[Cite as *State v. Jackim*, 2009-Ohio-6640.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92617

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BRUCE JACKIM

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-439646

BEFORE: Jones, J., Cooney, A.J., and Kilbane, J.

RELEASED: December 17, 2009

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Bruce Jackim ("Jackim"), appeals his conviction for assault on a police officer and resisting arrest.

{¶ 2} On appeal, Jackim asserts the following assignments of error:

> "I. The trial court committed plain error when it failed to properly instruct the jury, there was insufficient evidence to support Jackim's convictions, and the convictions were against the manifest weight of the evidence.
>
> "II. The trial court committed plain error by allowing the state to proceed with a defective indictment.
>
> "III. The trial court committed plain error by failing to grant Jackim's motion to dismiss based on a violation of his right to a speedy trial.
>
> "IV. The trial court committed plain error in excluding expert reports and testimony as to the expert's findings and ultimate issue of fact.
>
> "V. The trial court committed plain error in misapplying the hearsay rule by excluding the testimony of defense witnesses."

{¶ 3} Finding no merit to the appeal, we affirm.

{¶ 4} In 2003, Jackim was charged with felonious assault of a police officer, assault on a police officer, and resisting arrest. Before trial, Jackim moved to dismiss the indictment, arguing a violation of his right to a speedy trial. The matter proceeded to a trial before a jury, and Jackim was convicted of one count of assault of a police officer and one count of resisting arrest. The court sentenced him to a six-month suspended jail sentence and one year of community control sanctions. Jackim appealed, claiming error in the trial court's denial of his motion for acquittal, the court's failure to enforce subpoenas to material witnesses, suppression of a videotape, and denial of his motion for a new trial. *State v.*

Jackim, Cuyahoga App. Nos. 87012 and 87400, 2006-Ohio-4756 ("*Jackim I*"). We reversed his conviction, finding that the trial court had erred in granting a motion in limine excluding the surveillance videotape as well as reference to it at trial. *Jackim I*. We remanded the case for a new trial and ruled that Jackim's other claims were moot because of the court's ruling. Id. at ¶21.

{¶ 5} On remand, Jackim filed another motion to dismiss the case based upon an alleged violation of his right to a speedy trial. The trial court again denied his motion. In December 2007, Jackim filed a petition with this court for a writ of prohibition to prevent the trial court from proceeding with Jackim's retrial because of the claimed speedy-trial violation. We dismissed his claim sua sponte for failure to state a claim upon which prohibition would issue. *State ex rel. Jackim v. Ambrose*, Cuyahoga App. No. 90785, 2008-Ohio-45, affirmed by, *State ex rel. Jackim v. Ambrose*, 118 Ohio St.3d 512, 2008-Ohio-3182, 890 N.E.2d 324.[1]

{¶ 6} Prior to the beginning of the second trial, the trial court amended the indictment to reflect the verdict previously rendered by the jury in the first trial; the indictment was amended to one count of assault on a peace officer specification and one count of resisting arrest. The matter then proceeded to a second trial before a jury. The following evidence was adduced at trial.

[1]Jackim's counsel has filed on his behalf, and personally, numerous writs in both state and federal court regarding this case. All writs have either been sua sponte dismissed or denied.

{¶ 7} In May 2003, Jackim and his wife, Nina Jackim, were shopping at Sam's Club in Brooklyn, Ohio. After the cashier finished processing their order, Jackim noticed that the tax-exempt status of his business account was not appearing on the receipt and he had been charged sales tax on his purchase. The cashier called her supervisor for assistance. The supervisor escorted the Jackims to the customer service counter and referred the couple to a customer service clerk. The clerk checked the account status and did not find any proof of the couple's tax-exempt status. Jackim became upset, and the clerk contacted her store manager. The manager was unable to immediately assist the Jackims because she was with another customer. Jackim became upset and began to complain loudly.

{¶ 8} Dan Meadows, a uniformed Brooklyn police officer who was working off-duty at Sam's Club, approached Jackim. Officer Meadows asked Jackim several times to calm down and twice asked for his identification. The acts that followed are disputed; however, the testimony shows that Jackim and Officer Meadows engaged in an altercation and the two men fell to the ground. Officer Meadows attempted to handcuff Jackim, who resisted. Meadows used his police-issued pepper spray on Jackim, who bit Meadows's arm. Two other police officers and a store employee assisted Meadows in his attempts to subdue and restrain Jackim. Eyewitnesses to the incident testified that Officer Meadows's arm was bleeding; these same witnesses heard the officer say that Jackim bit him.

{¶ 9} Officer Meadows was treated for his injuries at Deaconess Hospital. Another officer was also treated at Deaconess for a cut he sustained during the incident. Both Jackim and his wife were arrested at the store.[2]

{¶ 10} At the police station, Jackim told Officer Meadows that he "fought" him because he did not think the officer had the authority to arrest him, that he had "military training," and if he had wanted to get "freed," he would have broken Meadows's nose and crushed his throat.

{¶ 11} The jury convicted Jackim of both counts, and the trial court sentenced him to a 90-day suspended jail sentence, one year of community control, 400 hours of community service, anger management and a mental health assessment, and fines and court costs. The court further found that Jackim had already served his community control under his first case and ordered community control sanctions terminated.

{¶ 12} Jackim appeals, raising five assignments of error for our review.

Jury Instructions

{¶ 13} In the first assignment of error, Jackim argues that the trial court committed plain error when it failed to properly instruct the jury, there was insufficient evidence to support Jackim's convictions, and the convictions were against the manifest weight of the evidence. First, we note that contrary to how Jackim has titled his first assignment of error, he does not argue that the evidence

[2]Nina Jackim was charged with resisting arrest and pled no contest to attempted disorderly conduct. She appealed her guilty plea, and we dismissed her appeal as moot. See *Brooklyn v. Jackim*, Cuyahoga App. No. 89659, 2008-Ohio-931.

was insufficient to support his convictions or that his convictions were against the manifest weight of the evidence. Instead, the crux of Jackim's argument is that the trial court should have instructed the jury on disorderly conduct as it is defined in the Brooklyn Codified Ordinance 509.03, as opposed to state statutory law.

{¶ 14} First, we note that Jackim did not request a jury instruction based on the municipal ordinance, nor object to the ordinance's omission in the final jury instructions. His failure to object to the jury instructions waives all but plain error. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus. Plain error "should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice." Id. at 14. Plain error exists only where it is clear that the verdict would have been otherwise but for the error. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

{¶ 15} We find no error, plain or otherwise, with the jury instructions. The trial court instructed the jury on resisting arrest, in violation of R.C. 2921.33, the crime for which Jackim was charged and tried. Jackim was not charged with, nor tried for, a violation of the Brooklyn ordinance prohibiting disorderly conduct.[3]

{¶ 16} Therefore, we overrule the first assignment of error.

Indictment

{¶ 17} In his second assignment of error, Jackim argues that his indictment was defective. In his first trial, Jackim was convicted of assault on a police officer

[3] Jackim was originally charged in Brooklyn Municipal Court with disorderly conduct in violation of R.C. 2917.11; that charge was dismissed by the city prosecutor in 2003 before Jackim's case was bound over to common pleas court.

and resisting arrest. He argues on appeal that the trial court erred when it allowed the state to proceed on the assault charge in the second trial. Specifically, Jackim argues that he could not be tried for the crime of assault on a police officer because that charge was dismissed by the trial court in his first trial. We disagree.

{¶ 18} Crim.R. 33(D) governs the procedure when a new trial is granted and provides: "[w]hen a new trial is * * * awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted."

{¶ 19} The record shows that the trial court dismissed the charge for assault on a police officer after the close of the state's case in the first trial. However, the jury in the first trial found Jackim guilty of assault on a police officer as a lesser included offense of felonious assault. At the beginning of the second trial, the trial court amended the indictment to reflect the charges for which the jury convicted Jackim in the first trial; specifically, assault on a police officer and resisting arrest.

{¶ 20} We see no error in the court's decision to follow Crim.R. 33(D) or in its amendment of the charge.

{¶ 21} The second assignment of error is overruled.

Speedy Trial

{¶ 22} In the third assignment of error, Jackim argues that his right to a speedy trial was violated.

{¶ 23} R.C. 2945.71(C)(2) provides that a person against whom a felony charge is pending shall be brought to trial within 270 days after his arrest. For purposes of computing time under R.C. 2945.71(C)(2), each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. See R.C. 2945.71(E). Consequently, "[a] felony defendant in Ohio must be tried within ninety days if incarcerated on the pending charge or within two hundred seventy days if on bail." *State v. Coleman* (1989), 45 Ohio St.3d 298, 304, 544 N.E.2d 622. If the state violates a defendant's right to a speedy trial, then the court must dismiss the charges against the defendant. R.C. 2945.73(B).

{¶ 24} The speedy trial statute may be tolled by several events, set forth in R.C. 2945.72. For example, a defendant's demand for discovery or a bill of particulars tolls the speedy trial period. *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, ¶26. The period is also tolled by "[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); *State v. Baker* (1993), 92 Ohio App.3d 516, 636 N.E.2d 363.

{¶ 25} In general, the trial court should, but is not required to, identify the party against whom it will charge the continuance. *Cleveland v. Ali*, Cuyahoga App. No. 88604, 2007-Ohio-3902, ¶22-23. When a court continues a matter sua sponte, it must show, through its journal entry, that the continuance was

"reasonable in light of its necessity or purpose," or the continuance should be charged against the state. Id. at ¶22.

{¶ 26} Jackim argues that the time to bring him to trial expired three months before his first trial began. The state responds that this argument is barred by the doctrine of res judicata. We disagree with the state, but do find that Jackim's speedy trial time did not expire prior to the first trial.

{¶ 27} First, it is important to note that Jackim's argument on appeal is not barred by res judicata. The state claims that Jackim did not raise the issue of speedy trial in *Jackim I*. We agree that Jackim did not properly argue his right to a speedy trial in *Jackim I* in accordance with App.R. 16. That being said, he did raise the issue by reference under the first assignment of error.[4] We find that the reference is sufficient to preserve the argument. In addition, since we decided *Jackim I* solely on the basis of the court's granting the state's motion in limine and found all other assignments of error moot, Jackim's speedy trial claim is not now barred by res judicata.

{¶ 28} When we review the time between Jackim's arrest and trial, including tolled periods, we find no violation of his statutory right to a speedy trial. Jackim was arrested on May 25, 2003. He was held in jail for one day, which counts as three speedy-trial days. His municipal court case was dismissed on June 3,

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[4]When we dismissed Jackim's writ in *State ex rel. Jackim v. Ambrose*, Cuyahoga App. No. 90785, supra, we noted that Jackim included a reference to the issue of speedy trial in his appellate brief in *Jackim I*. Id. at ¶2.

2003, and he was re-indicted on July 24, 2003. His arraignment was held on July 25. From July 25, 2003 until May 26, 2004, Jackim filed several motions and sought numerous continuances.

{¶ 29} The trial court continued the matter sua sponte from June 24 to July 21, 2004. This continuance was reasonable under the circumstances, and was entered before the statutory trial period expired. See *State v. Holmes*, Cuyahoga App. No. 91948, 2009-Ohio-3736.

{¶ 30} Time was tolled from July 22, 2004 until August 3, 2004, and from September 23, 2004, to October 4, 2004, based on Jackim's requests for a continuance. Jackim waived his right to a speedy trial from August 4, 2004, to September 30, 2004.

{¶ 31} The state concedes that speedy-trial days should be charged to the state from October 5, 2004 until February 9, 2005. Then, time was tolled from February 9 until March 1, 2005 because Jackim requested another continuance. Speedy-trial days are charged to the state from March 2, 2005 until June 14, 2005. The court was again unavailable from June 15, 2005 until July 15, 2005, and we again find the request reasonable. Jackim filed a motion to dismiss on July 15, 2005 that tolled the speedy-trial time until July 20, 2005, when trial commenced.

{¶ 32} Considering all of these periods, we find that Jackim's trial took place before the statutory speedy trial period had elapsed. Thus, Jackim has not demonstrated a statutory speedy trial violation.

{¶ 33} The third assignment of error is overruled.

Expert Testimony

{¶ 34} In the fourth assignment of error, Jackim argues that the trial court erred in excluding portions of his expert's reports and testimony.

{¶ 35} Evid.R. 702 governs expert witness testimony and states that a witness

{¶ 36} may testify as an expert if all of the following apply:

> "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> "(2) The design of the procedure, test, or experiment reliably implements the theory;
>
> "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶ 37} In this case, Jackim moved to qualify Bruce Bynum as a video expert. Prior to trial, Jackim filed a motion in limine asking the trial court to determine the admissibility of Bynum's testimony. In the motion, Jackim proposed that Bynum testify regarding: 1) how a specialized VCR works and how the videotape was

analyzed, and how the resulting DVD and still photographs were produced; 2) the complexity involved in tampering with a "multiplexed" videotape; and 3) the ultimate issue of fact that Jackim's hands never went above his waistline during the incident, which was "ascertained by analyzing the fields and frames from the multiplexed VHS tape."

{¶ 38} During trial, the court issued an order allowing Bynum to testify as to the science of the store surveillance and recordings at issue but not allowing him to testify as to "any commentary as to body movements or actions by individuals appearing in the scenes."

{¶ 39} While some states still recognize the rule prohibiting testimony as to the ultimate issues of a case, Ohio does not. *State v. Daws* (1994) 104 Ohio App.3d 448, 662 N.E.2d 805, citing, *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 81-82, 228 N.E.2d 304. Evid.R. 704 states that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Thus, testimony on an ultimate issue is not per se inadmissible in Ohio.

{¶ 40} It is, however, within the discretion of the trial court to refuse to admit the testimony of an expert witness on an ultimate issue where such testimony is otherwise inadmissible under the Ohio Rules of Evidence, or when the testimony is not essential to the jury's understanding of the issue and the jury is capable of coming to a correct conclusion without it. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 148, 524 N.E.2d 881. See, also, Evid.R. 702 and 704; *State v. Stirnkorb*

(1990), 63 Ohio App.3d 778, 580 N.E.2d 69; *McQueen v. Goldey* (1984), 20 Ohio App.3d 41, 47, 484 N.E.2d 712.

{¶ 41} In order to be admitted at trial, expert testimony must (1) relate to scientific, technical, or other specialized knowledge; (2) assist the trier of fact to understand the evidence or to determine a fact in issue; (3) be relevant and material to an issue in the case; and (4) have a probative value that outweighs any prejudicial impact. Evid.R. 702, 402, and 403. See, also, *Daws*, supra.

{¶ 42} First, we do not find that testimony from Bynum regarding his opinion on Meadows's and Jackim's body movements observed in the videotape "relate to scientific, technical, or other specialized knowledge."

{¶ 43} Second, to establish that expert testimony will assist the trier of fact, it must generally be established that the subject of the testimony is outside the experience, knowledge, or comprehension of the trier of fact. *State v. Coulter* (1992), 75 Ohio App.3d 219, 228, 598 N.E.2d 1324, 1329; *Bostic* at 148-149. If the trier of fact can understand the issues and the evidence and arrive at a correct determination, expert testimony is unnecessary and inadmissible. *State v. Roquemore* (1993), 85 Ohio App.3d 448, 454-455, 620 N.E.2d 110, 114.

{¶ 44} Jackim proposed that Bynum be allowed to testify regarding his observations of what was on the videotape, specifically that he observed: "Meadows in very immediate proximity looking down at Bruce's right hand. Meadows's left arm is seen grabbing Bruce's right arm as Bruce's right hand is at

Bruce's right rear pocket. I do not observe Bruce's right arm go about the vicinity of Bruce's waistband."

{¶ 45} We find that the jury did not require any technical or specialized testimony by Jackim's expert to understand what was being shown on the videotape. The jury was able to view the videotape both during trial and deliberations. Nor is there any evidence that Bynum was an expert in body language or the investigation into what is seen on a videotape. Therefore, we find that the trial court did not err in excluding the testimony regarding body movements, and Jackim was not prejudiced by the omission of that portion of Bynum's proffered testimony.

{¶ 46} The fourth assignment of error is overruled.

Hearsay

{¶ 47} In the fifth and final assignment of error, Jackim argues that the trial court erred in excluding admissible hearsay testimony. Specifically, Jackim argues that defense witnesses should have been allowed to testify to what they heard Officer Meadows say during the incident at Sam's Club and during another incident in which Meadows arrested a customer at another store.

{¶ 48} Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." A trial court is afforded a wide range of discretion to exclude or admit evidence and its ruling will not be disturbed on appeal absent an abuse of discretion that amounts to prejudicial error. *State v.*

Lundy (1987), 41 Ohio App.3d 163, 535 N.E.2d 66; *State v. Graham* (1979), 58 Ohio St.2d 350, 390 N.E.2d 805.

{¶ 49} Jackim argues that defense witness Michelle Williams, who Meadows had arrested in a prior incident at another store, should have been allowed to testify as to what Officer Meadows allegedly said to her because she was "present on the scene" and had "personal knowledge" of the officer's statements. He further claims that Nina Jackim should have been allowed to testify about what Officer Meadows said to her during the incident at Sam's Club.

{¶ 50} Jackim offers no exception to the hearsay rule that would allow the testimony to come in. Not only is it not this court's duty to make Jackim's arguments for him, our review of the record shows no exception that would have allowed the proffered statements into evidence. Thus, the trial court did not abuse its discretion in disallowing the statements into evidence.

{¶ 51} Therefore, the fifth assignment of error is overruled.

{¶ 52} Accordingly, judgment is affirmed.

It is ordered that appellee recover of appellant 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 common pleas court 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.

LARRY A. JONES, JUDGE

COLLEEN CONWAY COONEY, A.J., and
MARY EILEEN KILBANE, J., CONCUR