[Cite as *State v. Phelps*, 2023-Ohio-2808.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO Appellee v. DAVID L. PHELPS Appellant	C.A. No. 22CA011928 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 22CR106598

DECISION AND JOURNAL ENTRY

Dated: August 14, 2023

HENSAL, Presiding Judge.

{¶1} David Phelps has appealed his convictions for felonious assault and obstructing official business in the Lorain County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} C.C. testified that he was outside of a friend's house when Mr. Phelps stabbed him in the back with a "knife sharpening steel[,]" telling C.C. that he did not like liars and that C.C. was "dead[.]" C.C. fled with the weapon still in his back and it was never recovered. The Grand Jury indicted Mr. Phelps for two counts of felonious assault and one count of obstructing official business. After Mr. Phelps waived his right to a jury trial, the court found him guilty of the offenses and sentenced him to five to seven and one-half years imprisonment. Mr. Phelps has appealed, assigning two errors.

II.

ASSIGNMENT OF ERROR I

MR. PHELPS WAS PREJUDICED AND DENIED HIS CONSTITUTIONAL AND STATUTORY RIGHT TO SPEEDY TRIAL.

{¶3} Mr. Phelps argues that his right to a speedy trial was violated because he was not brought to trial within 270 days of his arrest, as required under Revised Code Section 2945.71(C)(2). "When reviewing an assignment of error raising a violation of a criminal defendant's right to a speedy trial, this court reviews questions of law de novo." *State v. Bennett*, 9th Dist. Summit No. 21121, 2003-Ohio-238, ¶ 5. We must accept the factual findings of the trial court, however, "if they are supported by some competent, credible evidence." *Id*.

{¶4} Section 2945.71(C)(2) provides that a person "against whom a charge of a felony is pending" shall be brought to trial within 270 days "after the person's arrest." If the defendant is held in jail during the pretrial period, each day counts as three for speedy-trial purposes. R.C. 2945.71(E). "The triple-count provision does not apply," however, "if the defendant is being held in custody pursuant to other charges." *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶ 7. In addition, acknowledging that "some degree of flexibility is necessary," the General Assembly has "allowed for extensions of the time limits for bringing an accused to trial in certain circumstances." *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, ¶ 24. "Accordingly, R.C. 2945.72 contains an exhaustive list of events and circumstances that extend the time within which a defendant must be brought to trial." *Id*. One of those is "[a]ny period of delay necessitated by reason of a plea * * *, motion, proceeding, or action made or instituted by the accused[.]" R.C. 2945.72(E). Another is "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]" R.C. 2945.72(H).

{¶5} Mr. Phelps was arrested on April 24 and remained in custody until his trial. The State argues that 16 of the days are not subject to the triple-count provision because he was also being held on other cases on those days. It is not necessary to resolve that issue. Even assuming all the days count as three, the State would have had until July 23 to try Mr. Phelps. On July 11, the trial court scheduled the trial for August 9, "by agreement of the parties[.]" The Ohio Supreme Court has recognized that a "trial court has the discretion to extend the time limits of R.C. 2945.71 where counsel for the accused voluntarily agrees to a trial date beyond the statutory time limits." *State v. McRae*, 55 Ohio St.2d 149, 152 (1978), citing *State v. Davis*, 46 Ohio St.2d 444, 449 (1976). The court's exercise of that discretion qualifies as a "continuance granted other than upon the accused's own motion" under Section 2945.72(H) and, "as long as that continuance is reasonable, it extends the time limits of R.C. 2945.71 and does not deny an accused the right to a speedy trial." *Id*., quoting R.C. 2945.72(H). Accordingly, because Mr. Phelps agreed to the August 9 trial date, there was no violation of his speedy trial rights under Section 2945.71.

{¶6} The trial had to be continued from August 9 because Mr. Phelps's counsel was ill. Mr. Phelps conceded at trial that his counsel's illness was a legitimate tolling event. The court reset the trial for August 18, and it went forward that day. Upon review of the record, we conclude that Mr. Phelps has not established that he was denied the right to a speedy trial. His first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> MR. PHELP'S CONVICTION IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶7} In his second assignment of error, Mr. Phelps argues that his felonious assault conviction is not supported by sufficient evidence. Whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380,

386 (1997). In carrying out this review, our "function * * * is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "The relevant inquiry is 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." *Id*.

{¶8} Section 2903.11(A) provides that no person shall knowingly "(1) [c]ause serious physical harm to another * * * [or] (2) [c]ause * * * physical harm to another * * * by means of a deadly weapon * * *." The court found Mr. Phelps guilty of violating both subsections, and the State elected to have him sentenced for violating subsection (2). Mr. Phelps argues that there is insufficient evidence to establish that a deadly weapon was used in the attack, noting that no one testified that they saw him holding a weapon and no weapon was ever found.

{¶9} C.C. testified that Mr. Phelps stabbed him in the right upper torso with what he came "to find out was a knife steel, a knife sharpening steel." The owner of the house where the attack occurred testified that she was sitting on the porch when she heard C.C. accuse Mr. Phelps of stabbing him and saw a knife in his back as he ran around the side of the house. The homeowner's son also wrote in his statement to the police that he saw a knife sticking out of C.C.'s shoulder.

{¶10} Under Section 2903.11(E)(1), a "[d]eadly weapon" has the same meaning as in Section 2923.11(A), which is "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." R.C. 2923.11(A). This Court has recognized that "[a] knife constitutes a 'deadly weapon' if possessed, carried, or used as a weapon." *State v. Horne*, 9th Dist. Summit No. 24348, 2009-Ohio-

841, ¶ 10, quoting R.C. 2923.11(A). Here, whether the item with which Mr. Phelps stabbed C.C. was a knife or some sort of sharpening device, it punctured and collapsed C.C.'s lung, requiring him to spend four days in the hospital. We, therefore, conclude that there was sufficient evidence to support the court's finding that Mr. Phelps used a deadly weapon during the attack. *See State v. Norris*, 9th Dist. Summit No. 27630, 2016-Ohio-1526, ¶ 13 (noting that a screwdriver may be considered a deadly weapon).

{¶11} Regarding Mr. Phelps's arguments that no one testified that they saw him holding a weapon and no weapon was ever found, neither of those are required to support his conviction. C.C. testified that Mr. Phelps stabbed him in the back. The homeowner and her son shortly thereafter saw an object protruding from C.C.'s back or shoulder. Viewed in a light most favorable to the State, we conclude that there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Phelps caused physical harm to C.C. by means of a deadly weapon. Mr. Phelps's second assignment of error is overruled.

III.

{¶12} Mr. Phelps's assignments of error are overruled. The judgment of the Lorain 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 Lorain, 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(C). 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.

JENNIFER HENSAL
FOR THE COURT

CARR, J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

DENISE G. WILMS, Attorney at Law, for Appellant.

J.D. TOMLINSON, Prosecuting Attorney, and C. RICHLEY RALEY, JR., Assistant Prosecuting Attorney, for Appellee.