[Cite as *State v. Ison*, 2009-Ohio-5885.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	JUDGES:
	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	Hon. John W. Wise, J.
	Hon. Patricia A. Delaney, J.
-vs-	
	Case No. 2009CA0034
TERRENCE RAYSHAUN ISON	
Defendant-Appellant	OPINION

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas, Case No. 08CR0829H
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 3, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER, JR. PROSECUTING ATTORNEY RICHLAND COUNTY, OHIO	CHARLES M. BROWN Weldon, Huston & Keyser, L.L.P. 28 Park Avenue West Mansfield, Ohio 44902
BY: KIRSTEN L. PSCHOLKA-GARTNER Assistant Richland County Prosecutor 38 South Park Street Mansfield, Ohio 44902	

Hoffman, P.J.

{¶1} Defendant-appellant Terrence Rayshaun Ison appeals his conviction entered by the Richland County Court of Common Pleas on one count of robbery, in violation of R.C. 2911.02(A)(2). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On the evening of November 25, 2007, Matthew and Tabitha Kader were walking along Small Street in Mansfield, Ohio, returning home from purchasing pop, cigarettes and a twelve pack of beer. As they approached 22 Small Street, Appellant, along with Anthony Williams and Jonathan Hicks, shouted to the Kaders from the porch of the residence, "Hey give me a beer, give me a beer." Matthew Kader responded he did not know them, and would not give them beer. Chad McGuire, who was staying at the residence while on house arrest, overheard Appellant, Hicks and Williams discuss taking the beer from Kader.

{¶3} The State alleges Appellant and Hicks came off the porch and attacked Matthew Kader sweeping his legs out from under him and knocking him to the ground. The beer fell and shattered. Hicks punched Kader in the face several times, breaking his glasses. Tabitha Kader, in an attempt to assist her husband, was struck in the face. Matthew Kader testified at trial he saw Appellant attack his wife.

{¶4} At some point, Williams came off the porch to join the altercation. Hicks grabbed Matthew Kader from behind, pinning his arms. Williams put his hands around Kader's throat and backed him up against the garage. He cocked his fist to hit Kader, when Tabitha Kader jumped on his back and started to choke him. Williams knocked

her off his back, and Matthew Kader yelled for her to go into their house to call the police.

{¶5} After Appellant and the other co-defendants fled the scene, Tabitha Kader noticed her coat had been taken with her wallet in the pocket.

{¶6} Upon arrival at 22 Small Street, responding police officers found Williams in the living room sitting on the couch. Upon further search of the residence, the officers located Appellant and Hicks in the attic hiding under insulation. Appellant gave Tabitha Kader's coat to his girlfriend, Jessee Richmond, who disposed of it in the basement of a nearby residence.

{¶7} Appellant was arrested and charged with one count of robbery, a felony of the second degree. Co-defendants Williams and Hicks were also indicted on robbery and the cases were joined for trial. The trial court originally scheduled the trial in this matter for February 11, 2008. However, the trial was delayed due to other scheduled criminal trials, and the dismissal and re-indictment of the robbery charges pursuant to *State v. Colon.* At the same time, Appellant was incarcerated on unrelated charges in Cuyahoga and Crawford Counties.

{¶8} On February 6, 2009, Appellant, along with the other two defendants, filed a motion to discharge alleging a violation of his right to a speedy trial. The trial court did not file a judgment entry ruling on the motion; rather, the court overruled the motion on the record at trial, stating:

{¶9} "I'm going to overrule the Motion to Dismiss on the basis of time as I believe the matter is being brought to trial at the earliest this Court could bring it with all

the business and the other cases that have been brought before the Court and been tried."

{¶10} Following the jury trial, Appellant was found guilty of aiding and abetting robbery, and sentenced to four years in prison. The trial court further ordered restitution to the Kaders.

{¶11} Appellant now appeals, assigning as error:

{¶12} "I. THE TRIAL COURT ERRED IN OVERRULING THE MOTION TO DISCHARGE THE DEFENDANT-APPELLANT, ISON, FOR A SPEEDY TRIAL VIOLATION OF THE RIGHTS IN OHIO REVISED CODE SECTIONS 2945.71 AND 2945.73.

{¶13} "II. DEFENDANT-APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL PROVIDED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10, OF THE OHIO CONSTITUTION, AS WELL AS THE DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND IN ARTICLE 1, SECTION 16, OF THE OHIO CONSTITUTION.

{¶14} "III. THE TRIAL [SIC] COMMITTED PLAIN AND PREJUDICIAL ERROR BY PERMITTING THE PROSECUTORIAL MISCONDUCT IN THE PROSECUTOR ENGAGING IN PERSONAL INVECTIVE AGAINST THE DEFENDANT AND IN FURTHER COMMENTING UPON THE FAILURE OF THE DEFENDANT TO TESTIFY AT TRIAL IN VIOLATION OF THE DEFENDANT'S FIFTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION."

I.

{¶15} In the first assignment of error, Appellant argues the trial court erred in failing to dismiss the charge against him as he was denied his right to a speedy trial.

{¶16} The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, made obligatory on the states by the Fourteenth Amendment. Section 10, Article I of the Ohio Constitution guarantees an accused this same right. *State v. MacDonald* (1976), 48 Ohio St.2d 66, 68, 2 O.O.3d 219, 220, 357 N.E.2d 40, 42. Although the United States Supreme Court declined to establish the exact number of days within which a trial must be held, it recognized that states may prescribe a reasonable period of time consistent with constitutional requirements. *State v. Parker*, 113 Ohio St.3d 207; *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 113, 2007-Ohio-1534 at ¶ 11.

{¶17} In Ohio, the right to a speedy trial has been implemented by statutes imposing a duty on the State to bring a defendant who has not waived his rights to a speedy trial to trial within the time specified by the particular statute. R.C. 2945.71 et seq. applies to defendants generally. R.C. 2941.401 applies to defendants who are imprisoned within the State of Ohio. *State v. Smith*, 140 Ohio App.3d 81, 85-86, 2000-Ohio-1777, 746 N.E.2d 678, 682.

{¶18} R.C. 2945.71 provides:

{¶19} "(C) A person against whom a charge of felony is pending:

{¶20} "(1) * * *

{¶21} "(2) Shall be brought to trial within two hundred seventy days after the person's arrest.

{¶22} "***

{¶23} "(E) For purposes of computing time under divisions (A), (B), (C)(2), and (D) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. This division does not apply for purposes of computing time under division (C)(1) of this section.

{¶24} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin*, Richland App. No.2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a de novo standard of review and thus freely review the trial court's application of the law to the facts. Id.

{¶25} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state.

{¶26} The time to bring a defendant to trial can be extended for any of the reasons enumerated in R.C. 2945.72, which provides:

{¶27} "The time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by the following:

{¶28} "(A) Any period during which the accused is unavailable for hearing or trial, by reason of other criminal proceedings against him, within or outside the state, by reason of his confinement in another state, or by reason of the pendency of extradition proceedings, provided that the prosecution exercises reasonable diligence to secure his availability;

{¶29} "(B) Any period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial;

{¶30} "(C) Any period of delay necessitated by the accused's lack of counsel, provided that such delay is not occasioned by any lack of diligence in providing counsel to an indigent accused upon his request as required by law;

{¶31} "(D) Any period of delay occasioned by the neglect or improper act of the accused;

{¶32} "(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;

{¶33} "(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

{¶34} "(G) Any period during which trial is stayed pursuant to an express statutory requirement, or pursuant to an order of another court competent to issue such order;

{¶35} "(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;

{¶36} "(I) Any period during which an appeal filed pursuant to section 2945.67 of the Revised Code is pending."

{¶37} When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the appellant was properly brought to trial within the time limits set forth in R.C. 2945.71. *State v. Riley*,

162 Ohio App.3d 730, 2005-Ohio-4337, 834 N.E.2d 887, ¶ 19. Once the defendant demonstrates he was not brought to trial within the applicable statutory limit, he has established a prima facie case for dismissal. The burden then shifts to the state to demonstrate that as a result of tolling or extension of the statutory time limit, the right to a speedy trial has not been violated. *State v. Kist* (2007), 173 Ohio App.3d 158, 162.

{¶38} A sua sponte continuance must be properly journalized before the expiration of the speedy trial period and must set forth the trial court's reasons for the continuance. “The record of the trial court must ... affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose.” *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095. Further, the issue of what is reasonable or necessary cannot be established by a per se rule but must be determined on a case-by-case basis. *State v. Saffell* (1988), 35 Ohio St.3d 90, 518 N.E.2d 934; *State v. Mosley* (Aug. 15, 1995), Franklin App. No. 95APA02-232. However, a continuance due to the trial court's engagement in another trial is generally reasonable under R.C. § 2941.401. *State v. Doane* (July 9, 1992), Cuyahoga App. No. 60097; See also *State v. Judd,* Franklin App. No. 96APA03-330, 1996 WL 532180. However, a continuance because the court is engaged in trial may be rendered unreasonable by the number of days for which the continuance is granted. See *State v. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476.

{¶39} Because criminal cases are to be given priority over civil cases, *sua sponte* continuances because of a civil case should be carefully scrutinized. As a general rule it would seem reasonable to try older pending criminal cases before more recently filed criminal cases. Exceptions to the rule might depend upon whether the

respective defendants are in custody or not, which case is closer to the expiration of speedy trial time, etc.

{¶40} In this matter, the indictment was filed on December 5, 2007. On December 17, 2007, the trial court set the matter for trial on February 11, 2008. On February 8, 2008, February 20, 2008, April 11, 2008 and July 14, 2008 the case was bumped by the trial court. Again on September 3, 2008 and October 13, 2008, the trial was rescheduled. On October 17, 2008, the State dismissed the charges. On November 6, 2008, the State re-indicted Appellant. The matter proceeded to a jury trial on February 9, 2009.

{¶41} Appellant has not demonstrated the sua sponte continuances in this case were unreasonable. There is no evidence the trial court continued the matter for civil cases not yet commenced, or for more recently filed criminal cases. The trial court properly issued judgment entries for each continuance. Further, the speedy trial limit was tolled at times due to motions filed by Appellant. Specifically, Appellant filed a motion for bond reduction, and a motion to suppress. Also, from January 31, 2008 to June 18, 2008, Appellant was incarcerated in Cuyahoga County on an unrelated charge; thus, unavailable for trial. Finally, the record demonstrates Appellant's counsel failed to provide timely reciprocal discovery. Based upon the above, the trial court did not err in denying Appellant's motion to discharge.

{¶42} Appellant's first assignment of error is overruled.

II.

{¶43} In the second assignment of error, Appellant asserts he was denied the effective assistance of trial counsel.

{¶44} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry in whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L .Ed.2d 180; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶45} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley,* 42 Ohio St.3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶46} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial; a trial whose result is reliable. *Strickland* 466 U.S. at 687; 694, 104 S.Ct. at 2064; 2068. The burden is upon the defendant to demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.; Bradley,* supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland,* supra; *Bradley,* supra.

{¶47} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel's performance was deficient

before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

{¶48} Initially, Appellant cites counsel's failure to introduce evidence as to the unreasonable delay in bringing this matter to trial. For the reasons set forth in our analysis and disposition of Appellant's first assignment of error, we find Appellant's counsel was not ineffective in failing to raise the argument, and Appellant has not demonstrated prejudice in the record before us as a result thereof.

{¶49} Appellant further alleges the ineffective assistance of trial counsel in failing to object to the identification of Appellant by two eye witnesses. Specifically, Appellant cites the following exchange at trial during the testimony of Matthew Kader:

{¶50} "Q. Does that document appear to be your statement to the police?

{¶51} "A. Yes, it does.

{¶52} "Q. That's the one you gave them that night?

{¶53} "A. Uh-huh.

{¶54} "Q. Having read that, has it refreshed your recollection of what occurred that night as far as identifying people?

{¶55} "A. To be honest, I stopped reading when the one lawyer objected.

{¶56} "Q. Well, then keep reading. Fair enough, Mr. Kader. Keep reading.

{¶57} "A. Yeah.

{¶58} "Q. Does it refresh your recollection?

{¶59} "A. It does.

{¶60} "Q. Okay. Now, having reviewed your statement, I guess what happened with respect to identifying these guys?

{¶61} "A. Well, you know, the cops brought the witnesses around. I identified the third guy in the camo jacket. My wife did as well. And they brought the other two around, and she and I identified them.

{¶62} "Q. Okay. Now, you say she and I identified them. At the time you're with these guys, you yourself, you recognize this guy?

{¶63} "A. I did even without my glasses, yeah.

{¶64} "Q. Even without the glasses. And that is the guy pictured in State's Exhibit 13.

{¶65} "A. Uh-huh.

{¶66} "Q. But then the other two, you were with your wife when the police brought them around?

{¶67} "A. I was, yeah.

{¶68} "Q. Okay. And you say we identified.

{¶69} "A. Well, by we, I meant I was there. I wasn't too sure about them without my glasses.

{¶70} "Q. Okay. And your glasses were broken.

{¶71} "A. They were.

{¶72} "Q. So there wasn't any fixing that.

{¶73} "A. No.

{¶74} "Q. Did your wife identify them?

{¶75} "A. She did, yeah.

{¶76} "Q. And, in fact, your statement says we identified the other two, does it not?

{¶77} "A. I believe so."

{¶78} Tr. at 228-230.

{¶79} Appellant also cites the testimony of Tabitha Kader:

{¶80} "Q. Okay. And did there come a time when the police came back?

{¶81} "A. Yes.

{¶82} "Q. What happened then?

{¶83} "A. One of them said they may have found a few of the guys and they were going to bring them down and show them to us - -

{¶84} "Q. Okay.

{¶85} "A. - - to see if we could identify them.

{¶86} "Q. And did they?

{¶87} "A. Yes, they did.

{¶88} "Q. Were these three guys all together when they showed them to you, or where were they?

{¶89} "A. They were in separate vehicles.

{¶90} "Q. Okay. How many guys did they show to you?

{¶91} "A. Four.

{¶92} "Q. Four. And did you recognize any of they guys?

{¶93} "A. These three, just three.

{¶94} "Q. These three in front of you.

{¶95} "A. Yes.

{¶96} "Q. Okay. But there was a fourth guy?

{¶97} "A. Yeah.

{¶98} "Q. What did you tell the police about the fourth guy?

{¶99} "A. That I had never seen him.

{¶100} "Q. Okay. So of the gentlemen that the police showed you that night, if I understand you correctly, three of them you identified.

{¶101} "A. Yes.

{¶102} "Q. How many were involved in the fight?

{¶103} "A. Just three.

{¶104} "Q. Okay. And the fourth guy you told them - -

{¶105} "A. Yeah, he wasn't involved.

{¶106} "Q. Don't know who that guy is.

{¶107} "A. Yeah.

{¶108} "Q. Okay. And these three guys you pointed out to the police, these are the same guys in 11, 12, 13.

{¶109} "A. Yes.

{¶110} "Q. Okay. After the police brought these guys by for you to identify, what happened?

{¶111} "A. I identified them, and they took them away and did, like, the normal procedures.

{¶112} "Q. Okay. What's that entail?

{¶113} "A. Taking our statement and - -

{¶114} "Q. And did you give them a statement?

{¶115} “A. Yes, I did.

{¶116} “Q. And did Matthew give the police a statement?

{¶117} “A. Yes.”

{¶118} Tr. at 279-281.

{¶119} Each case involving the issue of pre-trial identification must be considered on the totality of the circumstances, *Simmons v. United States* (1968), 390 U.S. 377, *Stovall v. Denno* (1967), 388 U.S. 293. The reviewing court should consider first whether the pre-trial procedure was unnecessarily suggestive, and then determine whether the identification itself is reliable, because reliability is a “linchpin in determining the admissibility of identification testimony,” *Manson v. Brathwaite* (1977), 432 U.S. 98.

{¶120} If the court concludes the identification procedure was unnecessarily suggestive, the identification may still be admissible if the identification was reliable under the totality of the circumstances. *Id.* at 114. In determining reliability, the court must consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the time that has elapsed between the crime and the confrontation. *Neil vs. Biggers* (1972), 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401.

{¶121} In this matter, the evidence demonstrates the Kaders called the police immediately after the incident, and the police arrived ten to fifteen minutes later. Accordingly, upon review of the record and the evidence, the identification of Appellant was reliable even if suggestive.

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

III.

{¶123} In the third assignment of error, Appellant argues the trial court committed plain error in allowing the prosecutor to engage in personal invective against Appellant, including commenting on his failure to testify. Specifically, Appellant cites the following exchange at trial:

{¶124} "Within minutes of arriving at that scene, two police officers have the description of three suspects, three suspects dressed like this, like this, like this. Where did they go? They march right down to Small Avenue. In there. And what do they find in there? Three suspects dressed just as described by the victims. But you know what? We're going to call the victims liars.

{¶125} "How wrong are they, folks? Seriously? We're going to call them liars? But here they are. Here these three guys are. And what you didn't hear, with the exception of Mr. Williams, who was at least decent enough to say he was in the general vicinity and not totally vanished, but from the other two guys is, they were involved in a fight. These are the guys. Boy, that's a crappy investigation. My God, I hope they dock the cops' pay for this.

{¶126} "Incredible. It is absolutely incredible to stand here and say this is a rush to judgment at the same time you're telling 12 folks that this guy is involved. He's down there beating them up. It's incredible. And it is because – that insult is thrown at you folks because there's nothing else to say. They've got nothing else to tell you, because the overriding theme of these folks over there is that, well, this isn't a theft, and they all try to carve that little piece of pie up in different directions. But the gist of it is, ignore

that something got stolen. That's what they're telling you to do. And it's all just a matter of how fine they want you to slice it.

{¶127} "Mr. Hicks wants to say, and the Judge will instruct you, that the theft occurs during or after - - or that the assault occurs during or after the theft offense. It did. It absolutely did. It's all one event. You can't go up to attempt to forcibly remove somebody's property, put a whipping on them, pick their property up and leave, and then say, well, that's just an assault with a theft and it's not a robbery you can't put them together, because, really, I was done beating his ass when I picked up his property. It's outrageous.

{¶128} "You folks are the citizens of Richland County. We bring you in here in a pool, randomly select you and put you here so that you can figure out what the law is in the State of Ohio and how it applies to other citizens of Richland County. So the question is, how fine do you folks want to cut it when you have to walk down the streets of your town? Although, gee, whiz, I hope it's not Mansfield, because, boy do those cops stink. They only found the right three guys within minutes of arriving on the scene.

{¶129} "Two of the Defendants want to argue that they could have just taken the beer. And I think at least one wants to say, well, if they were going to go down to steal, they'd take everything. So what? We're going to find two people there stripped naked because now we're just going to thieve on them barbarian style?

{¶130} "Here's the difference: What they're trying to do is put a rational spin on an irrational act. What we have here is what they call street crime in law enforcement. And street crime doesn't make sense because it's stupid. Whether you're trying to steal the beer or a wallet or whatever, it's all equally dumb, so don't' try to make it rational like

they're going to run up behind him, sneak and take the beer and, ha, ha, ha, run off. They knocked him down. Why? So that it's easier to take their stuff. It's easier to take someone's stuff if you have knocked them down, the problem being when you knock someone down with a case or 12-pack of bottles and they break and the person gets up, now you're there with them.

{¶131} "Could they have taken the wallet? Maybe. Could they have grabbed the beer? Maybe. What is it? It's all speculation. Why did they take the coat? Well, because it's laying on the ground. It's the easiest darn thing there to take. In order to take Matthew's wallet, you'd have to hold him down and put your hand down his pants and then take off with the wallet. And, hopefully, even this crowd over here would agree that's a harder proposition than making off with the coat that's there.

{¶132} "Then we have what they call little inconsistencies, whether it's rainy or nice out or how good Matthew Kader's eyes are. They got the right guys. How wrong is it? Whether it's raining or not, ask yourself, okay, it's raining and these guys run down and beat them up and steal the coat. Okay. Now it's sunny out. Now it's daytime. Now it's nighttime. Fall, winter, snowing, sleeting. Who cares? What's it matter? It's been a year and a half. You guys think back to a year and a half. Have you ever had anything even remotely traumatic happen to you and try to recall night? day?

{¶133} "The point here is that it has been conceded when we discussed the elements of the offense by at least Hicks and Ison that they were involved in the assault and that the assault occurred, so the only thing, the only thing to consider with respect to them, is whether or not the theft occurred during the assault and how fine you want to cut it. And there's no question it occurred during. There's no question."

{¶134} Tr. at 555-557

{¶135} The test regarding prosecutorial misconduct in closing arguments is "whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Smith* (1984), 14 Ohio St.3d 13, 14; *State v. Hessler* (2000), 90 Ohio St.3d 108, 125.

{¶136} Upon review of the entire record, some of the prosecutor's statements, while arguably improper, did not result in prejudice sufficient to rise to the level of misconduct when taken in context of the entire closing argument. Further, the comments were made in direct response to the theory of the case offered by the defense and the jury was instructed arguments of counsel were not evidence.

{¶137} Accordingly, Appellant's third assignment of error is overruled.

{¶138} Appellant's conviction in the Richland County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman ___________________
HON. WILLIAM B. HOFFMAN

s/ John W. Wise________________________
HON. JOHN W. WISE

s/ Patricia A. Delaney ___________________
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
TERRENCE RAYSHAUN ISON	:	
Defendant-Appellant	:	Case No. 2009CA0034

For the reasons stated in our accompanying Memorandum-Opinion, Appellant's conviction in the Richland County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY