant carry on numerous occasions.

{¶15} Darby indicated that as soon as appellant started shooting, he turned and fled. As he was going back to his car, he saw appellant and C-Man drive down Bowman Avenue in a tan colored Buick LeSabre with chrome hubcaps. Darby stated that earlier that same evening, he had seen appellant driving around in a burgundy Nissan Maxima with gold wheels. At the time of the shooting, he saw that vehicle parked at the end of the alley on Stocking Avenue. An individual named Charles Anderson owned the vehicle; however, Darby explained that people often rent their cars to drug dealers in exchange for drugs.

{¶16} The day after the shooting, Darby saw appellant and C-Man near his house on West Dixon. They told him to keep his mouth shut about the shooting. In exchange for his silence, they gave him free drugs. At that point, Darby indicated that he did not want to get involved because he feared being labeled as a snitch. He did not contact the police until he was arrested for burglary. After he initially gave a statement to Detective Bosko, he spoke to other inmates to learn Nephew's real name.

{¶17} After James Darby informed him that Nephew was actually the appellant, Detective Bosko included appellant's picture in a photo lineup. He showed that lineup to James Darby, who immediately identified appellant as the person that shot Isaiah Dudley on October 8, 2004. Detective Bosko also showed the lineup to Isaiah Dudley

on January 4, 2005, while Dudley was undergoing rehabilitation at the Woodlawn Nursing Home. On that occasion, Dudley first pointed out individual number 4, appellant, as the shooter; however, he also briefly focused on individual number 5 before returning to his original identification of appellant. Detective Bosko showed Dudley the lineup a second time on January 11, 2005. At that time, Dudley again identified individual number 4, appellant, as the person who shot him on October 8, 2004. He signed his name and dated the photo to reflect this identification.

{¶8} Based on the identifications by James Darby and Isaiah Dudley, the Richland County Grand Jury indicted appellant for one count of attempted murder with a firearm specification, one count of felonious assault with a firearm specification, and one count of having weapons under disability. Although the indictment was issued on March 8, 2005, appellant could not be located to be served with that indictment until March 5, 2008, when he was arrested and extradited from Chicago, Illinois.

{¶9} Appellant pled not guilty to the charges at the arraignment and was held in the Richland County Jail on the charges in this case, as well as charges arising from an unrelated robbery and shooting in case number 2005-CR-148D.

{¶10} Appellant's jury trial on this case was originally set for May 15, 2008; however, that date was continued several times by the trial court due to conflicts with the trial of other cases. Appellant was brought to trial on this case on July 10, 2008. Prior to the start of that trial, his counsel raised a motion to dismiss on his behalf, alleging a violation to his right to a speedy trial. The trial court overruled the motion and the case proceeded to trial; however, after deliberating for two days, the jury was unable to reach a verdict.

{¶11} Appellant was retried on these charges on August 14, 2008. Apparently defense counsel renewed his earlier motion to dismiss during an in-chambers discussion prior to the start of the retrial. That motion, which was again overruled by the trial court, was not part of the transcript that was initially transmitted to the Court; however, it was supplemented into the record through a court order that the record on appeal reflect the renewal of the motion to dismiss.

{¶12} At the retrial, the State presented testimony from seven witnesses, including James Darby and Detective Bosko. After the State rested, the defense called the victim, Isaiah Dudley, to the stand. Dudley stood by his identification of appellant as the person who shot him on October 8, 2004; however, he gave a different account of the circumstances surrounding the shooting. He denied using drugs or knowing James Darby, appellant, or C-Man. Darby claimed that appellant shot him believing he was someone else.

{¶13} At the conclusion of the trial, the jury found appellant guilty of all charges and specifications in the indictment. The trial court sentenced appellant to ten years on the attempted murder charge, three years consecutive on the firearm specification, and five years consecutive on the weapons under disability charge.

{¶14} Finding that there is no final appealable order from which an appeal could be taken, this Court sua sponte dismissed appellant's original appeal. Appellant was resentenced in an Amended Judgment Entry on February 5, 2009.

{¶15} Appellant has timely appealed raising the following two assignments of error for our consideration:

{¶16} “I. THE JURY’S VERDICT IN FINDING THE DEFENDANT-APPELLANT GUILTY OF ATTEMPTED MURDER WITH A FIREARM SPECIFICATION AND HAVING A WEAPONS UNDER DISABILITY WAS CONTRARY TO THE MANIFEST WEIGHT OF EVIDENCE, THUS THE CONVICTION WAS IN VIOLATION OF ARTICLE I, 10 OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶17} “II. APPELLANT-DEFENDANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I , SECTION 10 OF THE OHIO CONSTITUTION.”

I.

{¶18} In his first assignment of error, appellant argues that his convictions for attempted murder and having a weapon while under a disability are against the weight of the evidence.¹

{¶19} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring).

{¶20} Weight of the evidence addresses the evidence’s effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. “In other words, a reviewing court asks whose evidence is more persuasive--the state’s or the defendant’s? Even though there may be sufficient

¹ Appellant does not argue that there was insufficient evidence to support his convictions.

evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings." *State v. Wilson*, supra.

{¶21} In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of 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 ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721).

{¶22} Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins*, supra.

{¶23} In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St. 3d 380 at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." *Id.*, paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶24} In the case at bar, there is no dispute that a shooting had in fact occurred. The only issue is appellant the shooter.

{¶25} Although there were inconsistencies between the testimony of eyewitness, James Darby, and the victim, Isaiah Dudley, about the circumstances leading up to the shooting, both men agreed on the central issue of the case – that Mr. Dudley was shot multiple times and the appellant was the man who pulled the trigger.

{¶26} Upon careful review of the record, we are persuaded that the state adduced credible probative evidence that appellant was the person who shot Mr. Dudley.

{¶27} “A fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’ *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the ‘part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.’ *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891).” *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶28} Although the appellant argued that there were inconsistencies between the testimony of eyewitness, James Darby, and the victim, Isaiah Dudley, about the circumstances leading up to the shooting, and that Mr. Darby told the police he witnessed the crime because he wanted to get out of jail, the jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness’s credibility. “While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant’s conviction against the manifest weight or sufficiency of the evidence”. *State v. Craig* (Mar. 23, 2000),

Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236. Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke*, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶29} After reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses and resolving the conflicts in the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes charged in the indictment.

{¶30} Based upon the foregoing and the entire record in this matter, we find appellant's convictions were not against the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before it. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶31} Appellant's first assignment of error is overruled.

II.

{¶32} In his second assignment of error, appellant argues the trial court erred in denying his motion to dismiss the indictment based upon a violation of his right to a speedy trial. We disagree.

{¶33} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin*, Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a de novo standard of review and thus freely review the trial court's application of the law to the facts. *Id.*

{¶34} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state. In *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709, the court reiterated its prior admonition "to strictly construe the speedy trial statutes against the state."

{¶35} In Ohio, the right to a speedy trial has been implemented by statutes that impose a duty on the state to bring a defendant who has not waived his rights to a speedy trial to trial within the time specified by the particular statute. R.C. 2945.71 et seq. applies to defendants generally. R.C. 2945.71 provides:

{¶36} "(C) A person against whom a charge of felony is pending:

{¶37} "(1) * * *

{¶38} "(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

{¶39} "(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section."

{¶40} The time to bring a defendant to trial can be extended for any of the reasons enumerated in R.C. 2945.72, which provides:

{¶41} "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:

{¶42} "(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

{¶43} "(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;

{¶44} "(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;

{¶45} "(D) Any period of delay occasioned by the neglect or improper act of the accused;

{¶46} "(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;

{¶47} "(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

{¶48} "(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

{¶49} "(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;

{¶50} "(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending."

{¶51} "When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the appellant was properly brought to trial within the time limits set forth in R.C. 2945.71." *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, 834 N.E.2d 887, ¶ 19.

{¶52} In this case, appellant was indicted on March 8, 2005 for two separate cases. The first case, 2005-CR-147D, from which this appeal stems, arose from the October 8, 2004 shooting of Isaiah Dudley. The second case, 2005-CR-148D, arose from an unrelated January 17, 2005 robbery and shooting. Appellant was not served with those indictments until March 5, 2008, after he was located and extradited from Chicago, Illinois. Pursuant to R.C. 2045.72(A), any time that he spent in jail awaiting extradition does not count against the State for purposes of calculating his speedy trial time.

{¶53} Appellant's speedy trial time began to run when he was served with the indictment on March 5, 2008. From that date, he was continuously incarcerated in the Richland County Jail until September 5, 2008. However, since he was being held on two

separate cases, the triple-count provision of R.C. 2945.71(E) does not apply. Thus, only 185 of the allotted 270-days elapsed during that time. Based on these calculations, appellant's statutory speedy trial time was set to expire on November 29, 2008.

{¶54} Appellant's jury trial in case number 2005-CR-147D was initially set for May 15, 2008, well within the 270-day period. The May 15, 2008 trial date was continued by the trial court *sue sponte*. The continuance was journalized in an entry filed on May 16, 2008, before the expiration of appellant's speedy trial time. In that entry, the trial court stated that the reason for the delay was due to a conflict with the case of *Janet I. Welch v. Coca-Cola Enterprises, Inc.*, case number 06-CV-1083 that was still in trial on that date. The trial was rescheduled for June 5, 2008.

{¶55} The trial court issued a *sue sponte* continuance of appellant's June 5, 2008 trial date. In an entry journalized on that date, the trial court stated that the continuance was again due to a conflict with the trial of a civil case, *Robin and William Walker v. Erie Insurance Company*, which continued in trial on that date. The trial court re-scheduled the Appellant's trial to July 10, 2008.

{¶56} A *sua sponte* continuance by the trial court must be properly journalized before the expiration of the speedy trial period and must set forth the trial court's reasons for the continuance. *State v. Weatherspoon*, Richland App. No. 2006CA0013, 2006-Ohio-4794. "The record of the trial court must ... affirmatively demonstrate that a *sua sponte* continuance by the court was reasonable in light of its necessity or purpose." *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095. Further, the issue of what is reasonable or necessary cannot be established by a per se rule, but must be determined on a case-by-case basis. *State v. Saffell* (1988), 35 Ohio St.3d 90,

518 N.E.2d 934; *State v. Mosley* (Aug. 15, 1995), Franklin App. No. 95APA02-232. However, a continuance due the trial court's engagement in another trial is generally reasonable under R.C. 2941.401. *State v. Doane* (July 9, 1992), Cuyahoga App. No. 60097; See also *State v. Judd*, Franklin App. No. 96APA03-330, 1996 WL 532180. Nonetheless, a continuance because the court is engaged in trial may be rendered unreasonable by the number of days for which the continuance is granted. See *State v. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476.

{¶57} Because criminal cases are to be given priority over civil cases, *sua sponte* continuances because of a civil case should be carefully scrutinized. As a rule, it would seem reasonable to try older pending criminal cases before more recently filed criminal cases. Exceptions to the rule might depend upon whether the respective defendants are in custody or not, which case is closer to the expiration of speedy trial time, etc. *State v. Ison*, Richland App. No. 2009CA0034, 2009-Ohio-5885 at ¶ 39.

{¶58} Appellant has not demonstrated the *sua sponte* continuances in this case were unreasonable. There is no evidence the trial court continued the matter for civil cases not yet commenced, or for more recently filed criminal cases. The trial court properly issued judgment entries for each continuance. According to the judgment entries, the civil cases that prompted the continuance of the appellant's case had commenced trial prior to the date the appellant's case was scheduled to commence. *State v. Ison*, *supra* at ¶ 41; *State v. Foster*, Richland App. No. 2007CA0031, 2007-Ohio-6626 at ¶ 18.

{¶59} Appellant's case in 2005-CR-147D proceeded to trial on July 10, 2008. Following the presentation of the evidence, the jury deliberated on July 11 and 14,

2008, but was unable to reach a verdict on any of the three crimes charged. As a result, the trial court discharged the jury and declared a mistrial. Appellant was scheduled for re-trial on those charged on August 14, 2008.

{¶60} In *State v. Fanning* (1982), 1 Ohio St.3d 19, 437 N.E.2d 583, the Ohio Supreme Court considered whether R.C. 2945.71 applied to a second trial conducted after the jury failed to reach a verdict. The Court noted that the statute was "not applicable to retrials...The standard to be applied, therefore, is basically reasonableness under federal and state constitutions." *Id.* at 21, 437 N.E.2d 583; *State v. Hull* 110 Ohio St.3d 183, 186, 852 N.E.2d 706, 708 – 709; 2006-Ohio-4252 at ¶ 13. In *Fanning*, the Court concluded it was reasonable to schedule retrial of defendant 29 days after trial date following mistrial because of hung jury and the delay did not deny defendant a speedy trial. 1 Ohio St. 3d at 21, 437 N.E.2d at 585. In the case at bar, appellant's retrial occurred within thirty-one days following the mistrial. Appellant makes only a generalized argument with no factually specific and compelling prejudice argued or demonstrated by the record.

{¶61} Accordingly, we find no abuse of discretion in the trial court's overruling appellant's motion to dismiss, as appellant's right to a speedy trial was not violated.

{¶62} Appellant's second assignment of error is overruled.

{¶63} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

KENNETH HILL

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2009-CA-25

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER