

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 25069

Appellee

v.

MARRION P. SMITH

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 03 1065

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 25, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant, Marrion P. Smith, appeals the judgment of the Summit County Court of Common Pleas in which he was convicted of aggravated robbery, having weapons under disability, and retaliation. For the reasons that follow, we affirm.

BACKGROUND

{¶2} On April 18, 2005, a masked man, armed with a gun, robbed Thirsty's Bar & Grill. Smith was indicted for aggravated robbery with a firearm specification, and having weapons under disability in connection with the robbery of Thirsty's. Shortly thereafter, Smith was indicted on six charges unrelated to the bar robbery. The charges stemming from the robbery were severed and tried separately from the six, unrelated charges.

{¶3} In August 2005, a jury was unable to reach a verdict on the charges of aggravated robbery with a firearm specification and having weapons under disability. A mistrial was declared.

{¶4} In November 2005, Smith was tried on the other six charges that were not related to the robbery. A jury found Smith guilty of all charges and the trial court sentenced him to twenty years in prison. Upon the State's motion, the charges that resulted in the mistrial in August 2005 were dismissed in January 2006.

{¶5} Smith appealed his conviction to this Court. *State v. Smith*, 9th Dist. No. 23006, 2007-Ohio-51. In January 2007, we reversed his conviction and remanded to the trial court. *Id.* at ¶30.

{¶6} In October 2007, Smith was convicted in Franklin County for charges that were brought as a result of an incident that occurred in May 2006 while he was being transported from prison to the hospital. In connection with that case, the Franklin County court ordered a competency evaluation. Smith was sentenced to twenty-four years in prison in the Franklin County case.

{¶7} In April 2008, the Summit County Prosecutor re-indicted Smith for the robbery of Thirsty's Bar & Grill. The indictment included aggravated robbery with a firearm specification and having weapons under disability. In light of the Franklin County conviction, the State also included a repeat violent offender specification to the aggravated robbery charge. In addition, the April 2008 indictment included four counts of retaliation as a result of threatening letters Smith sent to Summit County judges and prosecutors. Smith was convicted of all counts and sentenced to twenty-eight years in prison. Smith appealed. Due to an error in the sentencing entry, this Court remanded to the trial court for a new sentencing hearing. *State v. Smith*, 9th Dist. No. 24677, 2009-Ohio-4865, at ¶1.

{¶8} Smith was resentenced on October 19, 2009 to twenty-eight years in prison. He appeals his conviction and sentence, asserting the following errors: (1) the trial court erred in

denying Smith's motion to dismiss the repeat violent offender specification; (2) the trial court erred in denying Smith's motion to sever the charges of aggravated robbery and having weapons under disability from the retaliation charges; (3) the trial court erred in denying Smith's motion to dismiss the aggravated robbery and having weapons under disability charges because his speedy trial rights were violated; (4) the trial court erred in denying Smith's motion for acquittal on the retaliation charges because the State failed to establish an element of the offense, and; (5) the indictment was defective because it failed to charge a predicate offense as to the retaliation charges. We shall rearrange and combine some of the assigned errors for ease of analysis.

SPEEDY TRIAL

{¶9} In his first assignment of error, Smith argues that the repeat violent offender specification should have been dismissed because he was not brought to trial within the statutory time limitation designed to protect his right to a speedy trial. In his third assignment of error, he contends that his speedy trial rights were also violated when the trial court failed to dismiss the charges of aggravated robbery and having weapons under disability. We will address the third assignment of error first.

{¶10} The Ohio Revised Code outlines the time period during which an offender must be brought to trial from the date of arrest in order to preserve the offender's constitutional right to a speedy trial. See R.C. 2945.71 et seq. However, this statutory scheme is not applicable to retrials. *State v. Bigley*, 9th Dist. No. 02CA0017-M, 2002-Ohio-4149, at ¶21, citing *State v. Fanning* (1982), 1 Ohio St.3d 19, 21. Instead, we must determine whether the delay was constitutionally reasonable. *Id.* The Supreme Court of the United States in *Barker v. Wingo* (1972), 407 U.S. 514, noted, "the right to a speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has

been denied.” Id. at 521. The Court rejected two “inflexible” approaches to analyze the right and instead outlined an approach in which the conduct of the defendant and the prosecution are weighed. Id. at 529-530. The Court acknowledged that this approach “necessarily compels courts to approach speedy trial cases on an ad hoc basis.” Id. at 530. The Supreme Court identified some of the factors courts should consider: (1) length of the delay; (2) reason for the delay; (3) circumstances concerning the defendant’s assertion of the right to a speedy trial, and; (4) any prejudice to the defendant. Id.; *State v. O’Brien* (1987), 34 Ohio St.3d 7, 10 (applying the *Barker* factors).

{¶11} In the instant matter, Smith specifically asserts that his speedy trial rights were violated because a mistrial was declared on August 19, 2005, on the aggravated robbery and having weapons under disability charges and the State did not re-indict him on those charges again until April 3, 2008. On January 27, 2006, the trial court granted the State’s motion to dismiss the aggravated robbery and weapons under disability charges, thus, those felony charges were no longer pending against Smith from January 27, 2006 to April 2, 2008. On August 5, 2008, Smith filed a motion to dismiss the charges, thereby asserting his speedy trial rights for the first time.

{¶12} As outlined in our summary of the procedural history of this case, there are several circumstances that explain the almost three-year delay between the mistrial and re-indictment. Following the mistrial, Smith was brought to trial on six other felony charges. A verdict was reached in November 2005 and was subsequently appealed by Smith. In January 2007, this Court reversed Smith’s convictions and remanded to the trial court. In addition, in October 2007, Smith was tried in Franklin County for an assault that occurred while he was being transported between prison and a hospital. As part of that prosecution, the trial court

ordered an evaluation of Smith's competency to stand trial. In light of these events, this is not a case in which the State was aware of Smith's criminal conduct and allowed time to pass prior to indictment in an attempt to deliberately hinder Smith's defense. Instead, the State's delay occurred in the context of Smith pursuing an appeal of his November 2005 conviction, Smith's prosecution in Franklin County, and the evaluation that was undertaken to establish whether Smith was competent to stand trial. In light of the particular circumstances of this case, we conclude that the delay between mistrial and re-indictment was not unreasonable.

{¶13} Furthermore, were we to determine that the length of the delay was unreasonable; Smith has failed to demonstrate prejudice due to delay. The Supreme Court enumerated three interests of a defendant that the right to a speedy trial is designed to protect – preventing unnecessary, pretrial confinement; lessening the suspect's anxiety; and minimizing the possible impairment of the defense. *Barker*, 407 U.S. at 532. Here, Smith was incarcerated on other charges while he awaited retrial on the aggravated robbery and weapons under disability charges that are the subject of this appeal. See *State v. Turner* (1982), 4 Ohio App.3d 305, 307 (no prejudice to the defendant while he was imprisoned on other charges awaiting retrial on reversed convictions). Additionally, Smith has not identified any specific prejudice other than to make the generalized statement that evidence is evanescent and may fade over time. Smith has not demonstrated that particular evidence germane to his defense has been lost due to the passage of time. Prejudice caused by a delay in filing an indictment may not rest on speculation. See *State v. Luck* (1984), 15 Ohio St.3d 150, 154, 157 (holding defendant prejudiced by fifteen-year delay because two key defense witnesses died and specific tapes and transcripts were destroyed).

{¶14} Upon consideration of the particular facts and circumstances of this case and the considerations enunciated in *Barker*, we conclude that Smith’s constitutional right to a speedy trial was not violated between the mistrial and his re-indictment.

{¶15} Smith alleges in his first assignment of error that the repeat violent offender specification should have been dismissed because his right to a speedy trial was violated.

{¶16} “[A] specification is, by its very nature, ancillary to, and completely dependent upon, the existence of the underlying criminal charge or charges to which the specification is attached.” *State v. Evans*, 113 Ohio St.3d 100, 2007-Ohio-861, at ¶15, quoting *State v. Nagel* (1999), 84 Ohio St.3d 280, 286. It is a penalty enhancement, not a separate violation or offense. *Evans* at ¶15. See, also, *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶71 (referring to the repeat violent offender specification as a penalty enhancement). A defendant is classified as a repeat violent offender based on a prior conviction or guilty plea to a first- or second-degree offense of violence or an attempt of an offense of violence. R.C. 2929.01(CC). The repeat violent offender classification is “strictly a sentencing consideration for the court.” *State v. Allen* (1987), 29 Ohio St.3d 53, 55. See, also, R.C. 2929.14(D)(2)(b) (dictating the prison term the trial court shall impose upon the defendant’s conviction of the repeat violent offender specification).

{¶17} In the instant matter, the repeat violent offender specification was dependant upon, and attached to, the underlying charge of aggravated robbery. The specification arose from Smith’s 2007 Franklin County convictions. Because the specification was ancillary to the charges of aggravated robbery and having weapons under disability, Smith does not have a separate right to a speedy trial for the specification. As we have determined that the right to a speedy trial was not violated as to the charges of aggravated robbery and having weapons under

disability, the same holds true concerning the repeat violent offender specification which is ancillary to these charges.

{¶18} The trial court did not err in denying Smith’s motions to dismiss the aggravated robbery and having weapons under disability charges or the attendant repeat violent offender specification. We overrule Smith’s first and third assignments of error.

SEVERANCE

{¶19} In his second assignment of error, Smith complains that the trial court erred in denying his motion to sever the prosecution for the aggravated robbery and weapons under disability charges from the prosecution for the four counts of retaliation.

{¶20} A defendant arguing against the denial of his motion to sever has the burden to demonstrate prejudice and that he or she provided the trial court with sufficient information to balance the defendant’s right to a fair trial with the policies in favor of joinder. *State v. Lott* (1990), 51 Ohio St.3d 160, 163. “Only an actual injustice, and not merely a risk of injustice, is sufficient.” *State v. Groce-Hopson*, 9th Dist. No. 03CA008377, 2004-Ohio-2949, at ¶13. If the defendant moves to sever pursuant to Crim.R. 14, the motion must be renewed during trial when the state rests or at the close of all the evidence. *State v. Hatfield*, 9th Dist. No. 23716, 2008-Ohio-2431, at ¶14. A defendant who fails to do so forfeits the issue on appeal. *Id.* at ¶¶14-15.

{¶21} Before trial, Smith filed his motion to sever the aggravated robbery and weapons under disability charges from the trial of the retaliation charges pursuant to Crim.R. 14. The State responded that the evidence relating to the charges was simple and direct and that evidence related to the retaliation charges was also relevant to the aggravated robbery charge. The trial court ruled that Smith had failed to carry his burden to demonstrate prejudice, and that the State negated any claim of prejudice. At trial, Smith did not renew his motion to sever at the close of

the State's evidence. Smith then rested without presenting witnesses and again did not renew the motion. Accordingly, Smith has forfeited any error related to the denial of his motion to sever; we, therefore, overrule his second assignment of error. *Id.* at ¶15.

RETALIATION

{¶22} In February and March 2006, then again in April 2008, Smith sent letters to two Summit County Common Pleas judges, the Summit County Prosecutor and an assistant Summit County prosecutor. In these letters Smith sent from prison, he graphically described specific acts of violence and sexual acts he intended to commit against the recipients of the letters. He also threatened the lives of the recipients. Smith warned that he would carry out his threats unless his brother was cleared of criminal charges. As a result, the State charged Smith with four counts of retaliation when he was re-indicted in April 2008. In his fourth and fifth assignments of error respectively, Smith asserts that he should not have been convicted for the retaliation charges because the State failed to establish the element of “unlawful threat” and the indictment failed to state the predicate offense for retaliation.

{¶23} Pursuant to R.C. 2921.05(A), “[n]o person, purposely and * * * by unlawful threat of harm to any person or property, shall retaliate against a public servant, * * * or an attorney * * * who was involved in a civil or criminal action or proceeding because the public servant, * * * [or] attorney * * * discharged the duties of the public servant, * * * [or] attorney * * *.” Although in his brief Smith acknowledges that the State produced evidence that the letters sent to the public officials contain “various threats of harm to the recipient should [he] be released from prison[.]” he argues that the State could not establish the existence of an unlawful threat of harm unless it also established that the threat of harm was “immediate[.]” Smith has not cited law for the proposition that the crime of retaliation contains an element of immediacy and our review of

Ohio jurisprudence has not revealed any. Indeed, no such requirement is provided in the retaliation statute. See R.C. 2921.05(A). We see no reason to read a requirement into the statute that is not apparent in its language, thus, Smith's fourth assignment of error is not well taken.

{¶24} In his fifth and final assignment of error, Smith alleges that the indictment charging him with retaliation was defective because the State failed to include a predicate offense that established the alleged unlawful act.

{¶25} Generally, defenses or objections premised on defects in the indictment not made prior to trial are waived; except that the argument that the indictment was defective because it failed to adequately charge an offense may be noticed at any time during the pendency of the case. Crim.R. 12(C)(2); *State v. Honaker*, 9th Dist. No. 09CA009687, 2010-Ohio-2515, at ¶10. "Courts, however, have held that failure to object to an indictment that fails to charge an offense prior to the close of the prosecution's case-in-chief does not result in waiver, but instead allows an appellate court to review the matter for plain error." *Honaker* at ¶10.

{¶26} Smith did not raise any issues with the indictment in any of the motions he filed prior to trial. At the close of the State's case, Smith moved the court for an acquittal of the retaliation charges based on Crim.R. 29. He argued that he could not be convicted of that offense because the State failed to produce sufficient evidence of a predicate offense for retaliation. He did not allege, however, that the indictment charging the retaliation offenses was defective in any way. Thus, our review of Smith's fifth assignment of error is limited to plain error analysis.

{¶27} In order to establish plain error, there must be (1) a deviation from a legal rule; (2) that is obvious, and; (3) that affects the appellant's substantial rights. *State v. Hardges*, 9th Dist. No. 24175, 2008-Ohio-5567, at ¶9. The appellant "bears the burden of demonstrating that a

plain error affected his substantial rights.” *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, at ¶14. Although Smith does not employ plain error analysis in his merit brief, Smith’s argument that the indictment was defective raises a question as to whether there was a deviation from a legal rule that was obvious.

{¶28} An indictment is sufficient to inform the defendant of the crime charged if the language of the indictment tracks the language of the statute the defendant is alleged to have violated. *State v. Landrum* (1990), 53 Ohio St.3d 107, 119. Smith’s indictment for retaliation tracked the language of R.C. 2921.05(A), thus, it was not defective on its face. See *id.* Smith cites *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, for the proposition that an indictment for retaliation requires a predicate offense. However, Smith’s reliance upon *Cress* is misplaced because *Cress* did not consider the sufficiency of an indictment for retaliation under R.C. 2921.05(A), the retaliation statute under which Smith was charged. Rather, in *Cress*, the Supreme Court of Ohio considered whether the State presented sufficient evidence of an unlawful threat of harm to support a conviction for intimidation under R.C. 2921.04(B). *Id.* at ¶45. The State established that Cress had threatened the victim by threatening to reveal incriminating photos of her to potentially compromise custody of her children. See *id.* at ¶48. The Supreme Court determined that the State did not present sufficient evidence to establish the “unlawful threat” element contained in the intimidation statute because the evidence adduced at trial only demonstrated that the acts that Cress had threatened were lawful. See *id.* at ¶45. *Cress* does not stand for the proposition that an indictment for retaliation that does not include a predicate offense is defective. See, also, *State v. Ott*, 11th Dist. No. 2007-P-0093, 2008-Ohio-4049, at ¶26 (stating that *Cress* does not hold that the State must charge a predicate offense in an indictment for retaliation under R.C. 2921.05(A)).

{¶29} Smith has failed to demonstrate that the absence of a predicate offense in an indictment for retaliation is plain error, that is to say, an obvious deviation from a legal rule. See *Hardges* at ¶9. As a result, Smith has not satisfied the first two requirements of the plain error doctrine. See *id* (stating the elements of the plain error doctrine in the conjunctive).

{¶30} Smith has not demonstrated that his convictions for retaliation were improper either because the State failed to establish an essential element of the offense or because his indictment was defective. Thus, we overrule Smith's fourth and fifth assignments of error.

CONCLUSION

{¶31} Upon consideration of the arguments of the parties and the record, we overrule each of Smith's assigned errors. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
BAIRD, J.
CONCUR

(Baird, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to §6(C), Article IV, Constitution.)

APPEARANCES:

DAVID M. WATSON, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.