[Cite as *State v. Canty*, 2009-Ohio-6161.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	CASE NO. 08-MA-156
	)	
JOHN CANTY,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County Case No. 07CR786
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Attorney Dennis Day Lager 1025 Chapel Ridge Street, NE Canton, Ohio 44714

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: November 18, 2009

[Cite as *State v. Canty*, 2009-Ohio-6161.]
DONOFRIO, J.

{¶1} Defendant-appellant, John Canty, appeals from a Mahoning County Common Pleas Court judgment convicting him of having weapons while under disability, improperly handling a firearm in a motor vehicle, and kidnapping, following a jury trial, and the resulting sentence.

{¶2} Appellant is married to Chalise Gibson Canty. Chalise has an admitted drug problem. As a result of her drug problem, Chalise sometimes leaves her home with appellant for days at a time to go out on drug binges.

{¶3} On June 8, 2007, appellant decided to go look for Chalise, who had not been home for some time. He solicited a ride from his friend, Mike Bara, to take him from his home in Warren to Youngstown to look for Chalise. Appellant learned that Chalise was at the home of Arthur Walters. Walters's home is a known drug house. Appellant was familiar with Walters and his drug house through Chalise.

{¶4} Upon arriving at Walters's house, Bara stayed in the driveway while appellant went up to the house. He entered the kitchen door and saw Chalise in the kitchen. Appellant told Chalise that it was time to come home. Chalise, who was high on crack, resisted. Appellant and Chalise began to argue. Appellant then dragged Chalise out to Bara's car. Chalise was screaming. Appellant eventually got Chalise into Bara's car.

{¶5} Appellant had a gun in his hand as he exited Walters's house with Chalise. He claimed that he saw the gun on a table in Walters's house and picked it up so that no one would use it against him.

{¶6} Once appellant got Chalise into the car, Bara began to drive them home. He did not make it very far when Youngstown Police Officer Sonia Wilson stopped the vehicle. She had been dispatched based on a 911 call where the caller described seeing a man with a gun jumping on a girl on North Avenue and dragging her across the ground.

{¶7} Before stopping Bara's car, Officer Wilson noticed Chalise's legs dangling out of the passenger side window. When Bara stopped his car, Chalise ran out yelling, "he's got a gun." Chalise was hysterical, disheveled, and had scrapes on

her. Officer Wilson, who was joined by Officer Colleen Villio, handcuffed appellant and Bara and asked if they had a gun in the car. They both denied having a gun. A search of the car turned up a gun in the backseat, which appellant later admitted was the gun he allegedly took from Walters's house. Chalise was taken to the hospital. Appellant was arrested.

{¶8} On July 12, 2007, a grand jury indicted appellant on one count of having weapons while under disability, a third-degree felony in violation of R.C. 2923.13(A)(3)(B), and one count of improperly handling a firearm in a motor vehicle, a fourth-degree felony in violation of R.C. 2923.16(B)(I)(2). On December 20, 2007, a grand jury issued a superseding indictment. In addition to the two original counts, it added one count of aggravated burglary, a first-degree felony in violation of R.C. 2911.11(A)(2)(B), one count of felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2)(D), one count of kidnapping, a first-degree felony in violation of R.C. 2905.01(B)(1)(C), and one count of domestic violence, a fourth-degree felony in violation of R.C. 2919.25(A)(D), with a firearm specification in violation of R.C. 2941.145(A) on the four new counts.

{¶9} Appellant filed a motion to dismiss the four new counts in the superseding indictment alleging a violation of his speedy trial rights. Appellant argued that the charges in the second indictment arose from the same facts as the charges in the first indictment and that the state had knowledge of these facts at the time of the first indictment. Therefore, he asserted that his speedy trial time for the additional charges began to run with his original arrest. The court held a hearing on the motion where it heard evidence and subsequently overruled appellant's motion finding that at the time of the original indictment, although the state had information that appellant committed other crimes, it had no evidence of such.

{¶10} The case proceeded to a jury trial. The jury found appellant guilty of having a weapon while under disability, improperly handling a firearm in a motor vehicle, and kidnapping. It found him not guilty of aggravated burglary, felonious assault, domestic violence, and the firearm specifications.

{¶11} The trial court later conducted a sentencing hearing. It sentenced appellant to five years for having a weapon while under disability, 18 months for improperly handling a firearm in a motor vehicle, and four years for kidnapping. The court ordered appellant to serve the sentences consecutively for a total of ten years and six months in prison.

{¶12} Appellant filed a timely notice of appeal on July 29, 2008.

{¶13} Appellant raises five assignments of error. His first and second assignments of error share a common factual basis. Therefore, we will address them together. They state:

{¶14} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING DEFENDANT-APPELLANT'S CRIMINAL RULE 29 MOTION FOR DIRECTED VERDICT OF ACQUITTAL WHEN THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIME OF KIDNAPPING, IN VIOLATION OF R.C. § 2905.01(B)(1)(C), BY PROOF BEYOND A REASONABLE DOUBT."

{¶15} "THE VERDICT OF THE JURY IN THE CASE SUB JUDICE, FINDING DEFENDANT-APPELLANT GUILTY OF THE CRIME OF KIDNAPPING, IN VIOLATION OF R.C. § 2905.01(B)(1)(C), IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW."

{¶16} Appellant argues that the state failed to present any evidence that he created a "substantial risk of serious physical harm" to Chalise, which is one of the elements of the kidnapping charge.

{¶17} Crim.R. 29 provides for the defendant to make a motion for acquittal if the evidence is insufficient to sustain a conviction. An appellate court applies the same test when reviewing a challenge based on a denial of a motion for acquittal as when reviewing a challenge based upon on the sufficiency of the evidence. *State v. Thompson* (1998), 127 Ohio App.3d 511, 525.

{¶18} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a

matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113.

{¶19} The jury convicted appellant of kidnapping in violation of R.C. 2905.01(B)(1), which provides;

{¶20} "(B) No person, by force, threat, or deception, * * * shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim * * *:

{¶21} "(1) Remove another from the place where the other person is found."

{¶22} A "substantial risk" is "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." R.C. 2901.01(A)(8). And "serious physical harm" includes such things as physical harm that carries a substantial risk of death, that involves incapacity, that involves disfigurement, or that involves acute pain resulting in substantial suffering. R.C. 2901.01(A)(5).

{¶23} The jury also convicted appellant of having weapons while under disability and improperly handling a firearm in a motor vehicle. But appellant does not challenge these convictions based on the evidence. Thus, this analysis will only examine appellant's kidnapping conviction. To determine whether the state met all of the kidnapping elements, we must look at the state's evidence.

{¶24} Bara testified first. He testified that he picked appellant up on the morning in question and drove him to a house in Youngstown. (Tr. 159). Bara stated that he stayed outside. (Tr. 162). He did not notice appellant go into the house but did see appellant approaching the car with Chalise. (Tr. 162). Bara stated that appellant and Chalise were arguing. (Tr. 163). He stated that appellant was trying to

drag Chalise into the car. (Tr. 163). At the time, Bara stated, Chalise was screaming. (Tr. 164). He stated that Chalise did not want to get into the car. (Tr. 165). Eventually, Bara stated, appellant got Chalise into the car and told him to leave. (Tr. 165). He stated that they did not make it very far, however, because the police stopped them. (Tr. 166).

{¶25} Bara testified that he first noticed appellant had a gun when appellant was coming up to the car with Chalise and that appellant was "messing around with it." (Tr. 164, 170). He testified that he told police that the gun belonged to appellant. (Tr. 167). Bara stated he told the police this because he knew the gun did not belong to him. (Tr. 167).

{¶26} Officer Wilson testified that she responded to a 911 call that morning. (Tr. 193). The caller stated that a black man with a gun was beating a black female. (Tr. 193). She testified that she saw a bluish-gray station wagon, which matched the description from the 911 call, pulling away from a house on North Avenue. (Tr. 194). Prior to stopping the car, Officer Wilson stated that she saw a woman's legs "flopping" out of the passenger's side window as the car was moving. (Tr. 195, 196).

{¶27} Officer Wilson stopped the car. (Tr. 195). She stated that a woman, later indentified as Chalise, ran out of the car hysterical and saying "he's got a gun." (Tr. 197). Officer Wilson described Chalise as having messy hair, sweating, and crying. (Tr. 197).

{¶28} Officer Wilson stated that she asked appellant and Bara if there was a gun in the car and they both denied it. (Tr. 202-203). However, upon searching the car, she found a gun behind the driver's seat in plain view. (Tr. 204). She stated that the magazine contained rounds inside but that the gun was not chambered. (Tr. 208).

{¶29} Officer Villio was the other officer on the scene. She testified that Chalise had scrapes on her, she was disheveled, and she was crying. (Tr. 177). She also corroborated Officer's Wilson's testimony regarding the gun. (Tr. 179-81).

And Officer Wilson stated that they called an ambulance for Chalise because she was highly upset and scraped up. (Tr. 182).

{¶30} Shelly Van Meter is a 911 supervisor. She stated that she made a copy of the 911 call made regarding the incident at hand. (Tr. 224). The prosecutor then played the tape recording of the call for the jury.

{¶31} In the 911 call, the caller stated that a black man was beating a black woman with a gun on North Avenue.

{¶32} Walters testified next. He first explained that he had a gun case pending and that he was testifying in cooperation with the state in exchange for consideration in his case. (Tr. 229-30). Walters testified that Chalise was at his house on the morning in question. (Tr. 231). He stated that he was high from drinking wine that day but was very cognizant of what was going on. (Tr. 235). He stated that appellant showed up at his house. (Tr. 231-32). At the time, Walters stated that he was in the hallway. (Tr. 233). He heard his screen door open. (Tr. 233). Then he heard someone yell that there was a man there with a gun. (Tr. 233). He stated that he went into the kitchen and saw appellant struggling with Chalise and carrying her out of the house to the driveway. (Tr. 233). Walters stated that appellant had Chalise by the hair and was pulling her out of the house while she was screaming. (Tr. 234). Walters stated that appellant had a gun in his hand and that he hit Chalise several times in the face with the gun. (Tr. 237).

{¶33} Walters testified that once appellant got Chalise outside into the driveway, appellant pointed the gun at him and told him to stay back. (Tr. 238-39). He stated that Chalise was screaming and telling appellant to stop. (Tr. 240). However, appellant put her in the car and left. (Tr. 239).

{¶34} Detective Michael Kawa testified next. He testified as to appellant's prior criminal record. (Tr. 253-54). He also testified that the gun appellant had in his possession was loaded with six live rounds. (Tr. 256).

{¶35} Officer Robert Mauldin, a crime lab technician, testified that the gun in question was in good working condition. (Tr. 269).

{¶36} Plaintiff-appellee, the State of Ohio, then rested its case.

{¶37} The state clearly presented evidence that appellant, by use of force, removed Chalise from Walters's home. Both Bara and Walters testified that appellant dragged Chalise out of the house and forced her into Bara's car. The only question is whether the state presented evidence that the circumstances under which appellant forcefully removed Chalise from Walters's home created a "substantial risk of serious physical harm" to her.

{¶38} Walters and Bara testified that appellant dragged Chalise from Walters's house by her hair while she was screaming and resisting. The two clearly struggled for some time before appellant managed to force Chalise into Bara's car. Just moments after leaving Walters's house, police officers described Chalise as scraped, disheveled, and hysterical. During this incident, appellant had a loaded gun in his possession.

{¶39} Even though a bullet was not chambered in the gun, because the gun contained six live rounds of ammunition, a strong possibility existed that appellant could accidentally or purposely discharge the gun, causing serious physical harm to Chalise. Other courts have found that the possession of a loaded firearm can play a part in creating a substantial risk of serious physical harm when coupled with other factors. See *State v. Lewis*, 10th Dist. No. 04AP-1112, 2005-Ohio-6955; *State v. Hawkins* (Dec. 29, 1977), 8th Dist. No. 36663.

{¶40} Furthermore, given Bara's testimony that appellant was "messing around" with the gun as he was struggling to get Chalise to the car, it seems even more likely that he could have discharged it.

{¶41} The fact that appellant had a loaded firearm in his hand that he was "messing around" with, combined with numerous other facts could lead a reasonable juror to believe that appellant created a substantial risk of serious physical harm to Chalise. In addition to appellant holding a loaded firearm in his hand, we also have the facts that the struggle took place in and outside of a crack house where others involved with drugs were present, Chalise was high and fighting with appellant, and

the struggle between appellant and Chalise was intense. Thus, viewing this evidence in the light most favorable to the state, as we are required to do, the kidnapping elements were met.

{¶42} Appellant further argues that his kidnapping conviction is against the weight of the evidence. He points out that the jury found him not guilty of domestic violence. He argues that the element of physical harm is contained in both domestic violence and kidnapping and the causation of it in one offense is closely related to the creation of it in the other. Appellant contends that it is contradictory to suggest that a defendant could create conditions allowing for physical harm while at the same time not attempting to cause physical harm.

{¶43} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other.'" Id. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. Id. at 390.

{¶44} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶45} In examining appellant's manifest weight challenge, we must consider appellant's evidence in addition to the state's evidence discussed above. Appellant presented two witnesses in his defense: Chalise and himself.

{¶46} Chalise testified that she uses crack cocaine. (Tr. 281-82). She stated that her drug use has caused problems in her marriage with appellant. (Tr. 282). She stated that she sometimes leaves home, goes out on the streets and gets high,

and does not come home for five or more days at a time. (Tr. 282). Chalise stated that in order to pay for her drugs she prostitutes herself and sells things out of her home. (Tr. 283). She stated she does this without appellant's consent. (Tr. 283-84). Chalise testified that she has called the police on appellant on several occasions because she wanted to get high and appellant would not let her. (Tr. 284). She also testified that appellant has come to Youngstown seven or eight times to pick her up and bring her home when she has been high. (Tr. 284-85).

{¶47} Chalise testified that on the day in question she had been at Walters's house for two or three days getting high. (Tr. 286-87). She stated that appellant did not know where she was. (Tr. 286-87). She stated that she has a sex-for-drugs arrangement at Walters's house. (Tr. 286-87). Chalise stated that when appellant showed up at Walters's house, she was "very high." (Tr. 287-88). However, she stated that she had a clear recollection of the events of that day. (Tr. 287). She stated that in addition to herself and Walters, three women and three men were present at Walters's house. (Tr. 288). She also stated that Walters owns a gun. (Tr. 288).

{¶48} Chalise testified that when appellant showed up at Walters's house, she had been gone for eight days. (Tr. 289). She stated that appellant told her to come home and that she told him she wanted to buy her drugs first. (Tr. 289). Chalise stated that appellant grabbed her and whispered to her to come home, but she was not ready. (Tr. 290). She stated that she made a scene because she was not ready to leave. (Tr. 290). Chalise testified that appellant was not really trying to hurt her. (Tr. 290). She stated that when she gets high and does not want to go home, she just says anything in order to get away from appellant. (Tr. 291).

{¶49} In a statement she gave to police right after the incident occurred, Chalise stated that appellant came into the house with a gun, dragged her out to the car, and held her down in the car. (Tr. 295). On cross-examination, Chalise stated this statement she wrote for the police was a lie. (Tr. 294). She also stated that she was coming down off of her crack high and could have said anything. (Tr. 298).

However, Chalise admitted that she had been in jail for two days and had not done drugs in jail. (Tr. 297-98, 300). Furthermore, Chalise admitted that she had just used crack the day before she took the witness stand. (Tr. 301-302).

{¶50} Appellant was the final witness to testify. He testified that Chalise has a habit of lying and stealing to support her drug habit. (Tr. 326). He stated that Chalise would often go to Youngstown to buy cocaine and he would pick her up. (Tr. 326). Appellant testified that on the day in question, Chalise had been gone for 30 days or more. (Tr. 327).

{¶51} Appellant testified that on June 8, 2007, he decided to go look for Chalise. (Tr. 329). He stated that he called Bara for a ride to Youngstown. (Tr. 329). Upon learning about Chalise's whereabouts, appellant stated that he headed to Walters's house, which he knew to be a crack house. (Tr. 330). He stated that he went up to the door and saw Chalise sitting at the kitchen table with a drug dealer throwing crack on the table to her. (Tr. 330). Appellant stated that he asked Chalise to come home. (Tr. 332). At first, he stated that she agreed and started walking back to the car with him. (Tr. 333). But then, appellant stated, Chalise fell to the ground and started screaming and making a scene. (Tr. 333). Appellant stated that Walters never came outside. (Tr. 333).

{¶52} As to the gun, appellant testified that he saw a gun sitting on the table in the house. (Tr. 334). He stated that he picked it up because Walters was coming towards it as if he was going to pick it up. (Tr. 334). Appellant stated that he took the gun because he "didn't want no trouble with the drug dealer or [Walters]." (Tr. 334).

{¶53} Appellant testified that he, Chalise, and Bara all got in the front seat of the car. (Tr. 335). He stated that Chalise was a "little hysterical" because she did not get any crack. (Tr. 335). Appellant stated that he put the gun in the backseat. (Tr. 335). He admitted that he told the police that there was no gun in the car. (Tr. 335). When asked why he lied, appellant stated he was scared and didn't think the police would search the car. (Tr. 336).

{¶54} The jury's verdict was supported by the weight of the evidence. In addition to the testimony discussed above, we also have testimony regarding Chalise's statement to police. In that statement, she told police that appellant entered Walters's house with a gun and forced her to leave. Although Chalise testified that she lied when she gave this statement, this was for the jury to determine. Furthermore, even appellant and Chalise testified that Chalise resisted appellant's attempts to get her into the car and that she did not want to leave Walters's house.

{¶55} Appellant's and Chalise's testimony made the struggle between them appear less intense than the other witnesses testified. But the jury must not have found Chalise's and appellant's testimony credible on this point. This could be for several reasons relating to their credibility. First, Chalise said that when appellant came to get her, she had been gone for eight days. However, appellant stated that Chalise had been gone for a month or more. Additionally, Chalise testified that she lied to police when she gave them her statement. And Chalise stated that she had just used crack the day before she testified. Furthermore, appellant admitted lying to police about the gun in the car. All of these factors could likely lessen Chalise's and appellant's credibility in the jurors' eyes.

{¶56} Appellant further argues that because the jury found him not guilty of domestic violence, it had to also find him not guilty of kidnapping. However, a close reading of the statutes indicates otherwise.

{¶57} Appellant was charged with domestic violence in violation of R.C. 2919.25(A), which provides: "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶58} In acquitting appellant on the domestic violence charge, the jury must have found that appellant did not knowingly cause or attempt to cause physical harm to his wife, Chalise. In convicting appellant of kidnapping, the jury must have found that appellant, by force, threat, or deception, knowingly removed Chalise from Walters's house under circumstances that created a substantial risk of serious

physical harm to her. While appellant must have acted knowingly in removing Chalise from Walters's house, he did not have to knowingly create a substantial risk of serious physical harm to her. Appellant could have recklessly or negligently created that substantial risk to Chalise in order for the jury to convict him of kidnapping. In contrast, in order to convict appellant of domestic violence, the jury would have had to have found that appellant knowingly caused or attempted to cause physical harm to Chalise. Thus, the mens rea differs for the two crimes. Consequently, the jury's verdicts were not contradictory as appellant suggests.

{¶59} For all of the reasons set forth, appellant's kidnapping conviction was supported by both the sufficiency and the weight of the evidence. Accordingly, appellant's first and second assignments of error are without merit.

{¶60} Appellant's third assignment of error states:

{¶61} "THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR BY OVERRULING DEFENDANT-APPELLANT'S OBJECTION TO THE PLAYING AND ADMISSION OF A 911 AUDIO TAPE IN VIOLATION OF DEFENDANT-APPELLANT'S RIGHT TO CONFRONTATION OF WITNESSES PURSUANT TO THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, § 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶62} In his reply brief, appellant withdraws this assignment of error. He states that he considered the authority of *Davis v. Washington* (2006), 547 U.S. 813, 821, 126 S.Ct. 2266, as cited in the state's brief, where the Supreme Court held that statements made for the primary purpose of assisting an on-going emergency are non-testimonial and are admissible evidence, not in violation of the confrontation clause. Appellant agrees that *Davis* is dispositive and withdraws his third assignment of error from this court's consideration.

{¶63} Appellant's fourth assignment of error states:

{¶64} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HIS MOTION TO DISMISS THE SUPERCEDING

INDICTMENT CONTAINING THE CHARGE OF KIDNAPPING ON THE GROUND THAT HIS RIGHT TO A SPEEDY TRIAL ON THAT INDICTMENT HAD BEEN VIOLATED."

{¶65} Appellant argues that his speedy trial rights were violated when the court denied his motion to dismiss the superseding indictment. Appellant argues that the joint motion for a continuance made on August 29, 2007, only continued the case until September 20, 2007, as noted in the court's August 30, 2007 judgment entry. Therefore, he argues that the court erred in its judgment entry denying his speedy trial motion by stating that the joint continuance lasted from August 29 until December 17, 2007.

{¶66} Next, appellant argues that the court had no basis for reasoning that because the state did not have *evidence* of the other crimes when it first indicted him, it did not have to indict him at that time even though it had *knowledge* of those crimes. He argues that there is no pre-condition that the state must have sufficient evidence to charge additional crimes arising from the same facts of an original charge. Appellant further argues that under the trial court's reasoning, the state would have a never-ending speedy trial timetable based upon whenever it deemed that it had sufficient evidence to charge a crime.

{¶67} In *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, the defendant was first arrested and charged with illegal conveyance of weapons or prohibited items onto the ground of a detention facility. He spent one day in a jail. The state dismissed the case without prejudice. The defendant was then charged with conspiracy in addition to the same charge from the first case. The defendant requested discovery, which tolled his speedy trial clock for 19 days. He then filed a motion for a continuance and waiver of speedy trial during the continuance, which the trial court granted. The state then dismissed this second case without prejudice. Two months later, the defendant was charged with two counts of trafficking in drugs along with conspiracy, all from the same set of facts as the first two indictments.

{¶68} The defendant later filed a motion to dismiss the charges alleging a violation of his speedy trial rights. The trial court determined that 301 days had elapsed since the defendant's original arrest in the first case and, therefore, dismissed the charges. The trial court relied on *State v. Adams* (1989), 43 Ohio St.3d 67, at the syllabus which held that "[w]hen an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver." The court of appeals affirmed.

{¶69} On the state's appeal to the Ohio Supreme Court, it argued that the defense delays from the second case resulted in the statutory tolling of time, and *Adams*, which involved the waiver of time, did not apply.

{¶70} The Court first noted that because the charges in all three cases arose from the same underlying circumstances, the speedy trial time dated back to the time when the defendant was originally charged. Id. at ¶11. The Court pointed out that the only issue before it was whether to include the delays resulting from the defendant's motions filed in the second case in calculating his speedy trial time. Id. at ¶12.

{¶71} The Court discussed *Adams*:

{¶72} "The issue before us in *Adams* was as follows: 'When an accused waives the right to a speedy trial as to an initial charge, can this waiver apply to a subsequently filed charge which arises out of the same facts as the former charge, when the later charge is brought after a *nolle prosequi* is entered as to the first charge?' 43 Ohio St.3d at 68, 538 N.E.2d 1025. The *Adams* court acknowledged that a criminal defendant's 'waiver must be done knowingly, voluntarily and intelligently.' Id. at 69, 538 N.E.2d 1025. 'For a waiver to be entered into knowingly, it is elementary that the defendant understand the nature of the charges against him, as well as know exactly what is being waived and the extent of the waiver.' Id. At the time Adams executed the waivers as to his original charge, he was unaware that they would apply to any subsequent charges that arose out of the same facts. In addition,

the subsequent charge was different and could involve different defenses. Therefore, at the time of the waivers, Adams was unable to make a knowing and intelligent waiver as to the second charges. *Adams* held that the waivers did not apply to extend the speedy-trial time as to the subsequent charge." Id. at ¶15.

{¶73} The Court then recognized there is a distinction between a speedy-trial waiver and the statutory speedy trial tolling provisions that affect speedy trial calculations in different ways. Id. at ¶16. It noted that a waiver is an intentional relinquishment of a known right. Id. at ¶17, citing *State v. Sarkozy,* 117 Ohio St.3d 86, 2008-Ohio-509, ¶18; *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, ¶31. But R.C. 2945.72, the Court stated, provides circumstances that extend or toll the time within which an accused must be brought to trial. Id. These circumstances do not involve an intentional relinquishment of the fundamental right. Id.

{¶74} The Court noted that the defendant brought up an issue because his motion to continue also contained waiver language. Id. at ¶22. The Court pointed out that there was no speedy trial waiver in open court. Id. And the Court concluded that the tolling provisions of R.C. 2945.72 automatically apply regardless of whether the defendant also waived time. Id.

{¶75} The Court then held: "In calculating the time within which a criminal defendant must be brought to trial under R.C. 2945.71, periods of delay resulting from motions filed by the defendant in a previous case also apply in a subsequent case in which there are different charges based on the same underlying facts and circumstances of the previous case." Id. at the syllabus.

{¶76} Consequently, the Court reversed the judgment of the court of appeals and remanded the case so that the trial court could re-calculate the defendant's speedy trial time consistent with the Court's opinion.

{¶77} Thus, *Blackburn* has left us with the following rules of speedy trial calculation: (1) When a defendant intentionally waives his right to speedy trial in one case, the waiver does not apply in a subsequent case based on the same facts and circumstances as the first case; (2) When a defendant files a motion in one case that

statutorily tolls the speedy trial time, this statutory tolling does apply in a subsequent case based on the same facts and circumstances; and (3) The tolling provisions of R.C. 2945.72 automatically apply regardless of whether the defendant also waives time. We will apply these rules in analyzing appellant's speedy trial argument. Every person who is charged with an offense for which he may be deprived of his liberty or property is entitled to the fundamental right of a speedy trial. *State v. Dunlap,* 7th Dist. No. 01-CA-124, 2002-Ohio-3178, at ¶10. This is so because the right to speedy trial "'is premised upon the reality that fundamental unfairness is likely in overlong prosecutions.'" *State v. Anderson,* 7th Dist. No. 02-CO-30, 2003-Ohio-2557, at ¶13, quoting *Dickey v. Florida* (1970), 398 U.S. 30, 54, 90 S.Ct. 1564.

{¶79} Pursuant to R.C. 2945.71(C)(2), the state must bring a person charged with a felony to trial within 270 days after his arrest. If the accused is held in jail in lieu of bail on the pending charge, then each day he is held in jail counts as three days. R.C. 2945.71(E). This is known as the "triple-count" provision.

{¶80} The time for speedy trial begins to run when an accused is arrested; however, the actual day of the arrest is not counted. *State v. Szorady,* 9th Dist. No. 02-CA-008159, 2003-Ohio-2716, at ¶12. Appellant was arrested on June 8, 2007. Thus, his speedy trial time began to run on June 9, 2007.

{¶81} Although not entirely clear from the record, appellant states in his brief that he was given an emergency release from the Mahoning County Jail on June 13, 2007, due to overcrowding. (Appellant's brief p. 20). At this time 15 days had run on his speedy trial clock (5 days x 3).

{¶82} Appellant was indicted on July 12, 2007, on the two weapons charges.

{¶83} On August 29, 2007, appellant filed a waiver of speedy trial. On that same day, appellant and the state also filed a joint motion to continue, which the court granted. Joint motions for continuance toll a defendant's speedy trial time because they can be attributed to both parties. *State v. Brown,* 7th Dist. No. 03-MA-32, 2005-Ohio-2939, at ¶44. The court reset the trial for September 20, 2007. At this time, 92 days had elapsed on appellant's speedy trial clock. (Per *Blackburn*, this joint

continuance will also apply to the additional charges, including kidnapping, that the state will file. However, the speedy trial waiver will not).

{¶84} Appellee contends that the joint continuance tolled appellant's speedy trial clock until an agreed December 17, 2007 trial date. However, there is no support for this contention in the record. Thus, we will only count the joint continuance as tolling the period from August 29, 2007 until September 20, 2007, which the court set out in its judgment entry granting the continuance.

{¶85} The next item in the record is another waiver of speedy trial by defendant, filed on October 5, 2007. (Again, per *Blackburn*, this waiver will not apply to the later charges),

{¶86} Appellant served an 80-day sentence in the Trumbull County Jail on an unrelated charge from November 8, 2007 to January 27, 2008. (Appellant's brief p. 20). Appellant is not entitled to the triple-count provision for this time. That is because the triple-count provision only applies to those defendants held in jail in lieu of bail solely on those pending charges. *State v. Dunkins* (1983), 10 Ohio App.3d 72, 74-75.

{¶87} On December 13, 2007, the court filed a judgment entry and warrant for removal to have the sheriff transport appellant to court for his December 14 pre-trial hearing.

{¶88} On December 17, 2007, the state filed a motion to continue the December 17, 2007 trial date. It is unclear when the court set this trial date because this is the first mention of it in the record. In its motion, the state asserted that a continuance was necessary because the prosecutor was only recently able to speak to Chalise, a material witness. It stated that it could not previously locate Chalise, but that she was recently arrested on a bench warrant and provided information that would result in a superseding indictment.

{¶89} On December 20, 2007, the trial court granted the state's motion and continued the trial until March 24, 2008, with a March 3 pretrial date. By this time, 184 days had elapsed on appellant's speedy trial clock. We reach this calculation by

using the tolling for the joint continuance from August 29, 2007 (the day of the motion for the joint continuance) to September 20, 2007 (the day the court first continued the trial to). Additionally, we did not count appellant's speedy trial waivers because they do not apply to the later-filed charges.

{¶90} The December 20, 2007 continuance tolled appellant's speedy trial clock until March 24, 2008. The period of any reasonable continuance granted other than upon the accused's own motion tolls the speedy trial clock. R.C. 2945.72(H). Reasonableness depends on the facts and circumstances of each particular case. *State v. Saffell* (1988), 35 Ohio St.3d 90, 91.

{¶91} The state filed the superseding indictment on December 20, 2007, adding charges of burglary, felonious assault, kidnapping, and domestic violence, with accompanying firearm specifications.

{¶92} Appellant did not return to the Mahoning County Jail on the pending charges until January 27, 2008.

{¶93} By March 24, 2008, the day on which the continuance expired, appellant's speedy trial clock was still at 184 days.

{¶94} Appellant filed a motion to dismiss the superseding indictment based on alleged speedy trial violations on March 20, 2008. This stopped appellant's speedy trial clock. The court set the motion for a hearing. By this date, 184 days had elapsed.

{¶95} The court held the hearing on appellant's motion on May 29, 2008. The court overruled appellant's motion. The trial court found that the "joint trial continuance from August 29, 2007 until December 17, 2007" was chargeable to appellant under both indictments. It further found that the state's continuance in order to bring the superseding indictment was reasonable and tolled the speedy trial time.

{¶96} On this point, the trial court found that when the state first indicted appellant on the weapons charges it had information that other crimes may have been committed, but it had no evidence to support this information. The prosecutor's

investigator attempted to locate or contact Chalise at this time but to no avail. The court found that the state did not obtain evidence of the other crimes until Chalise was arrested in December 2007, and gave a statement to an assistant prosecutor. The court stated that until Chalise gave this statement, the state did not have any evidence to charge appellant with kidnapping and the other charges. Under the particular circumstances here, the continuance was reasonable so that both parties could prepare for trial on the new charges.

{¶97} Appellant ultimately went to trial on July 7, 2008.

{¶98} Given the above calculations, at the time appellant filed his motion to dismiss alleging a speedy trial violation, 184 days had elapsed on his speedy trial clock. Consequently, his speedy trial right was not violated. The trial court erred in counting the joint continuance to run until December 17, 2007, because there is no evidence to support the continuance running past September 20 in the record. But the court did not err in ruling that the December 20 continuance was reasonable based on the circumstances.

{¶99} Accordingly, appellant's fourth assignment of error is without merit.

{¶100} Appellant's fifth assignment of error states:

{¶101} "THE TRIAL COURT'S SENTENCE ON THE CHARGES OF IMPROPER HANDLING OF FIREARMS, HAVING WEAPONS UNDER DISABILITY AND KIDNAPPING CONSTITUTED AN ABUSE OF THE TRIAL COURT'S DISCRETION AND A VIOLATION OF DEFENDANT-APPELLANT'S RIGHTS AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, § 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶102} In sentencing appellant, the court stated:

{¶103} "I believe the weapons violations are very important, the most serious of the crimes you were charged with. You had a weapon previously. You know better than that. And you proceeded to do it anyway. And let me tell you, I *do not*

believe you picked that gun up off the table. I've been around too long." (Emphasis added; Sentencing Tr. 12).

{¶104} Appellant objected to this statement arguing that it was inconsistent with the jury's finding regarding the weapon and asked the court to reconsider its sentence. (Sentencing Tr. 15). The following conversation then took place between the court and appellant's counsel:

{¶105} "THE COURT: If you explain it to me I might [reconsider the sentence].

{¶106} "MR. LAVELLE: You just said you don't think he pulled the weapon off the table, which, again, I guess that has to be inconsistent with the jury's verdict on the burglary charge as well as the firearm specification associated with the kidnapping charge."

{¶107} "THE COURT: So? What's that have to do with the sentence?

{¶108} "MR. LAVELLE: You've indicated you considered that or at least - -

{¶109} "THE COURT: I said that I think that.

{¶110} "MR. LAVELLE: Okay, well, if that's all it is, I'll leave it at that." (Sentencing Tr. 15-16).

{¶111} Appellant argues that the trial court abused its discretion in sentencing him. He contends that when the court made the statement that it did not believe that he picked the gun up off the table, it engaged in unconstitutional judicial fact-finding. Appellant points out that the jury found him not guilty on the firearm specifications. Thus, he contends that the court could not find that he brought the gun with him into Walters's house.

{¶112} Our review of felony sentences is now a limited, two-fold approach, as outlined by the recent plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. First, we must "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." Id. (O'Connor, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must

consider R.C. 2929.11 and R.C. 2929.12. Id. at ¶13-14 (O'Connor, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's exercise of discretion "in selecting a sentence within the permissible statutory range is subject to review for any abuse of discretion." Id. at ¶17 (O'Connor, J., plurality opinion). Thus, we apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. Id. at ¶17 (O'Connor, J., plurality opinion).

{¶113} The trial court sentenced appellant to five years for having a weapon while under disability, 18 months for improperly handling a firearm in a motor vehicle, and four years for kidnapping, to be serve consecutively for a total of ten years and six months in prison.

{¶114} Having a weapon while under disability is a third-degree felony. The possible sentences for a third-degree felony are one, two, three, four, or five years. R.C. 2929.14(A)(3). Improperly handling a firearm in a motor vehicle is a fourth-degree felony. The possible sentences for a fourth-degree felony are six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months. R.C. 2929.14(A)(4). Kidnapping is a first-degree felony. The possible sentences for a first-degree felony are three, four, five, six, seven, eight, nine, or ten years. R.C. 2929.14(A)(1). Thus, all three of appellant's sentences are within the prescribed statutory ranges.

{¶115} Appellant only takes issue with the court's statement regarding the firearm. Since the Ohio Supreme Court decided *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court is not permitted to engage in judicial fact-finding in sentencing defendants. Here, appellant's counsel brought this to the court's attention at the time the court made the above quoted statement about the firearm. As can be seen from the cited conversation between the court and appellant's counsel, the court was open to hear why counsel thought its comment was in error. Counsel questioned the court about whether it considered its finding that appellant brought the firearm into the house when it sentenced appellant. The court then explained to

counsel that it simply "thought" that appellant brought the firearm with him to Walters's house. This statement by the court in response to counsel's questioning indicates that the court did not make a finding that appellant brought the firearm into Walters's house as appellant now alleges. The court clarified that it was simply expressing its thoughts but did not make such a finding.

{¶116} It is not evident that the trial court engaged in judicial fact-finding. Furthermore, the sentences for each offense are within the statutory ranges. And there is no indication that the trial court abused its discretion in sentencing appellant. Accordingly, appellant's fifth assignment of error is without merit.

{¶117} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.