

[Cite as *State v. Holmes*, 2009-Ohio-3736.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91948

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DESMON HOLMES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-502442

BEFORE: Cooney, A.J., McMonagle, J., and Blackmon, J.

RELEASED: July 30, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Susan J. Moran
55 Public Square
Suite 1616
Cleveland, Ohio 44113-1901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: T. Allan Regas
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant, Desmon Holmes (“Holmes”), appeals his convictions and sentence for rape and kidnapping. Finding no merit to the appeal, we affirm.

{¶ 2} In October 2007, Holmes was charged with one count of rape and two counts of kidnapping. In April 2008, Holmes moved to dismiss his case for violation of his speedy trial rights; the trial court denied the motion. In June 2008, a jury found him guilty of one count of rape and one count of kidnapping with a sexual motivation specification. The trial court sentenced him to ten years in prison, merging both counts for purposes of sentencing.

{¶ 3} Holmes now appeals, raising four assignments of error for our review.

Manifest Weight of the Evidence

{¶ 4} In the first assignment of error, Holmes claims that his convictions are against the manifest weight of the evidence.¹

{¶ 5} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶125, the Ohio Supreme Court stated:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence

¹ Although in his brief, Holmes claims that his “convictions” were against the manifest weight of the evidence, his argument relates only to the rape conviction. Therefore, we will only address the rape conviction.

and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 6} In the instant case, Holmes was convicted of kidnapping under R.C. 2905.01(A)(2) and rape under R.C. 2907.02(A)(2).

{¶ 7} R.C. 2907.02(A)(2) provides that "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶ 8} Holmes denies raping the alleged victim, K.S. He claims that his conviction was against the manifest weight of the evidence because (1) K.S. offered inconsistent testimony regarding the events that occurred on the night of the rape and (2) there was no physical evidence linking him to the rape.

{¶ 9} The jury heard the following evidence at trial. On the night of October 8, 2007, K.S. had smoked \$80 worth of crack cocaine with her friend "Carmen" and several others. K.S. had previously supported her crack habit by engaging in prostitution, but she denied having engaged in prostitution on that

date. That night, she was walking with Carmen to her friend James's house to ask him for \$20. On the way, she stopped Holmes as he drove by and asked him for a ride to James's house. K.S. did not know Holmes but Carmen did. Holmes agreed to drive K.S. in exchange for gas money.

{¶ 10} When they arrived at James's house, K.S. exited Holmes's truck and obtained the money from James. She then returned to the vehicle and paid Holmes for the ride. Holmes began driving in the opposite direction, so she asked him to let her out of the vehicle. Holmes told her he had a small errand to run first and would then take her back.

{¶ 11} Holmes pulled into a dark driveway, parked behind a building, and told K.S. to get out of the truck. K.S. feared that if she did not comply, she would be in danger, so she obeyed him. Holmes grabbed her by her jacket and pushed her face into the truck. He pulled down her pants and forced his penis into her vagina. K.S. observed that Holmes wore a condom. She estimated that he penetrated her for two to three minutes. She did not resist because she was fearful. When Holmes went back to his truck to retrieve some lubricant, K.S. was able to run away.

{¶ 12} Holmes ran after K.S. and grabbed her. He punched her repeatedly, as she attempted to shield her face from the blows. She escaped and ran into the street to seek help. One motorist offered to assist her, and they stopped a passing police car. The police turned into the driveway where the attack began,

and Holmes drove away. K.S. could not see where he went because the bleeding above her eye obscured her vision.

{¶ 13} Officer Charles Moten (“Moten”) testified that as he and his partner were driving on Lee Road, he observed a male repeatedly punching a female victim. When the male noticed the police vehicle approaching, he stepped back and ran into an alley. K.S. then ran to the middle of the street to another approaching vehicle. Then she screamed to Moten, “He raped me!”

{¶ 14} Moten observed Holmes’s truck exit the driveway at high speed. Moten later stopped Holmes in his truck and arrested him.

{¶ 15} Moten photographed K.S.’s injuries, the alley where K.S. was assaulted, objects that were recovered at the scene, and a bottle of baby oil found in the alley. He also photographed a tube of oil or lubricant found on the front seat of Holmes’s vehicle.

{¶ 16} Emergency Medical Services (“EMS”) personnel interviewed and transported K.S. to University Hospitals. While they were in the EMS van, an EMS technician asked her what had occurred. The technician wrote down K.S.’s version of events. K.S. remained in the hospital overnight, and the hospital staff photographed her injuries. These photos were introduced into evidence at trial. A nurse also wrote down K.S.’s version of the incident. K.S. later met with police to provide another statement.

{¶ 17} Holmes claims that because K.S. presented different versions of the events to different people, and police never discovered the condom, his conviction is against the manifest weight of the evidence. We disagree.

{¶ 18} The jury heard evidence that when Holmes and K.S. left James's house, Holmes drove in the opposite direction of K.S.'s destination. She then asked to be let out, and he refused. Instead, he drove her into a dark driveway and parked his truck behind a building. K.S. was unfamiliar with the area and fearful that Holmes would harm her if she did not comply with his demands. She testified that Holmes forced his penis into her vagina. Later, when she tried to escape, he beat her, only stopping when police approached.

{¶ 19} Both Moten and the motorist corroborated K.S.'s version of the incident, and the jury viewed photos of the building and driveway, a baby oil bottle found in the driveway, and a tube of lubricant or oil found on the front seat of Holmes's truck. In sum, the jury heard credible evidence that Holmes raped K.S. This is not the exceptional case in which the evidence weighs heavily against conviction.

{¶ 20} Accordingly, the first assignment of error is overruled.

Speedy Trial

{¶ 21} In the second assignment of error, Holmes claims that the State violated both his statutory and constitutional rights to a speedy trial. We find no merit to this claim.

{¶ 22} R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest. For purposes of computing time under R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.² See R.C. 2945.71(E). Consequently, “[a] felony defendant in Ohio must be tried within ninety days if incarcerated on the pending charge or within two hundred seventy days if on bail.” *State v. Coleman* (1989), 45 Ohio St.3d 298, 304, 544 N.E.2d 622. But when a defendant is held on a parole violation, then the triple-count provision does not apply, even if additional criminal charges are pending. *State v. Stadmire*, Cuyahoga App. No. 81188, 2003-Ohio-873, ¶10-12.

{¶ 23} Additionally, the speedy trial statute may be tolled by several events, set forth in R.C. 2945.72. For example, a defendant’s demand for discovery or a bill of particulars tolls the speedy trial period. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, ¶26. The period is also tolled by “[t]he period of any continuance granted on the accused’s own motion, and the

²This is the so-called “triple-count” provision.

period of any reasonable continuance granted other than upon the accused's own motion[.]" R.C. 2945.72(H); *State v. Baker* (1993), 92 Ohio App.3d 516, 636 N.E.2d 363.

{¶ 24} When a court continues a matter sua sponte, it must show, through its journal entry, that the continuance was "reasonable in light of its necessity or purpose," or the continuance should be charged against the State. *Cleveland v. Ali*, Cuyahoga App. No. 88604, 2007-Ohio-3902, ¶22-23. In general, the trial court should, but is not required to, identify the party against whom it will charge the continuance. *Id.* at ¶22.

{¶ 25} Docket congestion may be reasonable grounds for a court to sua sponte continue a defendant's trial date, so long as 1) the length of the continuance is reasonable, and 2) the trial court continues the matter prior to the expiration of the statutory speedy trial period. *State v. Jackson* (1980), Cuyahoga App. Nos. 40809, 40810, citing *State v. Montgomery* (1980), 61 Ohio St.2d 78; *State v. Lee* (1976), 48 Ohio St.2d 208; *State v. Pudlock* (1975), 44 Ohio St.2d 104.

{¶ 26} Ultimately, if the State violates a defendant's right to a speedy trial, then the court must dismiss the charges against the defendant. R.C. 2945.73(B).

{¶ 27} In the instant case, when we review the time between Holmes's arrest and trial, including tolled periods, we find no violation of his statutory right to a speedy trial. Holmes was arrested on October 9, 2007, and tried on

June 10, 2008. He was held on a parole violation from October 9 to October 27 and filed several motions and sought continuances. The State also moved to continue once, and the only reason appearing on the record is that the “prosecutor did not show.” Because the record does not demonstrate the reasonableness of this one continuance, we charge it against the State.

{¶ 28} Additionally, the trial court continued the matter three times sua sponte. The first two were reasonable; their lengths of 20 and 40 days, respectively, were reasonable under the circumstances, and they were entered before the statutory trial period expired. Consequently, the speedy trial period was tolled. The trial court gave no reason for the third continuance, however, so we charge it against the State.

{¶ 29} Considering all of these periods, Holmes’s trial took place before the statutory speedy trial period had elapsed. Thus, Holmes has not demonstrated a statutory speedy trial violation.

{¶ 30} Holmes also claims that the State violated his constitutional right to a speedy trial. Therefore, we must consider the four-part balancing test enumerated in *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 113. This test requires a court to weigh the following: 1) length of delay, 2) reason for the delay, 3) the defendant’s assertion of his right, and 4) amount of prejudice to the defendant. *State v. Eicher*, Cuyahoga App. No. 89161, 2007-Ohio-6813, ¶28.

{¶ 31} In the instant case, Holmes was tried within nine months of his arrest. We consider three types of potential prejudice when evaluating the length of delay: “1) oppressive pretrial incarceration; 2) anxiety and concern of the accused; and 3) the possibility that the accused’s defense will be impaired by dimming memories and the loss of exculpatory evidence.” *Id.* at ¶31, citing *State v. Wells*, Cuyahoga App. No. 85586, 2006-Ohio-87, citing *Barker* at 532-533.

{¶ 32} We find that the eight-month pretrial incarceration was not prejudicial, particularly when Holmes’s own motions and requests for continuances caused much of the delay. Additionally, in this case, the period of delay was not long enough to erode memories or diminish exculpatory evidence. In particular, the detailed photographic evidence guarded against the danger of eroded memories. Also, Holmes has not identified any potentially exculpatory evidence that was lost as a result of this delay.

{¶ 33} Therefore, we overrule the second assignment of error.

Right to Confront Witnesses and
Evidence of Victim’s Prior Sexual History

{¶ 34} In the third assignment of error, Holmes claims that the trial court violated his constitutional right to confront witnesses by limiting his cross-examination regarding K.S.’s prior sexual activity. He sought to introduce evidence from a medical report (the “BCI report”) that her body contained two other men’s semen. He also sought to cross-examine K.S. regarding her sexual

relations with these two men to prove that they, rather than he, caused the abrasions to her vagina. The trial court excluded this evidence, finding that the rape shield statute barred its introduction.

{¶ 35} “It is within the trial court’s sound discretion to determine the relevancy of evidence and to apply the rape shield law to best meet the purpose behind the statute.” *State v. Miller* (1989), 63 Ohio App.3d 479, 483, 579 N.E.2d 276. However, we review the constitutional challenges to the application of the rape shield statute de novo. *State v. Brisco* (Aug. 24, 2000), Cuyahoga App. No. 76125, citing *State v. Ziepfel* (1995), 107 Ohio App. 3d 646, 652, 669 N.E.2d 299, 303.

{¶ 36} The “rape shield statute” appears at R.C. 2907.02(D) and provides, in pertinent part:

“Evidence of specific instances of the victim’s sexual activity, opinion evidence of the victim’s sexual activity, and reputation evidence of the victim’s sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim’s past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.”

{¶ 37} Holmes does not claim that the evidence in question falls within one of the exceptions to the rape shield statute. Rather he urges that the trial court’s application of the rape shield statute violated his constitutional right to confront K.S.

{¶ 38} The rape shield statute is not absolute and at times must yield to the defendant's constitutional right to confront witnesses. *State v. Gardner* (1979), 59 Ohio St.2d 14, 17, 391 N.E.2d 337. The Tenth District Court of Appeals stated:

“The Confrontation Clause of the Sixth Amendment guarantees the right of an accused ‘to be confronted with the witnesses against him.’ This right of confrontation is secured for criminal defendants in state as well as federal prosecutions. *Pointer v. Texas* (1965), 380 U.S. 400. To be sure, this right ‘* * * means more than being allowed to confront the witness physically. * * *’ *Davis v. Alaska* (1974), 415 U.S. 308, 315. Rather, ‘the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. * * *’ *Id.* at 316, quoting 5 Wigmore, *Evidence* (3d ed. 1940), page 123, § 1395 (emphasis original); *Douglas v. Alabama* (1965), 380 U.S. 415. The guarantee presumes a right to present a full and fair defense to the accusations of the state.” *State v. Pennington* (1991), Franklin App. No. 91AP-13.

{¶ 39} In this vein, the *Gardner* court held that to preserve a defendant's rights under the confrontation clause, courts should “balance the state interest which the [rape shield] statute is designed to protect against the probative value of the excluded evidence.”

{¶ 40} The Ohio Supreme Court explained that “[t]he key to assessing the probative value of the excluded evidence is its relevancy to the matters as proof of which it is offered.” *Gardner*. “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid.R. 401.

{¶ 41} Evidence merely impeaching the victim's credibility does not outweigh the state's interest in upholding the rape shield statute. *State v. Ferguson* (1983), 5 Ohio St.3d 160, 450 N.E.2d 265; *State v. Hightower* (Sept. 14, 2000), Cuyahoga App. No. 76847. On the other hand, evidence that both impeaches the victim's credibility and helps prove or disprove a material issue may be admissible. *State v. Williams* (1986), 21 Ohio St.3d 33, 487 N.E.2d 560.

{¶ 42} In the instant case, the probative value of K.S.'s prior sexual history did not outweigh the State's interest in shielding it. The abrasion and semen evidence did not relate to an essential element of rape. The State did not have to prove that Holmes caused the abrasions but only that Holmes engaged in sexual conduct with K.S. by force or threat of force. It accomplished this through her testimony and the corroborating testimony of Moten and the motorist. As to Holmes's claims that other men were the source of the semen and abrasions, the trial court allowed Holmes to introduce evidence that K.S. was a prostitute. Holmes had no need to identify specific instances of her sexual relations with other men to argue that he was not the source of the injury. In short, the evidence from the BCI report was of marginal probative value.

{¶ 43} Accordingly, the trial court was correct in excluding the evidence of the other men's semen, and we overrule the third assignment of error.

Ineffective Assistance of Counsel

{¶ 44} In the fourth assignment of error, Holmes claims he received ineffective assistance of counsel. He claims that his trial counsel wrongly failed to subpoena two EMS technicians who could have testified that K.S. related a different version of events to them immediately after the alleged rape than her trial testimony revealed.

{¶ 45} In order to substantiate a claim of ineffective assistance of counsel, Holmes must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of his trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Id.* at 689.

{¶ 46} Courts must generally refrain from second-guessing trial counsel's strategy, even where that strategy is questionable, and appellate counsel claims that a different strategy would have been more effective. *State v. Jalowiec*, 91 Ohio St.3d 220, 237, 2001-Ohio-26, 744 N.E.2d 163. "The decision of whether to call witnesses is within the province of counsel's trial tactics." *State v.*

McWhorter, Cuyahoga App. No. 87443, 2006-Ohio-5438, ¶54, citing *State v. Hunt* (1984), 20 Ohio App.3d 310, 312, 486 N.E.2d 108.

{¶ 47} The record in the instant case reflects that Holmes's counsel explained why he did not call the EMS personnel to testify. He believed that the EMS report was the best possible evidence of the material inconsistencies in K.S.'s accounts of the rape. He also stated that the jury would be able to review the report during deliberations and that would be more forceful than any testimony from EMS personnel.

{¶ 48} Accordingly, Holmes has not proven that he received ineffective assistance of counsel. We overrule the fourth assignment of error.

{¶ 49} Judgment is affirmed.

It is ordered that appellee recover of said appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
CHRISTINE T. McMONAGLE, J., CONCURS IN JUDGMENT ONLY