

[Cite as *State v. Fryerson*, 2009-Ohio-4227.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91960

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAFETTE FRYERSON

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510174

BEFORE: Sweeney, J., Boyle, P.J., and Jones, J.

RELEASED: August 20, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Lafette Fryerson (“defendant”), appeals his convictions for aggravated robbery and felonious assault. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On August 25, 2007, defendant was at a party at 7918 Finney Avenue in Cleveland. Also at the party were Antonio Hamilton (co-defendant) and Thomas Mitchell (the victim). At approximately 1:00 a.m., co-defendant and others began to play a card game in the backyard. Around 1:30 a.m., co-defendant insisted that someone took his \$100 bill from the card table, and he asked everyone to empty their pockets. A young man who was at the party abruptly got up from his seat and ran down the driveway away from the house. Defendant and co-defendant chased him.

{¶ 3} A few minutes later, defendant and co-defendant returned to the party and approached the victim’s girlfriend to look through her purse for the missing money. The victim intervened, telling co-defendant he was going too far. The victim and his girlfriend both saw defendant reach in his pants and hand something to co-defendant. Then defendant punched the victim in the face, wrestled him to the ground, and continued to fight with him in the grass. At the same time, co-defendant fired a gun into the air. The victim felt something give in his left leg and gave up fighting with defendant. Defendant and co-defendant then took money and a wallet out of the victim’s pants pockets. A few minutes

later, a partygoer returned the wallet, but not the cash, to the victim. Shortly after the incident, the police arrived at the party. By this time, defendant and co-defendant had left the scene.

{¶ 4} On May 8, 2008, defendant was indicted in Cuyahoga County Common Pleas Case No. CR-510174 for two counts of aggravated robbery in violation of R.C. 2911.01(A), and one count of felonious assault in violation of R.C. 2903.11(A)(1), with firearm specifications.¹

{¶ 5} On June 13, 2008, a jury found defendant guilty of all charges and on July 14, 2008, the court sentenced defendant to an aggregate of 13 years in prison.

{¶ 6} Defendant now appeals, raising three assignments of error for our review. Assignments of error I and II will be addressed together.

{¶ 7} “I. The trial court erred in denying appellant’s Criminal Rule 29 motion for acquittal when there was insufficient evidence to prove the elements of felonious assault.

{¶ 8} “II. The appellant’s convictions [sic] for [felonious assault] was against the manifest weight of the evidence.”

{¶ 9} When reviewing sufficiency of the evidence, an appellate court must determine, “after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential

¹See our analysis under defendant’s third assignment of error for a thorough discussion of the indictment process in this case.

elements of the crime proven beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶ 10} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 11} “The appellate court sits as the ‘thirteenth juror’ and, reviewing the entire record, weighs all the reasonable inferences, considers the credibility of witnesses and determines whether, in resolving conflicts in 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 12} Revised Code 2903.11 governs felonious assault, and the pertinent subsection states that “[n]o person shall knowingly *** [c]ause serious physical harm to another ***.” R.C. 2903.11(A)(1).

{¶ 13} Additionally, R.C. 2901.01(A)(5) defines serious physical harm as follows: “(5) ‘Serious physical harm to persons’ means any of the following:

{¶ 14} “(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶ 15} “(b) Any physical harm that carries a substantial risk of death;

{¶ 16} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶ 17} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶ 18} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

{¶ 19} In the instant case, defendant argues that the State presented no evidence that he caused serious physical harm to the victim. Specifically, defendant argues that the victim “suffered only minor injuries” from being punched in the side of the face and that he did not “knowingly cause” the injury to the victim’s leg.

{¶ 20} A careful review of the record shows that the victim testified that there was blood on his mouth and around his ear after defendant punched him. Additionally, he testified that his left leg was injured near the knee during the altercation. When he left the party, his friends helped put him in the car because he could not put any weight on his leg. His girlfriend took care of him at home for the next few days. However, his leg did not heal and on August 28, 2007, he went to the emergency room. The victim was referred to a specialist at MetroHealth Medical Center. He was diagnosed with a “left quadriceps tendon rupture,” and had surgery to repair the tear on September 20, 2007.

{¶ 21} The victim testified that he did not have any problems with his left knee prior to the incident on August 25, 2007. After the injury, defendant stopped working as a warehouse expediter and collected short term disability. He was in a knee immobilizer brace and attended physical therapy and rehabilitation sessions through March 24, 2008. The following colloquy took

place during the victim's direct examination regarding how his knee injury affected him:

{¶ 22} "Q: With regard to the frustration this has put you through, what has this been like for you?"

{¶ 23} "A: Just a lot of anxiety, depression. Like, when I was first hurt, I just was more worried about not being able to protect myself anymore. You know, it was just - it was just a scary feeling."

{¶ 24} "Q: And you said finally you completed rehabilitation; is that correct?"

{¶ 25} "A: I'm not quite finished. I'm not 100 percent. I have to still rehab on my own right now."

{¶ 26} "Q: All right. Are you able to walk 100 percent?"

{¶ 27} "A: I walk pretty good. I can't run, can't jump."

{¶ 28} "Q: Prior to this, were you a pretty active person?"

{¶ 29} "A: Yeah. I could do, basically, anything. Like I said, I have four kids. I have a four-year-old. I've got to chase around a seven-year-old."

{¶ 30} The victim's girlfriend testified that the victim was bleeding from his mouth and his ear after the incident, but that he was too stubborn to take an ambulance from the scene. She further testified that she had to drive the victim's car home from the party because of his leg injury. "[The victim] couldn't drive. He couldn't even stand up. His leg was messed up." Asked why the victim's leg was "messed up," the victim's girlfriend replied, "From [the

defendants] jumping on him.” The victim’s girlfriend testified that after the injury, the victim “couldn’t do anything, literally. He couldn’t get up to brush his teeth.” The victim’s girlfriend also testified that the victim did not have any problems with his left leg in the past seven years that they have been dating.

{¶ 31} The victim also presented as evidence his medical records from the emergency room and MetroHealth, as well as pictures of his leg before and after surgery. A MetroHealth document entitled “operative report” that was prepared on September 20, 2007 by one of the doctors who performed the victim’s surgery noted the following under “indications”: “The patient is a 41-year-old male who had multiple periods of left knee instability and then was assaulted on August 25 and had immediate pain in the left knee. The patient was unable to extend his left knee and was seen and followed up in the Orthopedic Clinic. The patient was diagnosed with a left quadriceps tendon rupture.” Additionally, the doctor wrote the following under “operative note”: “*** there was noted to be a gross disruption of the quadriceps tendon. *** the majority of the quadriceps tendon was ruptured. This appeared to be acute and chronic in nature with evidence of degenerative tendon.”

{¶ 32} Upon review, we find this evidence sufficient to prove the elements of felonious assault. The State presented evidence that the victim was incapacitated because of his knee injury and subsequent surgery, both at work and in his personal life. Furthermore, he will have a permanent scar because of the surgery. The victim was in pain prior to the surgery, such that he could not

walk or put weight on his leg. After surgery, he went through rehabilitation and physical therapy for the next six months. When he testified at trial, approximately 10 months after the injury, he stated that he was still “not 100 percent.” This evidence is sufficient to qualify as “serious physical harm” under R.C. 2901.01(A)(5)(c), (d), and (e)’s descriptions of “incapacity,” “disfigurement,” and “acute” or “prolonged” pain. See *State v. Wilson* (Sept. 21, 2000), Cuyahoga App. No. 77115 (holding that “[w]here injuries to the victim are serious enough to cause him or her to seek medical treatment, a jury may reasonably infer that the force exerted on the victim caused serious physical harm as defined by R.C. 2901.01(A)(5)”).

{¶ 33} Notwithstanding defendant’s argument that the injury to the victim’s face was only minor, we find the victim’s knee injury to be severe enough to satisfy the “serious physical harm” element of felonious assault under R.C. 2903.11(A)(1).

{¶ 34} Additionally, we find the victim’s knee injury was knowingly caused by defendant. The State presented evidence that although surgery revealed the victim had a degenerative tendon in his knee, he suffered an acute injury, which caused him immediate pain after being wrestled to the ground by defendant on August 25, 2007. This evidence is sufficient to show that defendant knowingly caused the victim’s injuries. See *State v. Cooley* (1989), 46 Ohio St.3d 20, 25 (holding that a “person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a

certain nature ****”) (citing R.C. 2901.22(B)). We find it implausible that defendant sucker-punched the victim in the face, then tackled him to the ground, without knowing that serious physical harm was probable.

{¶ 35} We also find that defendant’s conviction for felonious assault is not against the manifest weight of this evidence. The victim and his girlfriend testified consistently about the events of August 25, 2007, as well as the victim’s injuries, subsequent medical treatment, and recovery. Medical records show that the victim had surgery to repair a torn tendon in his knee. This evidence is both competent and credible, and there is nothing in the record to contradict it. Accordingly, we cannot say that the jury lost its way in convicting defendant of felonious assault.

{¶ 36} Defendant’s first and second assignments of error are overruled.

{¶ 37} Defendant’s third and final assignment of error states:

{¶ 38} “III. Appellant was deprived of his right to a speedy trial in violation of [the] Fifth and Sixth Amendments to the United States Constitution, Section 10, Article I of the Ohio Constitution, and Ohio Revised Code 2945.71.”

{¶ 39} Revised Code 2945.71(C)(2) requires the State to bring a defendant accused of committing a felony to trial within 270 days after his arrest. “[E]ach day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days.” R.C. 2945.71(E).

{¶ 40} For purposes of calculating speedy trial time, the first day counted is the day after the arrest. However, various events toll speedy trial days, including

for example, when the defendant requests discovery, when the court grants a defense-requested continuance, and when the court orders a reasonable sua sponte continuance. See R.C. 2945.72 (E) and (H), respectively. We note that a defendant's request for discovery tolls the speedy trial time until the State responds, as long as the response time is reasonable. See *State v. Bailey*, Portage App. No. 2005-P-0081, 2006-Ohio-6206, at ¶18.

{¶ 41} Furthermore, the Ohio Supreme Court has held that “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.” *State v. Blackburn* (2008), 118 Ohio St.3d 163, 2008-Ohio-1823, at ¶23.

{¶ 42} In the instant case, defendant was initially indicted for two counts of robbery on November 8, 2007 in Case No. CR-503087. A capias was issued and defendant was arrested on December 26, 2007. Defendant was then re-indicted for two counts of robbery and one count of felonious assault on January 4, 2008 in Case No. CR-505291. Defendant was indicted a third time on May 8, 2008 for two counts of robbery and one count of felonious assault in Case No. CR-510174. This third indictment, which is the basis of the case currently before us, was presumably due to the Ohio Supreme Court's holding in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, which addressed defective indictments for aggravated robbery. The dockets for all three cases list the date

of offense as August 25, 2007. On June 9, 2008, when jury selection began in Case No. CR-510174, the State dismissed Case Nos. CR-503087 and CR-505291.

{¶ 43} Following is a list of tolling events in Case Nos. CR-503087, CR-505291, and CR-510174:

- December 28, 2007 - defendant files motion for discovery and bill of particulars (Case No. CR-503087)
- January 9, 2008 - defendant requests continuance until January 11, 2008
- January 11, 2008 - defendant requests continuance until January 24, 2008
- January 15, 2008 - defendant files motion for discovery and bill of particulars (Case No. CR-505291)
- January 24, 2008 - defendant requests continuance until February 14, 2008
- February 14, 2008 - defendant requests continuance until March 5, 2008
- March 5, 2008 - defendant requests continuance until March 28, 2008
- April 7, 2008 - defendant requests continuance until April 21, 2008
- April 28, 2008 - defendant requests continuance until May 12, 2008
- May 15, 2008 - defendant files motion for discovery and bill of particulars (Case No. CR-510174)
- May 19, 2008 - trial continued sua sponte until June 9, 2008²

²We note that defendant's pro se motion to dismiss filed on May 20, 2008, which the court did not rule on, also tolls the speedy trial time. *State v. Byrd*, Cuyahoga App. No. 91433, 2009-Ohio-3283, at ¶23.

{¶ 44} In calculating the speedy trial time in the instant case, we begin with December 27, 2007, which is the day defendant was arrested. As defendant was in jail during the pendency of his case, the State had 90 days - or until March 26, 2008 - to bring him to trial. Defendant's trial began on June 9, 2008. Although this is outside the statutory time frame for a speedy trial, defendant essentially tolled the time from December 28, 2007, when he filed his first discovery request, until a reasonable amount of time passed for the State to respond to his last discovery request, filed May 15, 2008.³ This tolling period also includes seven continuances requested by defendant from January 9, 2008 through April 28, 2008. Additionally, the court's sua sponte continuance tolled the speedy trial time from May 19, 2008 until June 9, 2008.

{¶ 45} The following days, however, count toward computing the time it took the State to bring defendant to trial in the instant case: one day on December 27, 2008 (first day after arrest); eight days from March 29, 2008 until April 6, 2008; six days from April 22, 2008 until April 27, 2008; and two days from May 13, 2008 through May 14, 2008. According to these calculations, 17 speedy

³We note that defendant filed three discovery requests in Case Nos. CR-503087, CR-505291, and CR-510174, respectively. The first request was filed on December 28, 2007. The State responded to this request on January 30, 2008, which is 33 days after the request was made. Neither party raises on appeal the issue of whether this is a reasonable response time. However, the State did not respond to defendant's second and third discovery requests, as they were identical to the first request. If we disregard defendant's second and third discovery requests as superfluous, four additional speedy trial days elapsed - May 15, 2008 through May 18, 2008. See *State v. McDonald*, 153 Ohio App.3d 679, 2003-Ohio-4935 (holding that ambiguities in speedy trial computations are construed in favor of the accused).

trial days ran from defendant's arrest to his trial, taking into consideration the various docketed tolling events pursuant to R.C. 2945.72.⁴ This is well within the R.C. 2945.71 time frame of 90 days and defendant was not deprived of his right to a speedy trial.

{¶ 46} Defendant's third and final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY J. BOYLE, P.J., and
LARRY A. JONES, J., CONCUR

⁴ In adding the four days explained in FN2, the elapsed speedy trial time increases to 22 days, which is still less than the statutory 90 days within which the State must bring defendant to trial.