[Cite as *State v. Patterson*, 2015-Ohio-873.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101415

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM PATTERSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-03-437813-A

BEFORE: E.A. Gallagher, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 12, 2015

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EILEEN A. GALLAGHER, P.J.:

{¶1} Defendant-appellant William Patterson appeals his conviction for robbery in violation of R.C. 2911.02. Patterson contends that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. He also contends that (1) his rights to confrontation and cross-examination were violated when the trial court refused to allow his eyewitness identification expert testify as to the trustworthiness of the victim's identification of Patterson; (2) he was denied effective assistance of counsel due to trial counsel's failure to raise a double jeopardy issue after a mistrial was declared in Patterson's first trial and (3) his constitutional right to a speedy trial was violated due to the delay between the mistrial and the commencement of the second trial. Finding no merit to his appeal, we affirm Patterson's conviction.

Factual and Procedural Background

{¶2} Patterson's conviction arose out of a March 24, 2003 incident in which Pier Pinkney had her purse stolen as she was walking to work. Patterson was indicted by the Cuyahoga County Grand Jury on one count of robbery in violation of R.C. 2911.02, a second-degree felony. The indictment alleged that Patterson "did, in attempting or committing a theft offense, as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense upon Pier Pinkney, inflict, attempt to inflict, or threaten to inflict physical harm on Pier Pinkney[.]" Patterson pled not guilty and, on February 11, 2004, a jury trial commenced.

{¶3} During the third day of the trial, one of the state's witnesses, Detective Dale Moran with the Cleveland Police Department, disclosed, in response to an unrelated question by the prosecutor, that Patterson had a prior criminal record. Patterson moved for a mistrial. The

state objected. After hearing argument on the issue, the trial court granted Patterson's motion for a mistrial.

{¶4} Patterson filed a motion to dismiss the robbery charge on double jeopardy grounds. Patterson argued that Detective Moran was an experienced police detective who knew that it would be "inappropriate," "prejudicial" and in violation of an order in limine previously entered by the trial court to mention Patterson's criminal history. Patterson claimed that the prosecutor knew the information he was eliciting from the witness, knew that it would be prejudicial and likely to lead the jury to find the defendant guilty of the crime with which he had been charged to disclose that information and that it was designed to goad Patterson into moving for a mistrial. The trial court denied the motion.

{¶5} Patterson filed a motion to dismiss on speedy trial grounds, claiming that Patterson's right to a speedy trial under R.C. 2945.73 had been violated. The trial court denied the motion.

{¶6} A second jury trial commenced on April 20, 2005. The state's witnesses, which included Pinkney, Dennis Nichols, who witnessed the incident, and two police officers — Officer Herman Dotson and Detective Dale Moran with the Cleveland Police Department — provided the following account of the incident and subsequent investigation that led to Patterson's arrest and conviction.

{¶7} Pinkney testified that at approximately 7:40 a.m. on March 24, 2003, she parked her car between a homeless shelter and a bar near East 20th Street and Lakeside Avenue in Cleveland. Pinkney testified that each work day she parked her car somewhere in the area of Lakeside Avenue and East 18th Street and East 20th Street, where street parking was free, and then took the loop bus to the Cleveland Municipal Court where she worked as a bailiff. Pinkney testified that it was a clear day and light outside. She testified that as she began

walking down Lakeside Avenue to catch the loop bus, she saw a gentleman standing off to the side of the bar. She testified that, at the time, she "didn't really pay him no attention too much" because she was "just trying to catch [her] loop bus," but glanced at the man for "a quick second."

{¶8} Pinkney testified that before she reached the corner of East 18th Street and Lakeside Avenue, the gentleman she had observed near the bar came up behind her, grabbed her by her hair and said to her, "Don't turn around. I have a gun. Give me your purse." Pinkney testified that she felt the man's knuckle press into her back but that she knew from her training as a bailiff that it was not a gun. She testified that her assailant pulled her hair so hard she swung around to the right, facing him as they were "struggling" with her purse. Pinkney testified that the man had one strap of her purse and that she had the other and that they were both "tugging" at it, arm's length apart. She testified that as they were fighting over the purse, she looked at the man face-to-face for "[m]aybe like a minute" or "half a minute." She testified that her assailant was an African-American male with no facial hair. She testified that he was wearing dark clothing and jeans or dark pants with a hoodie pulled over his head. She further testified that his eyes got big and "bug-like" when she turned around and faced him. Pinkney testified that her assailant "wasn't real, real tall," "[b]etween 5'9[''] and 6 feet maybe," but was definitely taller than her height of 5'3" or 5'4" tall.

{¶9} Pinkney testified that the purse strap on which she had been tugging broke and that the man ran down Lakeside with her purse toward the bar. She testified that the man cut through a little yard and then ran around the corner. Pinkney testified that she tried to follow him but could not catch up with him. She testified that she had some knee problems at the time

but could still run "[a] little." She testified that her assailant ran away "very easily" and she did not recall seeing him limp as he ran.

{¶10} Pinkney testified that after the man fled, she walked back toward her car and saw Nichols sitting in his vehicle. Pinkney testified that she got into Nichols's vehicle and used his cell phone to call her employer to let her employer know what had happened and that Nichols then used his cell phone to call the police.

{¶11} Pinkney testified that two officers responded. She testified that she told the officers what had happened, that they took down her information and that the three of them then drove around the area looking for her purse and assailant. Pinkney testified that she had described her assailant to the officers and told them she thought she could identify him if she saw him again. Pinkney testified that they stopped at the nearby homeless shelter and that she and the police went inside the shelter to look for her assailant but that she did not see him there. After driving around with her for approximately thirty minutes, the officers returned Pinkney to her vehicle.

{¶12} Later that morning, Pinkney returned to the homeless shelter alone to see if she could find the man who stole her purse. She testified that she described the man who had taken her purse to one of the individuals who worked at the shelter and that he provided Pinkney with some information regarding a man named William Patterson who purportedly fit her description. Pinkney then went to two different locations she thought the man might be but was unable to locate him. Pinkney testified that the following day she met with Detective Moran, gave him the name William Patterson that she had received from the worker at the homeless shelter and provided a statement to the police regarding the incident.

{¶13} Pinkney testified that after she gave her statement to Detective Moran, he showed her a photo array consisting of six different photos of potential suspects. She testified that the detective gave her the six photographs all at once and that she then laid them down and viewed each one individually. She testified that after she viewed all the photographs, she picked Patterson out of the photographs as the man who had robbed her. She testified that she "knew it was him" "from his eyes" and the "chance [she had] to look at him for that minute" after she "swung around real fast" when her assailant grabbed her hair. She testified that after she went through the photographs once, she knew Patterson was the person who had robbed her but went through the photographs again, just to make certain it was him. Pinkney testified that she was "sure" it was Patterson who had stolen her purse.

{¶14} Pinkney testified that even though Patterson had facial hair in the photograph she picked out of the photo array, she knew it was him because she "remember[ed] what he looked like." She testified that after she picked out the photograph of Patterson in which he had facial hair, the detective showed her a second photograph of Patterson that "look[ed] more like him, because he didn't have really no facial hair" and that she again identified Patterson as the person who stole her purse. Pinkney denied that the detectives told her, prior to viewing the photo array, that Patterson was in the group of photographs they would be showing her. Pinkney testified that she had never seen Patterson before the March 24, 2003 incident and did not know the name of the man she had identified before she picked him out of the photo array. Pinkney also identified Patterson in court as the person who had robbed her.

{¶15} On cross-examination, Patterson's counsel pointed out several purported inconsistencies among Pinkney's current trial testimony, her prior trial testimony and/or the statement she had given police. These inconsistencies included (1) Pinkney's failure to tell

police that she had seen Patterson standing near the bar before he had come up behind her, (2) that she had previously testified that she had told police that her assailant did not have a hood over his head when she saw him and that her assailant's head was shaved, (3) that she had previously testified that her assailant was 5'8" or 5'9" and that she was struggling with her purse and facing her assailant for four or "maybe a few seconds" and (4) that she had previously testified that, when handing her the photographs for the photo array, one of the detectives said "something" to her, i.e., that "maybe one of the guys may be there." Pinkney also acknowledged on cross-examination that although she did not need glasses to drive, she did not have 20/20 vision at the time of the incident.

{¶16} Nichols, who witnessed the incident, also testified. He testified that as he was driving to work west on Lakeside Avenue, he noticed "a lady having an altercation with a gentleman" and that he "witnessed her getting her purse snatched." He testified that the incident occurred in front of a tavern located at the corner of East 20th Street and Lakeside Avenue. He testified that the woman, i.e., Pinkney, was in "direct contact" with her assailant, that she was "pulling" and he was "tugging" at her purse and that the woman was frantically yelling and screaming as she was fighting for her purse. He testified that when Pinkney was fighting with her assailant — at the "brief point when [he] saw them" — they were "facing each other" and that the man ultimately prevailed and ran off "swiftly" with the purse.

{¶17} Nichols testified that, although he did not know her name at the time, he recognized Pinkney because she had parked in the area and walked in her uniform along the same route "for quite some years." He testified that once the man took her purse, he saw Pinkney run after him, but could not recall in what direction the man ran. Nichols testified that he pulled his truck off to the side of the road and used his phone to call the police. He testified that he then

called Pinkney over to let her know that he had seen what had happened and had called the police. Nichols testified that Pinkney waited with him until the police arrived. When the police arrived, they took down their information and he and Pinkney told them what had happened.

{¶18} Nichols testified that the incident occurred between 7 and 7:30 a.m. and that it was "pretty clear lighting" for that time of day; however, he did not get a good look at Pinkney's assailant other than to observe that he was a black male. He testified that the man "wasn't a fat guy," was wearing jeans and a jacket — "loose-fitting type attire" — and that the man appeared to be about Pinkney's height or a little taller. Nichols testified that Patterson was taller than the person he saw struggling with Pinkney.

{¶19} Officer Dotson, a police officer with the city of Cleveland for thirteen years, responded to the call relating to the incident. He testified that when he and his partner, Officer Don Williams, arrived on the scene, they interviewed Pinkney, learned that her purse had been "snatched" from her and then toured the area, searching for the suspect and her purse. Officer Dotson testified that Pinkney described her assailant as a black male, wearing dark clothing and a hoodie. Officer Dotson testified that they drove around for approximately 30 minutes with Pinkney, searching the trash cans and dumpsters and looking behind buildings but never located her purse or the suspect. He testified that they drove by the homeless shelter looking for the suspect but did not go inside. Dotson testified that the officers then returned to the police station, completed their report regarding the incident and forwarded a copy to the detective unit.

{¶20} Detective Moran, a police officer with the city of Cleveland for 17 years and a detective for 11 years, testified that he was assigned to the case for follow up after the incident. He testified that when he came into the office the day after the incident, he read the report that

had been prepared by the responding officers and contacted Pinkney and scheduled a time to meet with her later that day. Detective Moran testified that prior to meeting with Pinkney, he set up a photo array for her to view based on the information Pinkney had previously provided, including that William Patterson was the name of the suspect. He testified that he used Patterson's name to get a photograph of him and then collected photographs of five other men to include in the photo array. He explained that he prepared a photo array, rather than a live lineup, because he did not have the suspect, Patterson, in custody.

{¶21} Detective Moran testified that when he met with Pinkney, he asked her what had happened and prepared a typewritten "synopsis story" (rather than a "verbatim" account) summarizing what she had told him. He testified that he then handed Pinkney the photo array he had created earlier and told her to let him know if her assailant was one of the men in the photographs. He testified that he used six photographs because that is how he has always done photo arrays and how he was taught to do them. He testified that he did not let Pinkney know which photograph was of Patterson and that Patterson's name was not "written on anything." He testified that Pinkney looked through the photographs and, 15 to 30 seconds later, identified the photograph of Patterson as "the man who did this to me." He testified that sometime after Pinkney "absolutely positively picked out" the photograph of Patterson, he showed her a second photograph of Patterson in which he had no facial hair. Detective Moran testified he showed Pinkney the second photograph because Pinkney had told him that the man who robbed her had no facial hair. Detective Moran testified that after he showed Pinkney the second photograph, she said, "that's how he looks now."

{¶22} After Pinkney identified Patterson in the photo array, Detective Moran secured a warrant for Patterson's arrest. Patterson was arrested on April 6, 2003. Detective Moran

testified that he "interviewed" Patterson, i.e., that he spoke with Patterson for four or five minutes, and that Patterson told him that "he didn't do it." Detective Moran testified that Patterson told him that he stays at the homeless shelter "on and off" but was not there that weekend as he had been staying with his mother, Helen Peoples. Detective Moran testified that he told Patterson to have Peoples call him but that she never did. Detective Moran testified that he attempted to call Peoples at the number he was given by Patterson but that that number was disconnected. Detective Moran testified that at the time of his arrest, Patterson was 6 feet tall and weighed 200 pounds. He testified that he had seen Patterson several times and had never seen him limp or use a cane.

{¶23} On cross-examination, Detective Moran admitted that his investigation focused on Patterson once Pinkney gave him Patterson's name. Detective Moran testified that he did not go to the homeless shelter to determine whether Patterson had stayed there the night before the incident but that he sent two other detectives to the shelter to see if they could locate Patterson and that they were unsuccessful. Detective Moran acknowledged that Nichols, the only other eyewitness, was never shown a photo array because Nichols had previously told him that, from the distance he observed the incident, he "could not give a positive ID on the [assailant's] face."

{¶24} The purse was never recovered and no other physical evidence was recovered linking Patterson to the crime.

{¶25} At the close of the state's case, Patterson moved for acquittal pursuant to Crim.R. 29. The trial court denied the motion.

{¶26} Five witnesses testified on behalf of the defense — Dr. Solomon Fulero, a psychologist specializing in eyewitness identification and the collection of eyewitness evidence, Terrell Vaughn, an intake tech for the homeless shelter, Dr. Feyisayo Adeyina, a family physician

at Care Alliance Health Centers who had treated Patterson for a foot and ankle condition, and two alibi witnesses — Leona Smith, Patterson's sister and Helen Peoples, Patterson's mother.

{¶27} Patterson's eyewitness identification expert, Dr. Fulero,[1] testified about research that has been conducted to determine eyewitness accuracy and the results of that research, i.e., that eyewitnesses are not generally as accurate or reliable with their identifications as lay people think they are. He explained in detail how memory works and the factors that can affect eyewitness reliability. Dr. Fulero also discussed eyewitness evidence collection, including the importance of collecting eyewitness evidence when it is fresh and that it is common for an eyewitness account to change over time as memory fades and new information is acquired. He also testified regarding how photo arrays should be performed to "enhance the likelihood of getting the right person and minimize the likelihood of getting the wrong person." Dr. Fulero explained that, contrary to popular belief, police or others with special training in law enforcement have not been shown to have an advantage in accurately recalling events they have witnessed. He testified that it is not who you are, but the situation in which you find yourself, that is the greater predictor of eyewitness accuracy.

{¶28} Smith, a senior federal investigator with the United States Equal Employment Opportunity Commission and Patterson's sister, was one of two alibi witnesses who testified at trial. She testified that on the date of the incident, Patterson was staying in the upstairs portion of a duplex Smith owned with their mother in Euclid, Ohio. Smith testified that Patterson did not stay at her home every day in 2003, that he was "coming and going," that she had "no tabs on him" and that she did "not always know[] where he [was] living at," but recalled that Patterson

[1] Dr. Fulero was tendered without objection as an expert in the areas of psychiatry, eyewitness identification and the collection of eyewitness evidence and was accepted by court as an expert in those fields.

had stayed with her mother that weekend. She testified that Patterson arrived at the house sometime on Saturday, March 22, 2003, and that she saw Patterson, their mother and her nephew all watching television together when she said good night to her mother the following evening.

{¶29} Smith testified that she was working from home the morning of March 24, 2003. She testified that between 6:30 a.m. and 7:00 a.m., she heard Patterson talking to her nephew, who lived with their mother upstairs, while he was waiting in the hallway inside the house for the school bus. Smith further testified that between 7:25 a.m. and 7:30 a.m., she heard Patterson talking to her daughter while she was waiting for her school bus. She testified that Patterson was still in the house at 8:30 a.m. because she recalls him knocking on her kitchen door around that time and telling her that he had placed a headset their mother had given Smith to use when doing telephone interviews for work on Smith's dining room table. She testified that she specifically recalls this period of time because she was in the process of planning her husband's 46th birthday party for later that week, i.e., March 26th.

{¶30} Peoples, a retired postal worker and Patterson's mother, was Patterson's second alibi witness. She testified that she and her grandson live in the upstairs portion of the house she shares with Smith and that Patterson also stays with her "off and on." She testified that she recalled Patterson spending the night on her couch on March 23, 2003, because she was getting ready to have her bathroom remodeled. She testified that Patterson came over sometime the previous day and helped her clean up the basement and bathroom in anticipation of the remodel. She testified that she went to bed around 9:00 or 9:30 p.m. on March 23, 2003, and that Patterson was at his brother's house that evening playing chess. Peoples testified that she was already in bed by the time Patterson came home on March 23, 2013, but that she heard him come in. She testified that when she awoke in the middle of the night to use the bathroom, she saw Patterson

sleeping on her couch. Peoples testified that he was still there the following morning. She testified that she woke Patterson up around 5:00 a.m. on March 24, 2003, to see if he wanted to use the bathroom before her grandson began getting ready for school.

{¶31} Peoples testified that she heard Patterson talking with her grandson around 6:45 a.m. while her grandson was waiting for the school bus. She testified that when the repairman came around 8:00 a.m. that morning, Patterson was still at her home. On cross-examination, the state pointed out some potential inconsistencies between Peoples's trial testimony and statements she had previously made in an affidavit her son had asked her to prepare to verify his whereabouts as of 7:00 a.m. on March 24, 2013. These potential inconsistencies included (1) the fact that Peoples had stated in her affidavit that Patterson had gotten up at 6:00 a.m. to help her bathe her grandson and that Patterson had been getting ready to go to Akron for a job and (2) the affidavit made no mention of Patterson waiting for the bus with her grandson or most of the facts she testified to at trial.

{¶32} Terrell Vaughn, the intake tech for the homeless shelter near where the incident occurred, also testified in Patterson's defense. He testified that he had checked the shelter's daily check-in sheets to see whether Patterson had stayed at the homeless shelter on the night of March 23, 2003, and that the shelter had no record of Patterson staying at the shelter that night.

{¶33} Dr. Adeyina was Patterson's final witness. She testified that she saw Patterson in February 2003 for complaints of bilateral foot pain. She testified that when Patterson came in to see her, he was mobile but walking with a cane. She testified that she examined Patterson and determined that Patterson had flat feet and a bone deformity that caused thickening around his ankles and decreased mobility in his ankle joints. Dr. Adeyina testified that she diagnosed Patterson with pes planus and degenerative arthritis, prescribed him ibuprofen for his pain and

referred him to a podiatrist because she thought he may need orthotics. Dr. Adeyina testified that, notwithstanding his foot and ankle conditions, Patterson could run, but "it might be limited." As to whether Patterson could "run fast, as an [O]lympic sprinter," Dr. Adeyina testified that she did not think so, but did not know because she had never asked Patterson to run for her.

{¶34} At the conclusion of all the evidence, Patterson renewed his Crim.R. 29 motion for acquittal. Once again, the trial court denied the motion and the case went to the jury.

{¶35} The jury found Patterson guilty of robbery as charged in the indictment. The trial court ordered a presentence investigation report and set a sentencing date of May 31, 2005. Patterson filed a supplemental motion for acquittal pursuant to Crim.R. 29(C) that the court denied. Patterson failed to complete the presentence investigation process and a capias was issued for his arrest. It was not until November 2013 that Patterson was back in custody.

{¶36} At his sentencing hearing on April 29, 2014 — nine years after the jury's verdict — the trial court sentenced Patterson to six years in prison on the robbery charge and a mandatory three-year period of postrelease control.

{¶37} This appeal followed. Patterson's appellate counsel filed a brief raising the following four assignments of error for review:

> First Assignment of Error
>
> The trial court erred in denying Appellant's motion for acquittal as to the charge when the state failed to present sufficient evidence against Appellant.
>
> Second Assignment of Error
>
> Appellant's conviction is against the manifest weight of the evidence.
>
> Third Assignment of Error

> The trial court erred in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 10 of the Ohio Constitution which provides rights to confrontation and cross-examination when it did not permit a witness to completely testify about the fallibility of eyewitness identification and render an opinion as applied to Appellant's case.
>
> Fourth Assignment of Error
>
> Appellant was denied effective assistance of counsel as guaranteed by Section 10, Article I, of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when counsel failed to raise the issue of double jeopardy after the first trial was declared a mistrial due to the fault of the state.

{¶38} Patterson filed a pro se brief in which he raised the following additional assignment of error:

> [Fifth] Assignment of Error
>
> The trial court erred in denying Appellant's Motion to Dismiss for Lack of Speedy Trial violating Appellant's speedy trial rights as guaranteed by the Sixth Amendment of the United States Constitution.

Law and Analysis

Sufficiency of the Evidence

{¶39} In his first assignment of error, Patterson argues that his conviction should be overturned because there was insufficient evidence to prove it was he who committed the robbery. We disagree.

{¶40} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the state has met its burden of production at trial. *State v. Hunter*, 8th Dist. Cuyahoga No. 86048, 2006-Ohio-20, ¶ 52. When reviewing sufficiency of the evidence, an appellate court must determine "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

proven beyond a reasonable doubt.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the state's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541; *Jenks* at paragraph two of the syllabus.

{¶41} Patterson was convicted of robbery in violation of R.C. 2911.02 as charged in the indictment. R.C. 2911.02(A)(2) provides, in relevant part:

> No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall * * * [i]nflict, attempt to inflict, or threaten to inflict physical harm on another[.]

{¶42} Patterson's challenge to his conviction is limited to the element of identity. He does not dispute that the state presented sufficient competent, credible evidence to prove the other elements of robbery beyond a reasonable doubt. We, therefore, limit our analysis to whether the evidence was sufficient to establish, beyond a reasonable doubt, that Patterson was the person who robbed Pinkney.

{¶43} Patterson contends that there was insufficient evidence that he was the perpetrator of this crime because (1) the state presented no evidence of motive; (2) his conviction was based solely on eyewitness testimony, which "has been shown to be inherently unreliable" and (3) Patterson's home was never searched and the purse was never found. Following a thorough review of the record, we find that the evidence presented by the state, when viewed in

the light most favorable to the prosecution, was sufficient to support Patterson's robbery conviction.

{¶44} Neither evidence of a particular motive for a crime nor physical evidence is necessary to support a conviction. *See, e.g., State v. Kemp,* 8th Dist. Cuyahoga No. 97913, 2013-Ohio-167, ¶ 47; *State v. Lopez*, 8th Dist. Cuyahoga No. 94312, 2011-Ohio-182, ¶ 62.

{¶45} Here, the state presented sufficient evidence that Patterson was the perpetrator based on Pinkney's testimony alone. Pinkney testified that the day was clear and light. She testified that she first saw Patterson standing near the side of a nearby bar after she parked her car. She testified that she saw Patterson again when — after he grabbed her hair, put his knuckles into her back and threatened her, "Don't turn around, I have a gun" — she swung around and stood face-to-face with her attacker. Pinkney testified that as she struggled for her purse, she looked directly at her assailant and observed his face for anywhere from several seconds to a minute. After speaking with a worker at the shelter, Pinkney learned of a person who fit the description she provided of her assailant and provided that information to police, who then used that information to create a photo array that included Patterson's picture.

{¶46} Without hesitation, Pinkney identified Patterson as the person who stole her purse from the photo array Detective Moran showed her the day after the incident. She again identified Patterson when Detective Moran showed her a second photograph of Patterson without facial hair. Pinkney identified Patterson as her assailant a third time in court during her trial testimony. Pinkney testified that she was "sure" Patterson was the person who robbed her based on her observation of his face while she was fighting for her purse. Pinkney's testimony, if believed, was sufficient to support Patterson's robbery conviction. Accordingly, Patterson's first assignment of error is overruled.

Manifest Weight of the Evidence

{¶47} In his second assignment of error, Patterson argues that his robbery conviction was against the manifest weight of the evidence because there was "no reliable or credible evidence tying [Patterson] to this crime." Once again, we disagree.

{¶48} In contrast to a challenge based on sufficiency of the evidence, a manifest weight challenge attacks the credibility of the evidence presented and questions whether the state met its burden of persuasion at trial. *State v. Whitsett*, 8th Dist. Cuyahoga No. 101182, 2014-Ohio-4933, ¶ 26, citing *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541; *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 13. When considering an appellant's claim that a conviction is against the manifest weight of the evidence, the court of appeals sits as a "'thirteenth juror'" and may disagree "with the factfinder's resolution of conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Weight of the evidence "addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, citing *Thompkins* 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?" *Id.*

{¶49} The reviewing court must examine the entire record, weigh the evidence and all reasonable inferences, consider the witnesses' credibility 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. *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). In conducting such a review, this court remains mindful that the credibility of the witnesses and the weight to be given the evidence are primarily for the trier of fact to assess. *State v. Bradley*, 8th

Dist. Cuyahoga No. 97333, 2012-Ohio-2765, ¶ 14, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner, demeanor, gestures and voice inflections, in determining whether the proffered testimony is credible. *State v. Kurtz*, 8th Dist. Cuyahoga No. 99103, 2013-Ohio-2999, ¶ 26, quoting *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 24. A manifest weight challenge to a conviction resulting from a jury verdict requires a unanimous concurrence of all three appellate judges to reverse. *Thompkins* at 389. Reversal on manifest weight grounds is reserved for the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins* at 387, quoting *Martin*, *supra*.

{¶50} In support of his manifest weight challenge, Patterson highlights several discrepancies between the testimony of the eyewitnesses Pinkney and Nichols and inconsistencies between Pinkney's trial testimony and what she allegedly told police shortly after the incident, including differences in the witnesses' descriptions of the height of the man who stole Pinkney's purse — Nichols claimed he was about the same height as Pinkney whereas Pinkney claimed he was taller — Pinkney's original testimony in February 2004 that her assailant was 5'8" or 5'9" and later trial testimony in March 2005 that her assailant was between 5'9" and 6 feet tall, differences in the length of time Pinkney claimed to stand face-to-face observing her assailant and differences between Pinkney's description of her assailant at trial and the description she gave police after the incident — i.e., allegedly failing to provide any description of the suspect's face to police, including that he was clean shaven or had the "bug-like" eyes that Pinkney found so distinctive in identifying Patterson in the photo array. Patterson contends that these inconsistencies combined with (1) the testimony of Dr. Fulero explaining the fallibility of

eyewitness identification, (2) the testimony of Patterson's two alibi witnesses (his sister and mother) that he was at their home at the time of the incident and (3) the testimony of Dr. Adeyina regarding Patterson's painful foot and ankle conditions rendered his conviction against the manifest weight of the evidence. These arguments do not persuade us that Patterson's conviction was against the manifest weight of the evidence.

{¶51} "A conviction is not against the manifest weight of the evidence solely because the jury heard inconsistent testimony." *State v. Wade*, 8th Dist. Cuyahoga No. 90029, 2008-Ohio-4574, ¶ 38, quoting *State v. Asberry*, 10th Dist. Franklin No. 04AP-1113, 2005-Ohio-4547, ¶ 11; *see also State v. Mann*, 10th Dist. Franklin No. 10AP-1131, 2011-Ohio-5286, ¶ 37 ("'While [a factfinder] 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.'"), quoting *State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 Ohio App. LEXIS 2245, *7 (May 28, 1996). The decision whether, and to what extent, to believe the testimony of particular witnesses is "within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-494, ¶ 54.

{¶52} "'Even where discrepancies exist, eyewitness identification testimony alone is sufficient to support a conviction so long as a reasonable juror could find the eyewitness testimony to be credible.'" *State v. Robinson*, 8th Dist. Cuyahoga No. 100126, 2014-Ohio-1624, ¶ 12, quoting *State v. Johnson*, 8th Dist. Cuyahoga No. 99822, 2014-Ohio-494, ¶ 52; citing *State v. Jordan*, 10th Dist. Franklin No. 04AP-827, 2005-Ohio-3790, ¶ 14. "'The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury.'" *State v. Roper*, 9th Dist. Summit No. 20836,

2002-Ohio-7321, ¶ 55, quoting *Foster v. California*, 394 U.S. 440, 443, 22 L.Ed.2d 402, 89 S.Ct. 1127 (1969).

{¶53} This case came down to the credibility of Pinkney and the alibi witnesses offered by the defense. The jury was presented with reasons to question Pinkney's credibility, such as the fact that she originally described her assailant as several inches shorter than Patterson's height of 6 feet tall, the fact that she originally claimed to have observed her assailant for only a few seconds (not a minute or so as she later claimed) and the fact she that did not provide a full description of her assailant, including his facial features, to police following the incident. But, as detailed above, she also gave the jury reasons to believe her testimony, including that she was "sure" of her identification of Patterson both when she first saw his photograph during the photo array and when testifying at trial.

{¶54} Although both Patterson's sister and mother testified that Patterson was at their home at the time of the incident, there were a number of inconsistencies in their testimony that may have led the jury to find all or part of their testimony to be not credible. For example, although Patterson's sister claimed to have seen Patterson, their mother and her nephew all watching television together when she said good night to her mother on the evening of March 23, 2003, Patterson's mother testified that Patterson was over at his brother's house playing chess that evening and had not returned by the time she went to bed around 9:00 or 9:30 p.m. In addition, what Peoples testified to at trial was quite different from what she previously testified to in the affidavit her son had asked her to prepare to verify his whereabouts at the time of the incident. Further, although Patterson claims that Dr. Adeyina's testimony "would certainly rule out [Patterson] as someone who could outrun a trained professional bailiff," Dr. Adeyina did not testify that, due to his foot and ankle conditions, Patterson was unable to run. With respect to

Patterson's ability to run, she testified only that Patterson could run, but "it might be limited." She further testified that she did not know how fast Patterson could run because she had never asked Patterson to run for her. Moreover, Pinkney testified that she had knee problems at that time that impacted her ability to run and might explain how, notwithstanding his medical conditions, Patterson could outrun her.

{¶55} Based on our review of the entire record in this case, weighing the strength and credibility of the evidence presented and the inferences to be reasonably drawn therefrom, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that Patterson's conviction is against the manifest weight of the evidence. Accordingly, we overrule Patterson's second assignment of error.

Limitation on Dr. Fulero's Testimony

{¶56} In his third assignment of error, Patterson argues that his constitutional rights of confrontation and cross-examination were violated when the trial court, sua sponte, precluded Patterson's expert, Dr. Fulero, from testifying regarding the "trustworthiness" of Pinkney's identification of Patterson as her assailant. He claims that this testimony was "relevant" and "critical to the defense," and that, as a result of the trial court's limitation of Dr. Fulero's testimony, Patterson was precluded from presenting "a complete defense." Patterson's argument lacks merit.

{¶57} The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]" A defendant's constitutional right to confront witnesses involves the right to challenge the credibility of their testimony through effective cross-examination; it does not involve the presentation of expert testimony challenging the credibility of a witness. The record reflects that

Patterson, through his counsel, was provided a full and complete opportunity to confront and cross-examine each witness presented by the state in its case, including, his accuser, Pinkney. Because Patterson, through his counsel, was able to cross-examine these witnesses, his confrontation rights were not violated. *Cleveland v. Amoroso*, 8th Dist. Cuyahoga No. 100983 2015-Ohio-95, ¶ 38, citing *State v. Simmons*, 8th Dist. Cuyahoga No. 98613, 2013-Ohio-1789, ¶ 27, citing *State v. Gray*, 12th Dist. Butler No. CA2011-09-176, 2012-Ohio-4769, ¶ 48.

{¶58} Nor is there anything in the record to support Patterson's claim that, due to the trial court's "limitation" of Dr. Fulero's testimony, he was precluded from presenting a "complete defense." To the contrary, any "limitation" the trial court purportedly placed on Dr. Fulero's testimony was proper under Evid.R. 702.

{¶59} Evid.R. 702 governs the admissibility of expert testimony. It provides, in relevant part:

> A witness may testify as an expert if all of the following apply:
>
> (A) The witness'[s] testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness'[s] testimony is based on reliable scientific, technical, or other specialized information. * * *

{¶60} A trial court's decision to admit or exclude expert testimony is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Thompson*, 8th Dist. Cuyahoga No. 99846, 2014-Ohio-1056, ¶ 15; *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, 850 N.E.2d 68, ¶ 9. An abuse of discretion means more than

an error of law or judgment; it implies an attitude of unreasonableness, arbitrariness, or unconscionability on the part of the trial court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶61} The trial court, in its role as gatekeeper has a responsibility to ensure that an expert witness does not testify outside the scope of his or her expertise or invade the province of the jury. It is the factfinder, not an expert, who is properly charged with assessing the credibility or "trustworthiness" of a witness. *State v. Essa*, 194 Ohio App.3d 208, 226, 2011-Ohio-2513, 955 N.E.2d 429, ¶ 90 (8th Dist.), citing *State v. Eastham*, 39 Ohio St.3d 307, 312, 530 N.E.2d 409 (1988); *see also State v. Cottrell*, 8th Dist. Cuyahoga No. 51576, 1987 Ohio App. LEXIS 7180, *17-18 (Feb. 18, 1978). ("Expert opinion testimony concerning a witness's credibility potentially invades the province of the jury as the primary arbiter of the witness's credibility. Under such circumstances, a trial court must be vigilant so as to prevent an expert's testimony from tainting the factfinding process.").

{¶62} At issue in this case is the following statement the trial court made to counsel, in the middle of Dr. Fulero's testimony, during a sidebar conference outside the hearing of the jury:

> THE COURT: Now, here's the thing under Evidence Rule 702. I have no problem with Dr. Fulero's testimony in the abstract and general factors we're talking about, okay, but I'm not going to allow Dr. Fulero to talk about whether or not this particular witness'[s] ability to identify this individual Defendant, okay, was not trustworthy, you understand that?
>
> [DEFENSE COUNSEL]: Yes I do.
>
> THE COURT: The last question, the first time it came out, I don't want you to somehow bootstrap a hypothetical by using some of the factors from the case, okay, because specific references to, you know, questions about reliability of eyewitness identification, and now he's not objected to it, I'm just bringing it up now because I don't want us to get too far down that line, okay?

[DEFENSE COUNSEL]: Thank you.[2]

{¶63} Experts who are called to testify regarding eyewitness identification are permitted to testify generally as to "the variables or factors that may impair the accuracy" of typical eyewitness identification. *State v. Buell*, 22 Ohio St.3d 124, 489 N.E.2d 795 (1986), paragraph one of the syllabus. However, expert eyewitness identification testimony is not admissible, under Evid.R. 702, "regarding the credibility of a particular witness'[s] identification testimony, absent a showing that the witness suffers from a mental or physical impairment which would affect the witness'[s] ability to observe or recall events." *Id.* at paragraph two of the syllabus; *see also State v. Booker*, 2d Dist. Montgomery No. 17709, 1999 Ohio App. LEXIS 5551, *11 (Nov. 24, 1999). ("While expert testimony on the variables that may impair the accuracy of a

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[2] The testimony that preceded this exchange was as follows:

Q. Are those two factors the only factors in acquisition?

A. Oh, no, the next one we call weapons focus. The presence or absence of a weapon. I mean, it actually — what could be a more salient detail than a weapon? Weapons draw attention. When a weapon is there, it draws attention away from the face. And you would expect that when a weapon is present that eyewitness facial accuracy decreases, which it does.

If the person believes there is a weapon or then, of course, in a similar fashion they're going to check, they're going to check for whether or not there is one and their attention and their eye will be drawn away.

Q. Is that true even if the person is told that there is a weapon?

A. Yes. They will at least check, right. They wouldn't — I mean, I think anybody would check to see if the weapon is present, what that does is divert attention away from the face and the limited processing time that the person has. And, again, you would expect that anything that diverts attention away from the face would decrease facial accuracy in later ID.

typical eyewitness identification is admissible, expert testimony applying those variables to or discussing the accuracy of a particular witness'[s] identification is not admissible, absent some showing that the witness had a physical or mental impairment which would affect his ability to observe or recall details."). No such need is claimed to have existed in this case. As such, Dr. Fulero could not properly testify regarding the credibility or trustworthiness of Pinkney's identification of Patterson as the man who stole her purse.

{¶64} The court's concerns did not arise "out of the blue." The state's case was based almost entirely on Pinkney's eyewitness identification and Patterson's identity was at issue. Dr. Fulero had previously testified that he had reviewed case-specific materials related to the eyewitness identification in the case, including certain pictures, "certain sworn statements and the stories that the people have told at several points along the way * * * with regard both to the event and to the manner in which the eyewitness evidence was collected," had previously testified regarding the "factors * * * that could be considered in this case as relevant to the jury's decision making with regard to whether or not the witnesses in this case were accurate" and had just been asked his "expert opinion" regarding a witness's failure to promptly report a salient detail in an unrelated "hypothetical." Patterson's counsel raised no objection to this "limitation" the court placed on Dr. Fulero's testimony.

{¶65} Patterson does not state specifically what testimony he sought to offer from Dr. Fulero that he was precluded from offering at trial as a result of the court's purported "limitation" of Dr. Fulero's testimony. He simply asserts that as a result of the trial court's actions, he was unable to "fully develop" his defense "as to possible misidentification" and contends that "[t]here could have been other evidence developed to indicate that the identification of Appellant was not reliable and trustworthy."

{¶66} The trial court permitted Dr. Fulero to testify at length as to the variables that might impact the accuracy of an eyewitness identification and regarding the proper means of presenting photo arrays to eyewitnesses. However, when Dr. Fulero's testimony appeared as if it might stray into areas that were outside the scope of admissible expert testimony, i.e., the accuracy, reliability and trustworthiness of Pinkney's eyewitness identification of Patterson, the trial court warned the parties that, consistent with Evid.R. 702, it would not permit Dr. Fulero to testify regarding such issues. Defense counsel, thereafter, continued with her direct examination of Dr. Fulero without incident. The record reflects that the trial court acted reasonably and within its duties as gatekeeper to ensure that only expert testimony that was admissible under Evid.R. 702 was offered by the parties. This purported "limitation" on Dr. Fulero's testimony, limiting his testimony to areas permissible under the Rules of Evidence, did not prohibit Patterson from presenting a "complete defense." *See State v. Smith*, 1st Dist. Hamilton No. C-010517, 2002-Ohio-2886, ¶ 41.

{¶67} As it appears in the transcript, Dr. Fulero's testimony on direct and redirect examination encompasses more than sixty pages. None of the questions defense counsel asked in her direct examination was objected to by the defense and the court did not otherwise preclude defense counsel from asking Dr. Fulero any specific question she sought to ask of him. The only objections that were raised and sustained to defense counsel's questions of Dr. Fulero were objections to questions defense counsel asked in her second re-direct examination of Dr. Fulero. These questions were objected to and the objections sustained as being outside the scope of the re-cross examination. Defense counsel was also permitted to question Detective Moran on cross-examination regarding the factors Dr. Fulero had identified as impacting eyewitness

identification and the application of those factors to the specific facts and circumstances of this case.

{¶68} Further, Dr. Fulero readily acknowledged on cross-examination that he was not in court to testify as to whether the identification of any particular witness was accurate or not:

> Q. * * * As far as what you testified today, it was general scientific research in this area?
>
> A. That's right.
>
> Q. You weren't testifying as to any specific firsthand knowledge of this particular case?
>
> A. Right. I appreciate your asking that. It's true. I am not here to say whether any given witness is correct or incorrect. That's not my job. That's the job of the triers of fact.
>
> I think my job is to explain to them what the factors are that the science shows for them to make their own decision about that. I wasn't there. You weren't there. They weren't there. Obviously, it's a tough decision.
>
> Q. And you haven't interviewed the victim in this case to find out any of her qualities or anything you'd like in this case?
>
> A. Well, there is sort of two answers to that. I haven't evaluated her like a psychological evaluation. I'm not here to testify about her, specifically.
> * * *

{¶69} After reviewing the testimony given by Dr. Fulero, we cannot say that Dr. Fulero's testimony was unfairly or prejudicially limited or that any purported limitation placed on his testimony impaired Patterson's constitutional rights of confrontation and cross-examination in any way. Accordingly, Patterson's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶70} In his fourth assignment of error, Patterson argues that he was denied effective assistance of counsel because his trial counsel failed to raise the issue of double jeopardy after

the first trial was declared a mistrial. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) deficient performance by counsel, i.e., that counsel's performance fell below an objective standard of reasonable representation, and (2) that counsel's errors prejudiced the defendant, i.e., a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. "Reasonable probability" is "probability sufficient to undermine confidence in the outcome." *Strickland* at 694. Where, as here, a claim of ineffective assistance of counsel is based on counsel's alleged failure to file a particular motion, a defendant must show that the motion had a reasonable probability of success. *State v. Matthews*, 10th Dist. Franklin No. 11AP-532, 2012-Ohio-1154, ¶ 17. Patterson's argument is meritless.

{¶71} First, the record reflects that Patterson's counsel did, in fact, raise the double jeopardy issue before his second trial. Patterson's trial counsel filed a motion to dismiss the robbery charge, raising the same arguments in support of a claim of double jeopardy that Patterson now makes. The trial court denied that motion. Even if we were to construe Patterson's assignment of error as challenging the manner or effectiveness with which trial counsel raised the double jeopardy issue below, we would still find no basis for reversing Patterson's conviction due to the ineffectiveness of trial counsel. Because there are "countless ways to provide effective assistance in any given case," judicial scrutiny of a lawyer's performance must be "highly deferential." *Strickland* at 689. Therefore, "'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Bradley* at 142, quoting *Strickland* at 689.

{¶72} The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article I, Section 10 of the Ohio Constitution protect a criminal defendant against repeated prosecutions for the same offense. *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *State v. Kareski*, 137 Ohio St.3d 92, 2013-Ohio-4008, 998 N.E.2d 410, ¶ 14. The Double Jeopardy Clause does not, however, bar reprosecution in every case. Where a defendant requests a mistrial, double jeopardy does not bar a retrial unless the defendant's request for a mistrial is precipitated by prosecutorial misconduct intended to provoke a defendant into seeking a mistrial. *N. Olmsted v. Himes*, 8th Dist. Cuyahoga Nos. 84076 and 84078, 2004-Ohio-4241, ¶ 36-37. As this court explained in *Himes*:

> Generally, there are no double jeopardy considerations when a mistrial is declared. *State v. Gaines*, 8th Dist. Cuyahoga No. 82301, 2003-Ohio-6855. If a defendant's motion for mistrial is granted, or the trial court sua sponte declares a mistrial, the State is usually not precluded from retrying a criminal defendant. *United States v. Tateo*, 377 U.S. 463, 467, 12 L.Ed. 2d 448, 84 S.Ct. 1587 (1964); *State v. Loza*, 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994).
>
> However, a narrow exception to this rule applies when the defendant's request or the judge's actions are prompted or instigated by prosecutorial misconduct designed to goad the defendant into seeking a mistrial. *Oregon v. Kennedy*, 456 U.S. at 676; *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900 (1988).

Id. Only prosecutorial misconduct "'intentionally calculated to cause or invite mistrial' will bar retrial." *Himes* at ¶ 38, quoting *State v. Girts*, 121 Ohio App.3d 539, 551, 700 N.E.2d 395 (8th Dist.1997), quoting *United States v. Thomas*, 728 F.2d 313, 318 (6th Cir.1984).

{¶73} Here, there is nothing in the record to suggest that "prosecutorial misconduct" was a cause of the mistrial. In this case, Patterson's motion for mistrial was granted after Detective Moran disclosed, in response to questioning by the prosecutor regarding how he

created the photo array viewed by Pinkney, that when he entered the suspect's name he had been given by Pinkney into the computer system, he "punched up that he had a criminal record." The line of questioning that led to the disclosure of this information and Detective Moran's response are as follows:

> Q. Okay. What was your — what was the point of meeting Pier Pinkney at this stage?
>
> A. During this investigation that was done earlier in the morning, on Tuesday, information was gathered through our invest[igation] that a name was given to us.
>
> Q. Okay. And through that, did you — did you create a photo line-up based on information that was given to you?
>
> A. Yes, I did.
>
> Q. Okay. So what was the information that caused you to create the photo line-up that you created?
>
> A. The information from that name, first thing we do is go over to our computer and we punch up any kind of history.
>
> Q. What did you punch up in the computer?
>
> A. On this individual's name we punched up that he had a criminal history.

{¶74} Further, even assuming "prosecutorial misconduct" led to the declaration of a mistrial, there is nothing in the record to suggest that the prosecutor intended, by means of any alleged misconduct, to "goad" Patterson into seeking a mistrial.

{¶75} In determining whether the requisite prosecutorial intent is present, a court may consider factors such as (1) whether a sequence of overreaching existed prior to the events giving rise to the mistrial, (2) whether the prosecutor resisted or was surprised by the defendant's motion for a mistrial and (3) any findings by the trial court concerning the intent of the prosecutor. *Himes* at ¶ 39, citing *Kennedy, supra* (Powell, J., concurring). None of these or any

other factors support the conclusion in this case that the state engaged in any misconduct with the intent of causing or inviting a mistrial.

{¶76} Although Patterson asserts that "the prosecutor intentionally engaged in conduct intended to goad the defendant into moving for a mistrial," he relies on nothing more than his own conclusory assertions to support his contention. Patterson does not claim that there were prior incidents of overreaching in the case and points to nothing in the record that suggests that the prosecutor intended to elicit testimony from Detective Moran regarding the defendant's criminal record. To the contrary, it appears that the prosecutor was simply attempting to elicit from the detective the *name* that he entered into the computer — not the results of his computer search. Although the prosecutor may have asked a poorly worded question, the trial court expressly acknowledged, during the sidebar conference regarding the issue, that it did not believe the prosecutor had intended to elicit testimony from Detective Moran regarding Patterson's criminal history:

> [THE PROSECUTOR]: You keep objecting. The name's already out there. He got the name, and from that name he created these pictures. If you'd just let him say, I got the damn name, that's how I got the pictures, this wouldn't have happened. I wasn't trying to get that out of him. * * * I said how do you create the photo line-up, how. That's what I keep asking him. He didn't pull the pictures out of thin air. He used the name William Patterson. That's how he created the photo lineup. I'm not asking for any hearsay. I'm asking how he created this photo lineup. I have to keep re-asking him, and that's when he — that's when he went into — I punched his name into the computer. * * *
>
> THE COURT: You don't see me jumping up and down, my arms waving, but at the same time — but I know what's going — I know, I'm just scratching my head here because beyond —
>
> [DEFENSE COUNSEL]: I'm moving for a mistrial.
>
> THE COURT: I knew that was coming. Do you want to argue about that?

I mean, you know, it's not really appropriate for us to get into the defendant's

criminal record anyway. It's come out. It's not — you didn't ask for this, okay.

But he did say it. * * *

{¶77} The prosecutor proceeded to argue against the declaration of a mistrial, but a mistrial was nevertheless granted by the trial court based on the detective's reference to Patterson's criminal record. Following a careful review of the record, we find nothing to suggest that the prosecutor intended, by means of any alleged misconduct, to "goad" Patterson into seeking a mistrial. The fact that one of the state's witnesses — and granted, one who should have known better — provided improper testimony, without more, does not support a conclusion that the prosecutor intentionally "goaded" Patterson into seeking a mistrial. *See, e.g., State v. Cisse*, 5th Dist. Delaware No. 12 CAA 09 0070, 2013-Ohio-3894, ¶ 30, 53 (where trial court granted defendants' motion for mistrial due to prejudicial comments, unprompted by the state, made by state's witness during narrative testimony, double jeopardy did not bar retrial as neither the state nor the trial court goaded defense counsel into asking for a mistrial); *Himes* at ¶ 40 (where act that prompted defendant's request for a mistrial was a single line of questioning, which may have elicited improper testimony, it could not be said that the prosecutor goaded defendant into requesting a mistrial).

{¶78} Because there is no evidence that Patterson's request for a mistrial was precipitated by prosecutorial misconduct intended to provoke him into seeking a mistrial, he has not met his burden of establishing (1) that his trial counsel's performance fell below an objective standard of reasonable representation or (2) a reasonable likelihood that the outcome of the case would have been different but for his trial counsel's alleged deficient performance. Accordingly, Patterson has not established that he was denied effective assistance of counsel. Patterson's fourth assignment of error is overruled.

Speedy Trial Rights

{¶79} In his final assignment of error, Patterson contends that his constitutional right to a speedy trial was violated due to the delay between the trial court's declaration of a mistrial on February 13, 2004 and the commencement of the second trial on April 20, 2005. As such, he contends, the robbery charge against him should have been dismissed.

{¶80} An accused is guaranteed the constitutional right to a speedy trial pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Section 10, Article I, of the Ohio Constitution. *State v. Williams*, 8th Dist. Cuyahoga No. 100898, 2014-Ohio-4475, ¶ 51, citing *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 32. Although Patterson references his constitutional speedy trial right in his assignment of error, he has not argued that the time within which he was brought to trial was constitutionally unreasonable; he has only argued that he was tried outside the time limitations provided by R.C. 2945.71. In response, the state argues that, as a result of various tolling events under R.C. 2945.72, Patterson was brought to trial within the statutory time limit and that his speedy trial rights were not violated.

{¶81} The statutory speedy trial provisions of R.C. 2945.71 et seq., however, do not apply to retrials following a mistrial. *State v. Fanning*, 1 Ohio St.3d 19, 21, 437 N.E.2d 583 (1982). Because R.C. 2945.71 "does not include any reference" to retrials or mistrials, once the court declares a mistrial, the issue becomes whether the delay in commencing the second trial is constitutionally reasonable. *Id.* The reasonableness of the time it takes for a retrial is determined based on the circumstances of the case, including (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101

(1972); *State v. O'Brien*, 34 Ohio St.3d 7, 10, 516 N.E.2d 218 (1987). Although the speedy trial statute is not controlling in the context of a retrial, it may nevertheless assist in determining whether a period of delay is "reasonable" under the circumstances for constitutional speedy trial purposes. *State v. Kraus*, 2d Dist. Greene No. 2011-CA-35, 2013-Ohio-393, ¶ 18, citing *Fanning*, *supra*.

{¶82} As an initial matter, the record must demonstrate some delay that is "presumptively prejudicial" in order to trigger a *Barker* analysis of whether a particular delay is reasonable. Courts have generally found that "a delay approaching one year becomes 'presumptively prejudicial.'" *State v. Winn*, 8th Dist. Cuyahoga No. 98172, 2012-Ohio-5888, ¶ 44, quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), fn 1.

{¶83} In this case, the delay between the mistrial and the retrial was approximately 432 days. The reason for the delay was a combination of scheduling issues, conflicts with other trials being handled by the trial court and Patterson's filing of motions.

{¶84} Before the first trial commenced, Patterson executed a waiver of his speedy trial time through February 28, 2004. *State v. Untied*, 5th Dist. Muskingum No. 00 CA 32, 2001 Ohio App. LEXIS 2788, *13 (June 5, 2001). ("An accused's express written waiver of his statutory rights to a speedy trial as provided in R.C. 2945.71 et seq., if knowingly and voluntarily made, may also constitute a waiver of the coextensive speedy trial rights guaranteed by the United States and Ohio Constitutions."). Patterson posted bail and was released from jail five days later on March 4, 2004. The case was originally set for retrial on April 13, 2004. On March 30, 2004, Patterson filed a motion to dismiss the case against him on double jeopardy grounds. On April 13, 2004, the trial court continued the trial "at the request of the court" until

October 19, 2004, stating in its journal entry that "this is the next available date for all parties." The trial court denied Patterson's motion to dismiss on April 26, 2004.

{¶85} On October 8, 2004, the trial court continued the trial date a second time, until January 26, 2005, "at the request of [the] court," stating in its journal entry that the continuance was necessary because the court was "in trial on a medical malpractice case." On December 30, 2004, the trial court, sua sponte, continued the trial date a third time until to February 23, 2005, stating in its journal entry that it would be "in a capital murder trial on the original [trial] date."

{¶86} On February 9, 2005, Patterson filed a motion to dismiss, claiming that his speedy trial rights had been violated. The trial court denied the motion on February 14, 2005. On February 23, 2005, the previously scheduled trial date was converted into a pretrial conference and the trial was continued a fourth time — this time "at the request of [the] state" — due to the "unavailability of [a] key witness." The trial was continued until April 20, 2005. The second trial commenced as scheduled, 56 days later, on April 20, 2005.

{¶87} Although the periods of delay resulting from motions filed by a defendant are properly charged to the defendant, any delays resulting from "'requests by either the state or the court itself for a continuance are infringements upon the defendant's constitutional right, and, thus, subject to scrutiny; consequently, the grounds for the request must be set forth in a journal entry.'" *State v. Holbert*, 8th Dist. Cuyahoga No. 88016, 2007-Ohio-986, ¶ 25, quoting *State v. Phillips*, 8th Dist. Cuyahoga No. 82886, 2004-Ohio-484, citing *State v. Baker*, 92 Ohio App.3d 516, 530-531, 636 N.E.2d 363 (8th Dist.1993), and *State v. Mincy*, 2 Ohio St.3d 6, 8, 441 N.E.2d 571 (1982). "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*, 48 Ohio St.2d 208, 209, 357 N.E.2d 1095 (1976). As the court explained in *Barker*,

> [D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101.

{¶88} There is nothing in the record that suggests that the continuances granted by the court in this case were unreasonable or that Patterson objected to any of them. There is no evidence that the trial court continued the trial in this case for civil cases not yet commenced or for more recently filed criminal cases and Patterson has not argued that any of the continuances were unnecessary or unreasonable. *See State v. Hill*, 5th Dist. Richland No. 2009-CA-25, 2010-Ohio-3102, ¶ 57-58, citing *State v. Ison*, 5th Dist. Richland No. 2009CA0034, 2009-Ohio-5885, ¶ 41, and *State v. Foster*, 5th Dist. Richland No. 2007CA0031, 2007-Ohio-6626, ¶ 18. The trial court properly issued judgment entries explaining the grounds for each continuance. According to the judgment entries, the cases that prompted the continuance of Patterson's case had commenced trial prior to the date Patterson's case was scheduled to commence. *See Hill* at ¶ 58.

{¶89} Even if we were to determine that the length of the delay was presumptively unreasonable or that the reasons given did not support a finding that all or part or all of the delay was reasonable or necessary, Patterson has not claimed — much less shown — any prejudice due to the delay in commencing the second trial. Whether a defendant has been prejudiced by a delay in trying his case is assessed in light of the interests of the defendant that the speedy trial right was designed to protect. *State v. Laird*, 11th Dist. Portage No. 99-P-0069, 2000 Ohio App. LEXIS 5924, *15 (Dec. 15, 2000), citing *Barker* at 532. The right to a speedy trial is

designed to protect three interests of a defendant — (1) preventing unnecessary, pretrial confinement, (2) lessening the accused's anxiety and concern and (3) minimizing the possible impairment of the defense. *State v. Smith*, 9th Dist. Summit No. 25069, 2010-Ohio-3983, ¶ 13, citing *Barker* at 532. In this case, Patterson was released on bond twenty days after the declaration of mistrial and shortly after his written waiver of his speedy trial rights expired. He remained out of bond until the second trial commenced. Accordingly, the first interest — prevention of unnecessary pretrial incarceration — is entitled to little weight. Likewise, although Patterson may have been subject to concern and anxiety while awaiting the second trial, this is not a case such as *Barker*, in which the defendant was charged with two counts of murder, faced the prospect of a life sentence and was "forced to live 'for over four years under a cloud of suspicion and anxiety.'" Nevertheless, the United States Supreme Court characterized the prejudice to the defendant in that case as "'minimal.'" *See Kraus*, 2013-Ohio-393 at ¶ 27-28, citing *Barker* at 534. Thus, while the anxiety to which Patterson may have been subject during the time between the declaration of mistrial and the commencement of his second trial is a factor, it does not weigh heavily in favor of a finding of prejudice. The most important consideration is whether there was any possible impairment of Patterson's defense as a result of the delay. There is nothing in the record to suggest that any evidence relevant to Patterson's defense was lost or that his defense was otherwise impaired in any way due to the delay in commencing the second trial.

{¶90} Upon consideration of the particular facts and circumstances of this case and the factors set forth in *Barker*, we conclude that the delay between the declaration of mistrial in Patterson's first trial on February 13, 2004, and the commencement of his second trial on April 20, 2005, was constitutionally reasonable and that Patterson's constitutional right to a speedy

trial, therefore, was not violated. Accordingly, Patterson's fifth assignment of error is overruled.

{¶91} The trial court's judgment is affirmed.

It is ordered that appellee recover from 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.

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EILEEN A. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR