

[Cite as *State v. Plemmons-Greene*, 2010-Ohio-655.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92267

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GLORIA PLEMMONS-GREENE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508334

BEFORE: Stewart, J., Blackmon, P.J., and Celebrezze, J.

RELEASED: February 25, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Gloria Plemmons-Greene, appeals from her convictions in the Cuyahoga County Court of Common Pleas on one count each of assault and domestic violence, both misdemeanor offenses. Upon review of the record and for the reasons stated below, we affirm.

{¶ 2} Appellant lived in the downstairs apartment of a duplex on West 140th Street in Cleveland. Appellant's granddaughter, Roxanne Daley, and her baby were staying with the resident of the upstairs apartment, Christy Bishop. On June 16, 2007, Lisa Daley ("Daley"), appellant's daughter and Roxanne's mother, came to the duplex to pick up Roxanne and the baby to take them to her house. Bishop and Daley began to argue. Appellant went upstairs and joined in the argument. According to Daley and Roxanne, appellant pushed Daley on the bed, punched her, kneed her, choked her with her necklace, and punched her in the eye.

{¶ 3} Police and an ambulance were called to the scene. Daley was examined in the ambulance by EMTs, but elected to drive herself to the hospital rather than leave her car at the apartment. Appellant was arrested and jailed by Cleveland police.

{¶ 4} A criminal summons charging appellant with domestic violence was issued by the Cleveland Municipal Court on June 21, 2007. The municipal court case was subsequently dismissed on March 3, 2008, with the notation that the case was to be presented to the grand jury as felonious

assault. On March 20, 2008, the grand jury indicted appellant on the misdemeanor charge of domestic violence and the felony charge of felonious assault. A jury trial began on August 18, 2008. The jury returned a verdict of guilty on the first count, domestic violence. On the second count, the jury found appellant not guilty of felonious assault, but guilty on the lesser included offense of assault.

{¶ 5} Appellant filed this timely appeal raising five assignments of error for our review.

{¶ 6} In her first assignment of error, appellant asserts that the trial court erred by denying her motion to dismiss on speedy trial grounds without first holding an evidentiary hearing.

{¶ 7} The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. To implement the guarantee, R.C. 2945.71 sets forth specific time limits within which a person must be brought to trial. “A person against whom a charge of felony is pending * * * shall be brought to trial within two hundred seventy days after his arrest.” R.C. 2945.71(C). If a defendant demonstrates that his or her speedy-trial right has been violated, he or she may seek dismissal of the criminal charges. R.C. 2945.73.

{¶ 8} A person’s speedy trial time may be waived or the period may be tolled under certain circumstances. R.C. 2945.72; *State v. Blackburn*, 118

Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319. Speedy trial waiver and the tolling provisions in R.C. 2945.72 are two separate, distinct concepts that affect speedy trial calculations in different ways. *Blackburn* at ¶16.

{¶ 9} A waiver is an intentional relinquishment of a known right. *Id.*, citing *State v. Sarkozy*, 117 Ohio St.3d 86, 2008-Ohio-509, 881 N.E.2d 1224. A waiver relinquishes the right, at least until the waiver is withdrawn. However, “[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.” *State v. Adams* (1989), 43 Ohio St.3d 67, 70, 538 N.E.2d 1025.

{¶ 10} Tolling does not waive a person’s speedy trial right. Rather, R.C. 2945.72 provides certain circumstances that extend the time within which the state must bring an accused to trial. R.C. 2945.71 provides in pertinent part that the time for trial shall be extended by: “(D) Any period of delay occasioned by the neglect or improper act of the accused; (E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused; * * * (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.” *Id.*

{¶ 11} The tolling provisions of R.C. 2945.72 automatically apply regardless of whether the accused also waived time. *Blackburn* at ¶23. “[I]n 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.*

{¶ 12} In this case, there are two separate and relevant periods of time to be analyzed. The first period of time commences with appellant’s arrest and ends with the dismissal of the municipal court case. The second period of time commences with the second indictment and ends with the trial. The period of time between indictments is not counted against the state. See *State v. Broughton* (1991), 62 Ohio St.3d 253, 259, 581 N.E.2d 541.

{¶ 13} While appellant was not indicted on the felonious assault charge until March 20, 2008, her speedy trial rights began to run on June 16, 2007, when she was arrested for the domestic violence charge brought in the Cleveland Municipal Court case. “When new and additional charges arise from the same facts as did the original charge, and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charges is subject to the same statutory limitations period that is applied to the original charge.” *State v. Dunbar*, 8th Dist. No.

8731, 2007-Ohio-3261, quoting *State v. Clay* (1983), 9 Ohio App.3d 216, 459 N.E.2d 609, syllabus. Thus, in calculating the time the state had to bring appellant to trial, we will not apply appellant's speedy trial waiver against the felonious assault charge, but must take into account the time between indictments and any time tolled for reasons permitted under the statute.

{¶ 14} The docket from the domestic violence case in Cleveland, case no. 2007CRB019961, shows that 13 days were tolled while the state responded to appellant's discovery motion, and another 67 days were tolled due to continuances granted at appellant's request. The docket from the instant case shows that 56 days were tolled as a result of motions filed by appellant, and an additional 39 days were tolled as a result of continuances at appellant's request. Therefore, of the 427 days that elapsed from arrest to trial, 175 days are not charged against the state.

{¶ 15} After a careful review of the dockets in both cases, we conclude appellant was brought to trial within 270 days within the meaning of R.C. 2945.71. Therefore, the motion to dismiss for lack of a speedy trial was properly denied.

{¶ 16} In her second, third, and fourth assignments of error, appellant challenges both the weight and sufficiency of the evidence supporting her convictions for assault and domestic violence. Although these arguments involve

different standards of review, because they are substantially interrelated, we will consider them together.

{¶ 17} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 18} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.

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.” *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 19} A reviewing court may find a verdict to be against the manifest weight of the evidence even though legally sufficient evidence supports it. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In reviewing a manifest weight of the evidence claim, this court reviews the entire record, weighs the evidence and all 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 judgment must be reversed and a new trial ordered. *Id.* We are mindful that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine.

State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 20} The jury found appellant guilty of domestic violence, a first degree misdemeanor, in violation of R.C. 2919.25(A), which reads: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” By definition, a family or household member includes a “child of the offender” who “is residing or has resided with the offender.” *Id.*

{¶ 21} The jury also found appellant guilty of assault, a first degree misdemeanor, in violation of R.C. 2903.13(B), which prohibits a person from recklessly causing another serious physical harm. R.C. 2901.01(A)(5) defines “serious physical harm to persons” as meaning any of the following:

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

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

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

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

{¶ 26} “(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.”

{¶ 27} Appellant challenges the sufficiency of the evidence, arguing that there is no evidence that Daley suffered “serious physical harm” or that Daley was “a household or family member.” Appellant also challenges the weight of the evidence, arguing that there was no credible evidence to prove that appellant knowingly caused or attempted to cause Daley physical harm. She contends that the entire incident was an unfortunate accident.

{¶ 28} Appellant’s contention that Daley is not a family or a household member lacks merit. Appellant testified that she is Daley’s mother, that Daley is her daughter by blood, and that she lived with her in the past. Thus, Daley fits the statutory definition of a family or household member.

{¶ 29} We also find that the state presented sufficient evidence for the jury to find serious physical harm. The state’s evidence showed that appellant punched, kicked, kneed, and choked her daughter. As a result of appellant’s attack, Daley suffered a black eye, the entire right side of her face was swollen and bruised, her neck was scratched and sore, and she had bruises all over her thighs and buttocks. A police photograph shows serious

bruising was evident on Daley's face five days after the attack. Daley's daughter testified that it took longer than a month for the injuries to heal. The emergency room doctor testified that he ordered CAT scans of the brain, the eye orbits, and the cervical spine. He testified that the injury to the right eye area could potentially be serious. He defined "serious" as resulting in "a permanent eye injury." Hospital records show that Daley was given Vicodan at the hospital for pain and was given a prescription for Vicodan to take at home for pain.

{¶ 30} Viewing this evidence in a light most favorable to the state, we conclude that it is sufficient to establish all of the elements of assault and domestic violence.

{¶ 31} We also do not find that the jury clearly lost its way in resolving conflicts in the evidence or that this is one of those exceptional cases in which the evidence weighs heavily against conviction. Daley and Roxanne both testified that appellant shoved Daley onto the bed, kned and punched her, and tore the necklace off of Daley's neck. And, while appellant maintained that she did not intend to hurt her daughter, she testified that she knew her daughter bruised easily but still, "hauled off and hit her." The second, third, and fourth assignments of error are overruled.

{¶ 32} In her fifth and final assignment of error, appellant argues that the court erred in not correcting the record. Appellant contends that the

judgment of conviction incorrectly states that she was convicted of felonious assault, rather than assault. Appellant is correct, however, the record reflects that while this appeal was pending, the trial court entered a corrected entry stating that appellant was convicted of assault. The error having been corrected, appellant's fifth assignment of error is moot.

Judgment affirmed.

It is ordered that appellee recover of 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 Cuyahoga County 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.

MELODY J. STEWART, JUDGE

PATRICIA ANN BLACKMON, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR