[Cite as *State v. Mills*, 2010-Ohio-4705.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio — Court of Appeals No. WM-09-014

Appellee — Trial Court No. 09 CR 077

v.

James W. Mills — **DECISION AND JUDGMENT**

Appellant — Decided: September 30, 2010

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, and Katherine J. Middleton, Assistant Prosecuting Attorney, for appellee.

Paul H. Duggan, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of conviction and sentence entered by the Williams County Court of Common Pleas after a jury found defendant-appellant, James W. Mills, guilty of five drug-related felony offenses. Mills now challenges that judgment through the following assignments of error:

{¶ 2} "I. The trial court erred to the prejudice of defendant/appellant in finding that the offenses occurred in Williams County, Ohio.

{¶ 3} "II. The trial court erred to the prejudice of defendant/appellant in admitting various exhibits and testimony regarding a co-defendant that was not indicted.

{¶ 4} "III. The trial court erred to the prejudice of defendant/appellant in admitting into evidence the prior conviction of defendant/appellant for possession of methamphetamine under Evidence Rule 404(B) as its probative value was outweighed by the prejudicial effect.

{¶ 5} "IV. The trial court erred to the prejudice of defendant/appellant as the verdict was not supported by sufficient evidence.

{¶ 6} "V. The trial court erred to the prejudice of defendant/appellant in denying the Criminal Rule 29 motion to dismiss as the state failed to produce any laboratory tests establishing that the items purchased or attempted to be purchased by defendant/appellant were in fact pseudoephedrine.

{¶ 7} "VI. The trial court erred to the prejudice of defendant/appellant in denying the Criminal Rule 29 motion to dismiss of defendant/appellant in that the state failed to present sufficient evidence as to the intent of defendant/appellant to manufacture crystal methamphetamine after purchasing the alleged pseudoephedrine.

{¶ 8} "VII. The cumulative effect of trial counsel's instances of ineffective assistance of counsel deprived defendant/appellant of a fair trial.

{¶ 9} "VIII. The right to a speedy trial of defendant/appellant had been violated."

{¶ 10} On December 7, 2008, Mills was arrested on a charge that he possessed one or more chemicals used in the manufacture of methamphetamine. On December 15, 2008, he was released from jail. He was then indicted on that charge, a violation of R.C. 2925.041(A), a third degree felony, on December 17, 2008 (case No. 08 CR 264). Subsequently, on May 7, 2009, the state entered a nolle prosequi in case No. 08 CR 264, dismissing that case. Thereafter, on May 20, 2009, the Grand Jury handed down a new five-count indictment against Mills. Counts I, II, III, and IV charged Mills with the illegal assembly or possession of chemicals for the manufacture of methamphetamine on October 9, October 22, November 1, and November 11, 2008, respectively, all third degree felonies. Count V charged Mills with attempted illegal assembly or possession of chemicals for the manufacture of methamphetamine on December 7, 2008, a fourth degree felony. The case proceeded to a jury trial on August 31, 2009, at which the following evidence was presented.

{¶ 11} On December 7, 2008, Mills, who lives in Butler, Indiana, entered the Wal-Mart store in Bryan, Ohio, approached the pharmacy counter and asked to purchase a 20 count package of 120 milligrams of pseudoephedrine. Mills asked for the brand Equate Sudafed, Wal-Mart's store brand of the product.

{¶ 12} Pseudoephedrine is a legal over the counter medication used for the treatment of colds and nasal congestion. It is also the key ingredient in the manufacture of methamphetamine ("meth"), a schedule II controlled substance. R.C. 3719.41(C)(2). Because of its use in the manufacture of meth, federal law requires pharmacies to follow

certain procedures when dispensing pseudoephedrine. The medicine is not displayed for sale in the aisles. Rather, it is kept behind the pharmacy counter with cards advertising the drugs displayed in the aisles of a pharmacy. When a customer wishes to purchase a particular remedy containing pseudoephedrine, he or she takes the card to the pharmacist and presents his or her driver's license. The pharmacist confirms that the person on the license is the person seeking the medication and then enters that person's name in a computer log. In this manner, a history of all pseudoephedrine purchases made at all pharmacies can be maintained. As a retailer who sells pseudoephedrine, Wal-Mart was required to maintain a pseudoephedrine log.

{¶ 13} In 2008, Deputy Greg Ruskey of the Williams County Sheriff's office, was assigned to the Multi-Area Narcotics Task Force, or MAN unit, in Williams County. The MAN unit is a local agency that conducts primary investigations into drug and narcotics sales, trafficking and use. As part of his duties with the MAN unit, Ruskey regularly inspected the pseudoephedrine logs of area pharmacies, including the pharmacy at the Bryan Wal-Mart. At some point in the late fall of 2008, Ruskey noticed a pattern of pseudoephedrine purchases upon inspecting the logs at the Bryan Wal-Mart. The logs showed that on October 9, October 22, November 1, and November 11, 2008, Mills purchased from the Bryan Wal-Mart, 2.4 grams of pseudoephedrine. Each time, he purchased a package containing twenty 120 milligram tablets of Equate Sudafed. The logs also showed that on those same days, a man by the name of Joshua Ruppert, purchased those exact same quantities of the exact same product within 10 minutes of

Mills' purchases. Seeing a pattern in the purchases, Ruskey asked the Wal-Mart pharmacy to call him if either Mills or Ruppert again tried to buy pseudoephedrine. The pharmacy therefore put the words "call, call" on the logs regarding Mills and Ruppert. Photographs of Mills and Ruppert were also posted behind the pharmacy counter.

{¶ 14} On December 7, 2008, Sue Staup was working at the Bryan Wal-Mart pharmacy counter when Mills approached and asked to buy the Equate Sudafed. Staup took his driver's license and entered his name in the computer. When she saw the words "call, call" on Mills' log, she went to the back of the pharmacy department and reported it to Robin Krill, a pharmacy technician. Staup also noticed that Mills was one of the men whose photograph was posted behind the pharmacy counter. Krill then called the police while Staup stalled Mills by telling him they were having computer problems. Staup testified that she then waited on other customers and Mills stepped off to the side to wait.

{¶ 15} Video footage from the Bryan Wal-Mart from December 7, 2008, showed that Mills had entered the store with another man who was subsequently identified as Alexander Dohner. Upon entering the store, the two men separated, with Mills going to the pharmacy and Dohner going to the camping department, where he purchased Coleman camping fuel. Dohner then left the store, returning to the parking lot. Coleman fuel is another substance used in the manufacture of meth. Dohner testified at the trial below. Dohner stated that he has known Mills for a couple of years and that prior to December 7, 2008, the two had smoked meth together numerous times. Dohner was also aware that Mills knows how to make meth. On December 7, 2008, the two were smoking

meth and hanging out at Mills' house when Mills asked Dohner if he wanted to go to the Bryan Wal-Mart to buy some pills. Dohner understood Mills to mean he wanted to buy Sudafed pills so he could make meth. Mills also gave Dohner $10 and asked him to buy the Coleman fuel. Dohner was familiar with the ingredients needed to make meth and testified that he knew Coleman fuel was used in the process. After he purchased the Coleman fuel, Dohner walked back to the parking lot. Because he was high on meth, however, he could not remember where the car was parked so he wandered around the parking lot, looking for the car.

{¶ 16} Patrolman Chris Chapa of the Bryan Police Department was also assigned to the MAN unit. On December 7, 2008, at approximately 2:15 p.m., he was notified that Mills was at the Bryan Wal-Mart attempting to purchase Sudafed. He then went to the Bryan Wal-Mart where Patrolman Steve Grimes had apprehended Mills. Chapa and other officers then took Mills to his car where they found Dohner sitting inside. A search of the car uncovered the Coleman fuel tank. In addition, drug paraphernalia associated with the use of meth was found on Dohner.

{¶ 17} At the conclusion of the trial, the jury found Mills guilty as stated above. Thereafter, he was sentenced to two years incarceration on each of the third degree felony convictions and six months on the fourth degree felony conviction, with the sentences to run consecutively, for a total sentence of eight years six months. It is from that judgment that Mills now appeals.

{¶ 18} We will first address Mills' eighth assignment of error in which he asserts that his right to a speedy trial was violated. Initially, we note that Mills did not file with the trial court a motion to dismiss on speedy trial grounds or raise the issue in any way in the proceedings below. Mills has therefore waived the issue for purposes of appeal on all but plain error grounds. *State v. Conkright*, 6th Dist. No. L-06-1107, 2007-Ohio-5315, ¶ 20. Plain error is to be noticed "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. It is recognized when an obvious error is prejudicial to the accused and, although it was neither objected to nor affirmatively waived, would have a substantial adverse impact on the integrity of and public confidence in judicial proceedings if it were allowed to stand. *State v. Craft* (1977), 52 Ohio App.2d 1, 7. For an appellate court to find plain error, the record must clearly indicate that an error was committed and, but for the error, the result of the trial clearly would have been otherwise. *State v. Bock* (1984), 16 Ohio App.3d 146, 150.

{¶ 19} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams* (1989), 43 Ohio St.3d 67, 68. Pursuant to R.C. 2945.71(C)(2), a person charged with a felony shall be brought to trial within 270 days of his arrest. Further, each day an accused is held in jail in lieu of bail on the pending charge is counted as three days for purposes of computing the time limit. R.C. 2945.71(E). Therefore, if an accused is held in jail for the entire time from arrest to trial, he must be brought to trial within 90 days. The time by which an accused must be

brought to trial, however, may be tolled under certain conditions, including "[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). Accordingly, where an accused requests a continuance of a pretrial, that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled hearing. *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15, citing *State v. Covington* (Dec. 17, 1999), 6th Dist. No. L-97-1196. Similarly, the period between the state's dismissal of charges without prejudice and the subsequent re-indictment of the defendant based upon the same facts is not counted for purposes of computing the speedy trial time period. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 36, citing *State v. Broughton* (1991), 62 Ohio St.3d 253, paragraph one of the syllabus.

{¶ 20} Mills was arrested on December 7, 2008. Accordingly, the first day counted for the speedy trial calculation was December 8, 2008. The total number of days from December 8, 2008, until case No. 08 CR 264 was dismissed on May 7, 2009, was 151 days. Mills, however, was entitled to the triple time calculation for eight of those days, creating a total time period from arrest to dismissal of the case of 167 days. That time period, however, was tolled from January 28, 2009, until February 26, 2009, or 29 days, when Mills had requested and was granted a continuance of a pretrial to allow his trial counsel to review tapes. Accordingly, when case No. 08 CR 264 was dismissed, 138 days could be counted toward the speedy trial calculation. Case no. 09 CR 077 was filed

on May 20, 2009. Accordingly, the speedy trial clock began to run again on May 21, 2009. From that date until the date of Mills' trial on August 31, 2009, 103 days ran, for a total of 241 days that could be counted toward the speedy trial calculation. Mills' right to a speedy trial was not violated and the eighth assignment of error is not well-taken.

{¶ 21} In his first assignment of error, Mills raises the issue of venue. He asserts that the lower court erred in finding that the offenses occurred in Williams County.

{¶ 22} The Ohio Constitution guarantees an accused the right to a "trial by an impartial jury of the county in which the offense is alleged to have been committed." Section 10, Article I, Ohio Constitution. Similarly, R.C. 2901.12(A) mandates that criminal trials be held "in the territory of which the offense or any element of the offense was committed." While venue is not a material element of a crime, it is a fact that must be proven at trial unless waived by the defendant. *State v. Headley* (1983), 6 Ohio St.3d 475, 477. Although it is not necessary that the venue of the crime be stated in express terms, it is essential that it be proven by all the facts and circumstances, beyond a reasonable doubt, that the crime was in fact committed in the county and state alleged. *State v. Dickerson* (1907), 77 Ohio St. 34, paragraph one of the syllabus. Finally, the trial court has broad discretion to determine the facts which would establish venue. *Toledo v. Taberner* (1989), 61 Ohio App.3d 791, 793.

{¶ 23} In the proceedings below, appellant never questioned the state's proof of venue. Accordingly, as with the speedy trial issue, he has waived the issue except on the ground of plain error.

{¶ 24} At the trial, no witness explicitly linked the Bryan Wal-Mart to Williams County, Ohio. Nevertheless, numerous witnesses testified to the essential facts of the case as occurring at the Wal-Mart store in Bryan, Ohio. In particular, as part of his duties in the MAN unit Deputy Ruskey of the Williams County Sheriff's office, regularly inspected the pseudoephedrine logs of the pharmacy at the Bryan Wal-Mart. Upon a review of the record, we find that sufficient circumstantial evidence existed to support a finding that venue was proven beyond a reasonable doubt. The first assignment of error is not well-taken.

{¶ 25} In his second assignment of error, appellant asserts that the lower court erred in admitting into evidence exhibits and testimony regarding an unindicted co-defendant.

{¶ 26} Appellant refers to the admission of evidence regarding Joshua Ruppert. That is, the Wal-Mart pseudoephedrine logs covering Mr. Ruppert's purchases of pseudoephedrine. We first note that while Ruppert may have been an unindicted co-conspirator, he was not unindicted co-defendant for the very reason that he was never indicted. Appellant contends that the admission into evidence of the Wal-Mart records regarding Ruppert's purchases of pseudoephedrine violated appellant's right of confrontation because Ruppert was never called as a witness.

{¶ 27} The admission or exclusion of evidence rests within the sound discretion of the trial judge and, therefore, such decisions will not be reversed on appeal absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. An abuse of discretion is

found only when it is determined that a trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 28} The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him[.]" In *Crawford v. Washington* (2004), 541 U.S. 36, the Supreme Court of the United States held that "[w]here testimonial evidence is at issue, * * * the Sixth Amendment demands what the common law required: unavailability [of the declarant] and a prior opportunity for cross-examination." Id. at 68. The threshold issue for our determination is, therefore, whether the evidence at issue, the pseudoephedrine logs, are testimonial, for "only testimonial statements implicate the Confrontation Clause." *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶ 15.

{¶ 29} In *Stahl*, at paragraph one of the syllabus, the Supreme Court of Ohio, following *Crawford*, held that "[f]or Confrontation Clause purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" The *Stahl* court further held, at paragraph two of the syllabus, that "[i]n determining whether a statement is testimonial for Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations."

{¶ 30} The logs at issue were maintained by the Wal-Mart pharmacy pursuant to federal law. Accordingly, they were both records maintained in the ordinary course of business, and records that an objective witness could reasonably believe would be available for use at a later trial. They are, however, simply lists of who purchased pseudoephedrine and when. They do not, in our estimation, constitute a statement for purposes of the Confrontation Clause. Finding no Confrontation Clause violation, the second assignment of error is not well-taken.

{¶ 31} In his third assignment of error, appellant contends that the lower court erred in admitting into evidence at the trial below his prior conviction for possession of methamphetamine. Appellant asserts that the probative value of this evidence was outweighed by its prejudicial effect. Again, our standard of review is whether the lower court abused its discretion in admitting this evidence.

{¶ 32} Evidence of other acts which are wholly independent of the crime charged is generally inadmissible. *State v. Thompson* (1981), 66 Ohio St.2d 496, 497. In that vein, Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Accordingly, evidence of other crimes committed by the accused either before or after the crime charged is inadmissible to show a propensity to commit crimes, but may be relevant and admissible to show motive or intent, the absence of mistake or

accident, or a scheme, plan or system in committing the act in question. *State v. Broom* (1988), 40 Ohio St.3d 277, paragraph one of the syllabus. Evidence of an accused's other acts is thus admissible only when it "tends to show" one of the material elements in the charged offense and only when it is relevant to the proof of the accused's guilt for such offense. *State v. Curry* (1975), 43 Ohio St.2d 66, 68-69.

{¶ 33} In *State v. Wright*, 6th Dist. No. E-03-054, 2004-Ohio-5228, this court held admissible evidence of the defendant's previous theft convictions to show purpose and intent in his prosecution for theft. Aside from the fact that the defendant committed the previous crimes as a sole proprietor and the current crime as an employee-salesman, the circumstances surrounding the prior charges were similar. Id. at ¶ 14.

{¶ 34} Even more persuasive is the holding by the Ninth District Court of Appeals in *State v. Kolvek*, 9th Dist. No. 21752, 2004-Ohio-3706. Under circumstances nearly identical to those in the present case, the court upheld the trial court's admission of the defendant's prior conviction of possession of methamphetamines and lab equipment to prove the defendant's intent to commit the offenses at issue, including illegal use or possession of drug paraphernalia and illegal assembly or possession of chemicals for the manufacture of drugs.

{¶ 35} In the present case, the state offered evidence of appellant's 2003 convictions in Indiana for possession of both methamphetamines and marijuana and maintaining a common nuisance (a building or structure) in connection with the storage or usage of methamphetamines and marijuana. Over appellant's objection, the court

admitted the prior convictions into evidence to establish motive, intent or knowledge under Evid. R. 404(B). In light of the cases discussed above, we find no abuse of discretion in this ruling and the third assignment of error is not well-taken.

{¶ 36} We will next address the fifth and sixth assignments of error together as they each challenge the trial court's denial of appellant's Crim.R. 29 motion for a judgment of acquittal.

{¶ 37} Crim.R. 29 (A) provides for an entry of a judgment of acquittal if the evidence is insufficient to sustain a conviction. "When reviewing the denial of a Crim.R. 29(A) motion, an appellate court must evaluate whether 'the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt.' See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, syllabus. An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard that is used to review a sufficiency of the evidence claim. See *State v. Carter* (1995), 72 Ohio St.3d 545, 553." *State v. Reyes*, 6th Dist. No. WD-03-059, 2005-Ohio-2100, ¶ 21. "'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. at ¶ 22, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 38} Appellant was charged with four counts of illegal assembly or possession of chemicals for the manufacture of methamphetamine in violation of R.C. 2925.041(A) and one count of attempt of the same crime. R.C. 2925.041(A) reads: "No person shall

knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code." Appellant now asserts that the lower court should have granted his motion for acquittal because the state failed to provide testimony establishing that the substances allegedly purchased by appellant were in fact pseudoephedrine and failed to provide evidence of appellant's intent.

{¶ 39} When appellant moved for a judgment of acquittal below, he first argued that no lab reports had been presented to establish the appellant purchased actual pseudoephedrine on the dates in question. He then asserted that even if the court were to find that appellant did in fact purchase pseudoephedrine, the state had failed to present any evidence with regard to intent. The court denied the motion for acquittal. Appellant then presented witnesses in his defense. At the close of his case, appellant renewed his Crim.R. 29 motion for acquittal, which the trial court denied.

{¶ 40} With regard to appellant's assertion that the state failed to prove he purchased actual pseudoephedrine on the dates in question, we note that the Wal-Mart pharmacy pseudoephedrine log covering appellant's purchases was admitted into evidence without objection from appellant. Three employees of the Wal-Mart pharmacy testified at the trial below regarding the procedures the pharmacy follows when a customer seeks to purchase pseudoephedrine. In particular, the pseudoephedrine is kept behind the counter and only given to the customer when the customer presents his or her

driver's license and the customer's identifying information is entered into the pseudoephedrine log. Given the log of appellant's purchases, and given that appellant never objected to its admission at trial, we find that the state proved that appellant purchased actual pseudoephedrine on the dates in question. We further note that in his closing argument, appellant's counsel conceded that appellant bought pseudoephedrine and that the only issue before the jury was intent. The fifth assignment of error is not well-taken.

{¶ 41} On the issue of intent, we first note that as to Count V, appellant conceded in the proceedings below that there was sufficient evidence of intent for that case to be submitted to the jury. We will, therefore, confine our discussion to the remaining counts which alleged that appellant knowingly possessed a chemical used in the manufacture of methamphetamine on October 9, October 22, November 1, and November 11, 2008, with the intent to manufacture methamphetamine.

{¶ 42} Intent lies within the privacy of an individual's own thoughts and is not susceptible of objective proof. *State v. Garner* (1995), 74 Ohio St.3d 49, 60. The law recognizes that intent can be proven from the surrounding facts and circumstances and that "persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." Id.

{¶ 43} At the trial below, Alexander Dohner, who was with appellant on December 7, 2008, testified that he has smoked meth with appellant on numerous occasions and that appellant knows how to make meth. It is clear that appellant and

Dohner's purpose in purchasing pseudoephedrine and Coleman fuel on December 7, 2008, was to gather the ingredients needed to manufacture meth. Our issue, however, is whether appellant also intended to manufacture meth when he purchased pseudoephedrine on the earlier dates. We find that given the following evidence, viewed in a light most favorable to the prosecution, reasonable minds could conclude that appellant knowingly possessed pseudoephedrine on the dates at issue with the intent of manufacturing meth. Alexander Dohner testified that he knows Joshua Ruppert and has been with appellant and Ruppert when the three were using meth together. Appellant lived approximately an hour away from the Bryan Wal-Mart, in the state of Indiana. Yet, his systematic purchases of pseudoephedrine on the four dates in question, when he traveled to Bryan and purchased the medication, each time within approximately 10 minutes of Joshua Ruppert, have left us at a loss for an innocent explanation. Accordingly, we cannot say that the lower court erred in denying appellant's Crim.R. 29 motion on the issue of intent and the sixth assignment of error is not well-taken.

{¶ 44} In his fourth assignment of error, appellant asserts that the verdict was not supported by sufficient evidence. In the text of his brief, however, he also asserts that the verdict was against the manifest weight of the evidence.

{¶ 45} We have already fully addressed appellant's sufficiency of the evidence argument above in our review of the lower court's ruling on the Crim.R. 29 motion for acquittal and, therefore, need not address it again here.

{¶ 46} The "weight of the evidence" refers to the jury's resolution of conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. In determining whether a verdict is against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and "'* * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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.'" Id. quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 47} Appellant contends that he was essentially convicted on the evidence of his prior conviction in Indiana and on the testimony of Alexander Dohner, whom he describes as not credible. As we discussed above, appellant's prior conviction was admitted for a limited purpose. Indeed, in charging the jury, the court expressly stated: "If you find that the evidence of other acts is true and that the defendant committed them, you may consider that evidence only for the purpose of deciding whether it proves the defendant's motive, knowledge, or intent to commit the offenses charged in this trial. That evidence cannot be considered for any other purpose." Nothing in the record leads us to believe that the jury failed to follow this instruction.

{¶ 48} With regard to appellant's assertion that Dohner was not a credible witness, it is well-settled that questions regarding the credibility of witnesses are matters left to the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Moreover, the lower court instructed the jury as follows:

{¶ 49} "You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witnesses. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.

{¶ 50} "You have heard testimony from Alexander Dohner, another person who was or may have been involved in the same crimes charged in this case and is said to be an accomplice. An accomplice is one who knowingly or purposely assists or joins another person in the commission of a crime. Whether Alexander Dohner was an accomplice and the weight to give to his testimony are matters for you to determine. Testimony of a person who you find to be an accomplice should be viewed with grave suspicion and weighed with great caution."

{¶ 51} Accordingly, the jury was fully informed of the concerns regarding accomplice testimony and it was up to them to determine what weight that testimony should be afforded. Upon a full review of the evidence presented in the trial below, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in convicting appellant of the crimes charged. The fourth assignment of error is not well-taken.

{¶ 52} Finally, in his seventh assignment of error, appellant contends that the cumulative effect of the instances of ineffective assistance of counsel was to deprive him of a fair trial.

{¶ 53} The standard for determining whether a trial attorney was ineffective requires appellant to show: (1) that the trial attorney made errors so egregious that the trial attorney was not functioning as the "counsel" guaranteed appellant under the Sixth Amendment, and (2) that the deficient performance prejudiced appellant's defense. *Strickland v. Washington* (1984), 466 U.S. 668, 686-687. In essence, appellant must show that his trial, due to his attorney's ineffectiveness, was so demonstrably unfair that there is a reasonable probability that the result would have been different absent his attorney's deficient performance. Id. at 693.

{¶ 54} Furthermore, a court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" in reviewing a claim of ineffective assistance of counsel. Id. at 689. A properly licensed attorney in Ohio is presumed to execute his duties in an ethical and competent manner. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156. Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85. Even if the wisdom of an approach is debatable, "debatable trial tactics" do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 48-49. Finally, reviewing courts must not use hindsight to second-guess trial strategy, and must keep in mind that different trial counsel will often defend the same case in different manners. *Strickland,* supra at 689; *State v. Keenan* (1998), 81 Ohio St.3d 133, 152.

{¶ 55} Appellant first asserts that his trial counsel was ineffective for failing to object to the admission into evidence of the Wal-Mart surveillance video from December 7, 2008, when the state failed to lay a proper foundation for its admission. The video at issue was admitted into evidence during the direct examination of Deputy Ruskey by the state. The relevant portion of the transcript reads as follows:

{¶ 56} "Q. Okay. That was on December 7, 2008. After that date did you do any follow-up investigation, get any further evidence?

{¶ 57} "A. I looked into his criminal record, Mr. Mills' criminal record, yes.

{¶ 58} "Q. Okay. Did you do any follow-up with Wal-Mart for a video? Was there any other evidence?

{¶ 59} "A. Yes, we also obtained a video footage of Mr. Mills and a co-defendant in the case coming into the store at that time.

{¶ 60} "Q. Okay. I want to mark this Exhibit 3. Do you recognize that?

{¶ 61} "A. Yes, that's a CD of the MAN unit's that we use for evidence.

{¶ 62} "Q. Would this have been something that the MAN unit obtained from Wal-Mart?

{¶ 63} "A. Yes.

{¶ 64} "Q. Okay.

{¶ 65} "MR. HILL: Your Honor, just for the record, Wal-Mart associates would be a more proper witness to introduce this by way of foundation, but I have received this

video and have reviewed it. I have no objection to it being introduced through the officer's testimony."

{¶ 66} The court then admitted the video into evidence without objection.

{¶ 67} Evid.R. 901 provides in relevant part:

{¶ 68} "(A) **General provision** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

{¶ 69} "(B) **Illustrations** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

{¶ 70} "(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be."

{¶ 71} Appellant claims that because Deputy Ruskey was not a witness with knowledge, he could not authenticate the video. The video in question is simply the Wal-Mart surveillance footage from the day that appellant was arrested attempting to purchase pseudoephedrine at the Wal-Mart pharmacy. The video shows appellant and Dohner entering the store, appellant at the pharmacy counter presenting his driver's license, appellant stepping out of the video frame, and eventually appellant being approached by a Bryan police officer. There is no question that appellant entered the Bryan Wal-Mart on December 7, 2008, and attempted to purchase pseudoephedrine from the pharmacy. Several pharmacy employees testified to that fact. That appellant's trial counsel allowed

the video to be admitted into evidence without the state laying the proper foundation could easily be viewed as sound trial strategy in an attempt to limit the number of witnesses called by the state. We fail to see how appellant was prejudiced by his counsel's representation in this regard.

{¶ 72} Appellant further asserts that his trial counsel was ineffective for failing to object to the admission of the records of his previous convictions in Indiana. Again, appellant asserts that no proper foundation was laid by the state.

{¶ 73} As we stated above in our discussion of appellant's third assignment of error, appellant's trial counsel did, prior to the selection of the jury, object to the admission of the records pursuant to Evid.R. 404(B). He now contends that his counsel was ineffective for stipulating that the records were authentic. The records at issue, however, were certified copies of records from the Dekalb Circuit Court. Evid.R. 902 reads in relevant part:

{¶ 74} "Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

{¶ 75} "* * *

{¶ 76} "(4) Certified copies of public records. * * *."

{¶ 77} Accordingly, we fail to see how appellant's trial counsel was ineffective in stipulating to the authenticity of appellant's prior criminal record. Appellant has failed to demonstrate how his trial counsel was ineffective and the seventh assignment of error is not well-taken.

{¶ 78} On consideration whereof, the court finds that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Williams County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J.
CONCUR. _____
JUDGE

Keila D. Cosme, J. _____
CONCURS AND WRITES SEPARATELY. JUDGE

COSME, J.

{¶ 79} I concur with the decision. However, I take exception to the majority's statement:

{¶ 80} "Accordingly, where an accused requests a continuance of a pretrial, that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled hearing. *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15, citing *State v. Covington* (Dec. 17, 1996), 6th Dist. No. L-97-1196."

{¶ 81} This statement overlooks the fact that, in this case, the original pretrial date was also the date of the request. The request itself, which could in other cases take place before a scheduled hearing date, does not toll the statutory speedy trial period, only the delay itself suspends the time to a speedy trial.

{¶ 82} Pursuant to R.C. 2945.72, "[t]he time within which an accused must be brought to trial * * * may be extended only by the following:

{¶ 83} "(E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused;

{¶ 84} "* * *

{¶ 85} "(H) The 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[.]"

{¶ 86} While the plain language of R.C. 2945.72(H) makes obvious that a continuance is a delay, the language of R.C. 2945.72(E), dealing more generally with any motions, proceedings, or actions by the defendant, has produced two bodies of thought in Ohio courts. On the one side, the Supreme Court of Ohio in *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶ 26, ruled that any motion filed by a defendant automatically tolls the running of speedy trial time because of the time required to respond and rule upon it. See *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15, ("* * * where an accused requests a continuance of a pretrial, that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled

hearing"); *State v. Owens* (June 26, 1992), 2d Dist. No. 13054 ("Whether a delay 'results' from a motion or other action requires an analysis of cause and effect. Not every delay that follows a motion results from it; the delay must be caused by it"). On the other hand, in *State v. Singer* (1977), 50 Ohio St.2d 103, 107-109, the Ohio Supreme Court determined that actual delay must be shown in order to toll the statutory speedy trial period.[1] See *State v. Dotson* (Nov. 5, 1999), 4th Dist. No. 99CA03, ("A defendant's mere request for a pretrial conference does not automatically toll the speedy trial time"); *State v. Clark* (Apr. 15, 1997), 6th Dist. E-95-067, ("by definition, R.C. 2945(E) does not apply to motions which do not cause a delay in the proceedings"); *State v. Wirtanen* (1996), 110 Ohio App.3d 604, 608, ("The scheduling of a pretrial conference or hearing does not automatically extend the time requirements of R.C. 2945.71"); *State v. McLaren* (June 21, 1991), 6th Dist. No. L-90-201, ("a defendant's request for a pretrial conference does not ipso facto, extend the time for trial under the speedy trial statute.")

{¶ 87} In this case, Mills requested a continuance of the pretrial which falls under R.C. 2945.72(H) leaving no doubt that the time between the request at the first pretrial and the postponement tolled the speedy trial time.

{¶ 88} It is my belief, that where an accused requests a continuance of a pretrial, that request may toll the statutory speedy trial period for the delay due to the continuance,

[1]The statute, R.C. 2945.72, in existence at the time *Singer* was decided is identical to the statute upon which Mills was indicted with the exception of the addition of subsection (I) which provides that the time within which an accused must be brought to preliminary hearing and trial, may be extended by "[a]ny period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending."

in this case, the time between the original pretrial date, which was also the date of the request, and the rescheduled hearing. R.C. 2945.72. *State v. Clark* (Apr. 15, 1997), 6th Dist. E-95-067; *State v. Wirtanen* (1996), 110 Ohio App.3d 604, 608; *State v. McLaren* (June 21, 1991), 6th Dist. No. L-90-201; *State v. Dotson* (Nov. 5, 1999), 4th Dist. No. 99CA03. Cf. *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15.

{¶ 89} I posit however, that the request itself, does not toll the statutory speedy trial period, rather the actual delay suspends the time to a speedy trial.