

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
Plaintiff-Appellee	:	Hon. John W. Wise, P.J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	Hon. Patricia A. Delaney, J.
	:	
BRYAN K. HAWK	:	Case No. 2009 CA 000028
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Knox County Court of
Common Pleas Case No. 07CR03-0032

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: December 29, 2009

APPEARANCES:

For Plaintiff-Appellee:

JOHN C. THATCHER
KNOX COUNTY PROSECUTOR

CHARLES T. MCCONVILLE
Assistant Prosecuting Attorney
117 E. High St., Suite 234
Mount Vernon, OH 43050

For Defendant-Appellant:

BRUCE J. MALEK
KNOX COUNTY PUBLIC DEFENDER

MARK A. ZANGHI
Assistant Public Defender
One Public Square
Mount Vernon, OH 43050

Delaney, J.

{¶1} Defendant-Appellant Bryan K. Hawk appeals the judgment of the Knox County Court of Common Pleas convicting him of one count of Aggravated Robbery, in violation of R.C. 2911.01(A)(1). He was convicted after a jury trial.

{¶2} The testimony adduced at trial was as follows. On August 19, 2000, Jo Sharon Gartner was working from midnight to 8:00 a.m. as the clerk in the Dairy Mart store in Mount Vernon, Ohio. She began her nightly routine in the store, and shortly thereafter her “regulars” began to come in, mostly “bar stragglers” and people getting off work.

{¶3} At about 2:00 a.m., a man wearing “John Lennon” glasses came in and asked Gartner to break a \$50 bill. He put his purchases, two pizzas and a Coke Freeze, on the counter, told her that he forgot his money, and left the store. She put the purchase “on hold” and proceeded to ring out other customers. After Gartner rang out all the other customers in the store, Appellant came back in. He told her that he couldn’t find his money and asked if she could take a check. He then lifted up his shirt, revealing the butt of a gun tucked into the waistband of his pants.

{¶4} The man told Gartner that he wanted all the money from the register. He repeated the request three times before she understood what he was asking her to do. She gave him \$65 to \$75 in cash from the register. He left the store and told Gartner to “have a nice day.” He left his purchases on the counter, including the Coke Freeze with a straw from which he had taken a drink earlier.

{¶5} Gartner called the police after the robber left the store. Police retrieved the straw from the Coke Freeze and sent it to the Ohio Bureau of Criminal Investigations (BCI) for DNA analysis.

{¶6} A few hours after the incident at the Dairy Mart, two men walked into Hot Rod's Sunoco in Fredricktown. The Dairy Mart and Hot Rod are approximately seven miles apart. One of the men, who was wearing circular-shaped glasses, asked the clerk, Kristin Bloomfield, for a carton of cigarettes. She turned to grab the carton and when she turned back toward the men, one of them pulled out a gun and laid it on the counter. The man said, "Give me the money in the register and you will not get hurt." Bloomfield gave him the money from the register. He told Bloomfield to lie on the floor. She lay on the floor and waited a few minutes, then called her mom. Her mom called the police, and Bloomfield pushed the panic button in the store to alert the police.

{¶7} In 2006, for reasons unrelated to the Dairy Mart or Hot Rod incidents, DNA swabs had been taken from Appellant. Appellant's DNA swab was matched to the DNA sample taken from the straw retrieved from the Coke Freeze. According to Lynda Eveleth, a forensic scientist in the DNA serology division of BCI, the DNA taken from the straw was consistent with Appellant's DNA with an expected frequency of occurrence of 1 out of 158 quadrillion, 800 trillion, unrelated individuals.

{¶8} On March 6, 2007, Appellant was indicted by the Knox County Grand Jury, in case number 07CR030032, on one count of aggravated robbery with a firearm specification in violation of R.C. 2911.01(A)(1) and R.C. 2923.11(B), arising from the robbery of the Mount Vernon Dairy Mart.

{¶9} On March 7, 2007, a warrant was issued for Appellant's arrest. On June 14, 2007, Appellant was arrested and arraigned. The trial court set bond in the amount of \$100,000.00 cash. Appellant was unable to post bond and remained incarcerated on the charge until the trial on December 11, 2007.

{¶10} On September 11, 2007, a second indictment was returned against the Appellant in case number 07CR090150, for one count of aggravated robbery with a firearm specification, in violation of R.C. 2911.01(A)(1) and R.C. 2923.11(B), for the incident occurring at Hot Rod's Sunoco.

{¶11} On September 11, 2007, Appellant was served with the indictment in the Hot Rod case at the Knox County Jail where he was being held on the indictment in the Dairy Mart case. On September 28, 2007, Appellant was arraigned on the Hot Rod case and the court gave Appellant a personal recognizance bond.

{¶12} On October 10, 2007, the State moved the trial court to join the two aggravated robbery cases for trial. On October 12, 2007, the court granted the State's motion.

{¶13} On November 28, 2007, Appellant moved the court to dismiss the indictment in case number 07CR030032 (the Dairy Mart Case), arguing that there had been a speedy trial violation. On November 29, 2007, the State filed a response arguing, in part, that Appellant's speedy trial time had been tolled by Appellant's failure to respond to the State's request for discovery, which had been filed on July 20, 2007.

{¶14} On December 11, 2007, the matter proceeded to jury trial. Prior to the presentation of evidence, the trial court denied Appellant's motion to dismiss on speedy trial grounds.

{¶15} On December 13, 2007, after the presentation of evidence, the jury acquitted Appellant of aggravated robbery with a firearm specification in case number 07CR090150, the case arising from the robbery of Hot Rod's Sunoco. The jury found Appellant guilty of aggravated robbery of the Dairy Mart store in case number 07CR030032 but acquitted Appellant on the firearm specification. On January 18, 2008, the Appellant was sentenced to an eight-year term of imprisonment for the aggravated robbery conviction.

{¶16} Appellant filed a timely appeal of his conviction and sentence to this Court. In his first appeal, Appellant raised as one of his Assignments of Error that the trial court erred in failing to dismiss the Dairy Mart case on speedy trial grounds. The issue in *State v. Hawk*, Knox App. No. 08CA05, 2009-Ohio-1995, was whether Appellant's failure to respond to discovery tolled the speedy trial time. We remanded the matter to the trial court for a review of the record on whether Appellant's lack of response was reasonable under the facts and circumstances of the case. *Id.* at ¶35. Based on our remand, we declined to address Appellant's other Assignments of Error regarding his conviction and sentence for aggravated robbery as being premature.

{¶17} On June 5, 2009, the trial court issued its judgment entry pursuant to this Court's remand. The trial court reviewed the record and determined that based on the facts and circumstances of the case, the speedy trial was tolled on October 24, 2007, thirty days after the public defender's second appearance on behalf of Appellant.

{¶18} Appellant now re-files his original appeal after our remand.

ASSIGNMENTS OF ERROR

{¶19} Appellant raises five Assignments of Error:

{¶20} “I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR AGGRAVATED ROBBERY.

{¶21} “II. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE CONVICTION FOR AGGRAVATED ROBBERY WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶22} “III. THE TRIAL COURT ERRED WHEN IT DID NOT DISMISS THE INDICTMENT IN CASE NUMBER 07CR030032 (DAIRY MART) FOR THE FAILURE OF THE STATE OF OHIO TO PROVIDE DEFENDANT A SPEEDY TRIAL.

{¶23} “IV. THE TRIAL COURT ERRED WHEN IT DID NOT INSTRUCT THE JURY ON THE ISSUE OF BEING ‘HOPELESSLY DEADLOCKED’ AFTER THE JURY INDICATED THEY WERE DEADLOCKED ON THE DECISION FOR THE AGGRAVATED ROBBERY OF DAIRY MART.

{¶24} “V. THE DEFENDANT’S RIGHT TO A GRAND JURY INDICTMENT UNDER THE OHIO CONSTITUTION, AND HIS RIGHTS TO DUE PROCESS UNDER BOTH THE FEDERAL AND STATE CONSTITUTIONS WERE VIOLATED BECAUSE THE INDICTMENT IN CASE NO. 07CR03-0032 FAILS TO STATE A MENS REA ELEMENT FOR THE OFFENSE OF AGGRAVATED ROBBERY.”

{¶25} For ease of discussion, we will begin by addressing Appellant’s fifth Assignment of Error, which challenges the sufficiency of the indictment.

V.

{¶26} Appellant was charged by indictment with one count of Aggravated Robbery, with a firearm specification. His indictment, exclusive of the firearm specification, charges that Appellant: “on or about the 19th of August, 2000, in the County of Knox, State of Ohio, BRYAN K. HAWK did commit AGGRAVATED ROBBERY, in that while attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code of Ohio, or in fleeing immediately after such attempt or offense, BRYAN K. HAWK had a deadly weapon, to wit: one pistol, on or about his person or under his control and either displayed the weapon, brandished it, indicated that he possessed it, or used it, A FELONY OF THE FIRST DEGREE, contrary to and in violation of Section 2911.01(A)(1) of the Revised Code of Ohio and contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Ohio.”

{¶27} Appellant claims the indictment is defective because it fails to charge a mens rea element for the act of “displaying,” “brandishing,” “indicating,” or “using” a deadly weapon. Appellant further asserts the State must charge that a defendant acted recklessly, because the statute fails to mention any degree of culpability, citing *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 (“*Colon I*”).¹

{¶28} We must reject Appellant’s contentions in light of the Ohio Supreme Court’s ruling in *State v. Lester*, -- Ohio St.3d --, 2009-Ohio-4225, -- N.E.2d --, which was recently decided on August 27, 2009. In *Lester*, the Supreme Court held the

¹ Appellant’s citation to *Colon I* is the only case law upon which Appellant relies in his entire brief.

aggravated robbery statute, R.C. 2911.01(A)(1), that prohibits brandishing, displaying, using or indicating possession of a deadly weapon while attempting or committing a theft offense has no mens rea requirement; thus, the statute imposes strict liability regarding that element. *Id.* at ¶32. Therefore, the State is not required to charge a mens rea for this element of the crime of aggravated robbery under R.C. 2911.01(A)(1). *Id.* at ¶33.

{¶29} The Supreme Court noted “it is rational to conclude that the General Assembly imposed strict liability in R.C. 2911.01(A)(1) for the brandishing, display, or use-of-a-deadly weapon element” due to the increased risk of harm to victims or bystanders when a defendant brandishes or displays the weapon. *Id.* at ¶28. The Court also determined *Colon I* was not dispositive of the issue because *Colon I* addressed the element of inflicting or threatening to inflict physical harm under R.C. 2911.02(A)(2), and not the defendant’s use, display, brandishing, or indicating possession of a deadly weapon under R.C. 2911.01(A)(1).

{¶30} Accordingly, the fifth Assignment of Error is overruled.

{¶31} We will next address Appellant’s third Assignment of Error, which raises the issue of the right to a speedy trial.

III.

{¶32} Appellant argues that the State failed to bring the aggravated robbery charge to trial within the speedy trial time set forth in R.C. 2945.71(E), and therefore, the trial court erred in overruling the Appellant’s motion to dismiss.

{¶33} Pursuant to R.C. 2945.71(C)(2), a felony offense must be tried within 270 days of an arrest. Each day an accused is held in jail in lieu of bail, it counts as three

days toward the 270-day deadline. In the present case, Appellant was arrested and held in jail starting June 11, 2007; therefore, without a tolling event, he should have been tried on the 90th day after his arrest, which was September 9, 2007.

{¶34} Both the Ohio Revised Code and case law set forth events that toll the 270-day deadline. Among those tolling events are “any period of delay occasioned by the neglect or improper act of the accused.” R.C. 2945.72(D). Appellee asserts that the State filed a request for discovery on July 20, 2007, to which Appellant never responded. Appellee argues that Appellant’s failure to respond to discovery constituted a period of delay occasioned by Appellant’s neglect and, therefore, the time within which he must be brought to trial was tolled during this time.

{¶35} Appellant contends that the generally accepted practice in Knox County is to not immediately respond to a request for discovery when the defendant does not have reciprocal discovery to provide. Appellant argues, “The number of actual trials versus negotiated guilty pleas is very small and therefore reciprocal discovery is provided to the State of Ohio after it is apparent that a negotiated plea is not possible and the case will be settled only at trial.” Brief of Appellant, page 11.

{¶36} In reviewing a speedy trial claim, we must count the days of delay chargeable to either side and determine whether the case was tried within the time limits set forth in R. C. 2945.71. *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶ 8. Our review of a trial court’s decision regarding a motion to dismiss based upon a violation of the speedy trial provisions involves a mixed question of law and fact. *State v. Moore*, Knox App. No. 06-CA-17, 2007-Ohio-2174, ¶ 11. Due deference must be given to the trial court’s findings of fact if supported by competent, credible evidence.

Id. However, we must independently review whether the trial court properly applied the law to the facts of the case. Id. When reviewing the legal issues presented by a speedy trial claim, we must strictly construe the relevant statutes against the state. Id., citing *Brecksville v. Cook* (1996), 75 Ohio St. 3d 53, 57, 661 N.E.2d 706.

{¶37} In *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, the Ohio Supreme Court considered a criminal defendant's failure to respond to discovery to be the kind of neglect contemplated by R.C. 2945.72(D) that tolls the speedy trial time. In *Palmer*, the defendant responded to the State's discovery request 60 days after it was made by replying that he had no discoverable information to provide. On review, the Supreme Court stated:

{¶38} "That response clearly could have been prepared and served much earlier than 60 days after it was requested, and it was neglect on the part of Palmer not to have done so. The trial court therefore did not abuse its discretion in tolling the running of speedy trial time after 30 days had passed from service of the State's request." *Palmer* at ¶23.

{¶39} The *Palmer* Court held that the failure of a criminal defendant to respond to the State's request for reciprocal discovery within a reasonable time constitutes neglect that tolls the running of speedy trial time pursuant to R.C. 2945.72(D) Id. at paragraph one of the syllabus. The Court further held:

{¶40} "The trial court should determine the date by which a defendant should reasonably have responded to a reciprocal discovery request based on the totality of facts and circumstances of the case, including the time established for response by local rule, if applicable." Id. at paragraph 3 of the syllabus.

{¶41} In this case, the State filed a request for discovery on July 20, 2007. The State requested that the defendant provide reciprocal discovery and witnesses the defendant intended to present at trial. Appellant filed a witness list on the eve of trial, December 10, 2007, listing two witnesses, and 130 days had passed from the State's request. The Appellant revealed no other disclosures or supplemental responses. Upon remand, the trial court found "thirty days constitutes a reasonable time for the Defendant to respond to a discovery demand under the facts and circumstances of this case." Judgment Entry, June 5, 2009. The trial court constructed a timeline of events and determined that a total of 53 days were chargeable to the State towards the time limit (applying the aforementioned 30 days in the calculation), and therefore concluded the Appellant was not denied his right to speedy trial. *Id.*

{¶42} Like the defendant in *Palmer*, we find that Appellant's response clearly could have been prepared and served much earlier than 130 days after it was requested and it was neglect on the part of Appellant not to have done so. Even assuming it is unwritten local practice for a defendant not to provide reciprocal discovery unless the case will be tried, this practice defeats the purpose of the discovery rules to prevent surprise and the secreting of evidence favorable to one party. *Palmer* at ¶18.

{¶43} We find the trial court did not abuse its discretion in determining that the Appellant should reasonably have responded to a reciprocal discovery request within 30 days based on the totality of facts and circumstances of this case

{¶44} Accordingly, the third Assignment of Error is overruled.

{¶45} We will next address Appellant's fourth Assignment of Error pertaining to jury instructions.

IV.

{¶46} Approximately four hours into the jury deliberations, the jury sent out a note. It stated: “We are deadlocked on the decision for aggravated robbery of Dairy Mart. What do we do?” (T. at 365).

{¶47} The trial court announced that it would give the *Howard* charge reflected in Ohio Jury Instructions. See Ohio Jury Instructions (2008), Section 429.09(1)-(2)². *State v. Howard* (1989), 42 Ohio St.3d 18, 25-26, 537 N.E.2d 188. The defense asked the court to add a *Martens* charge, which discussed the impossibility of reaching a verdict and is further reflected in Ohio Jury Instructions (2008), Section 429.09(3). *State v. Martens* (1993), 90 Ohio App.3d 338, 629 N.E.2d 462. The charge provides:

{¶48} “If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations.” Id. at 343, 629 N.E.2d 462.

{¶49} The trial court refused to give the additional charge, indicating, “[T]he first time around I do not give them the option of being hopelessly deadlocked. If they come back in with this same concern later on, we’ll discuss that instruction. (T. at 366). The trial court then delivered the *Howard* charge (T. at 367-368), and the jury resumed deliberations and returned a verdict shortly thereafter.

{¶50} In this Assignment of Error, Appellant argues that the trial court erred in failing to give a “hopelessly deadlocked” charge.

² The trial transcript reflects the court referenced OJI Section 415.50, which was the prior number of this instruction.

{¶51} It is well established that the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constitutes an abuse of discretion under the facts and circumstances of the case. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶37, 796 N.E.2d 506.

{¶52} In *Brown*, the Ohio Supreme Court stated:

{¶53} "Whether the jury is irreconcilably deadlocked is essentially 'a *necessarily* discretionary determination' for the trial court to make. *Arizona v. Washington* (1978), 434 U.S. 497, 510, 98 S.Ct. 824, 54 L.Ed.2d 717, fn. 28. In making such a determination, the court must evaluate each case based on its own particular circumstances. *State v. Mason* (1998), 82 Ohio St.3d 144, 167, 694 N.E.2d 932. There is no bright-line test to determine what constitutes an irreconcilably deadlocked jury." *Id.*

{¶54} The *Brown* Court upheld the trial court's refusal to give a *Martens* charge in the penalty phase of a capital case at the jury's first deadlock and at their later indication of a compromise verdict even though several days of deliberations had passed. The Court further stated:

{¶55} "In this case, even though the jurors deliberated for a lengthy period of time, they never advised the court, after their initial deadlock, that they were unable to reach a verdict. Thus, the court acted within its discretion in refusing to give the *Martens* instruction regarding the impossibility of reaching a verdict. Even the *Martens* court itself, in refusing to require the instruction in that case, acknowledged that such an instruction should not be given prematurely. Otherwise, the instruction may be contrary

to the goal of the *Howard* charge of encouraging a verdict where one can conscientiously be reached.” (Internal quotations and citation omitted).

{¶56} Here, the jury deliberated from approximately 1:30 p.m. until 4:00 p.m. when it indicated it was deadlocked at least to one count of aggravated robbery and inquired what it should do. This was the first time the jury came to the court with its deadlock. Less than four hours of deliberations had elapsed. We note this case involved not one, but two store robberies, a total of 11 witnesses and 42 exhibits, including many photographs. The jury did not indicate it was deadlocked on the other charge and the time of deliberations was not particularly lengthy for this kind of case. Appellant does not dispute a *Howard* charge was proper to encourage a verdict if appropriate and the trial court’s instruction comports with the goal to reach a consensus. Under the circumstances of this case, we find no error in failing to give *Martens* instruction.

{¶57} The fourth Assignment of Error is overruled.

{¶58} We will now address Appellant’s remaining Assignments of Error.

I., II.

{¶59} In his first and second Assignments of Error, Appellant maintains that his conviction for aggravated robbery of the Dairy Mart was based on insufficient evidence and was against the manifest weight of the evidence.

{¶60} In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Waddy* (1992), 63

Ohio St.3d 424, 430, 588 N.E.2d 819. To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence, and conclude that in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387,1997-Ohio-52, 678 N.E.2d 541.

{¶61} Essentially, Appellant argues that the jury’s finding against the firearm specification negates the deadly weapon element of the aggravated robbery offense for the Dairy Mart incident and the surveillance photographs admitted at trial do not show a gun or evidence of a robbery at the Dairy Mart, therefore, acquittal is warranted.

{¶62} R.C. 2911.01(A)(1) provides that “[n]o person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender’s person or under the offender’s control and either display the weapon, brandish it, indicate that the offender possesses it, or use it.”

{¶63} A deadly weapon is defined in R.C. 2911.01(D)(1) as having the same meaning as R.C. 2923.11. Said section defines deadly weapon as “any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.”

{¶64} A firearm specification pursuant to R.C. 2941.145 states the imposition of a three-year mandatory prison term is precluded unless the indictment specifies “the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense.”

{¶65} R.C. 2923.11(B) states that “(1) ‘[f]irearm’ means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. ‘Firearm’ includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.”

{¶66} Appellant contends that an essential element of the offense of aggravated robbery, that during the commission of the theft offense he had a deadly weapon, was not proved by the State because the jury acquitted Appellant on the gun specification.

{¶67} This Court has previously found on two occasions that a guilty verdict on an aggravated robbery charge is not rendered invalid by a jury’s finding of not guilty on the deadly weapon specification. See, *State v. Moses*, 5th Dist. No. 01CA104, 2002-Ohio-3832; *State v. Bivens*, (June 3, 1994), 5th Dist. No. 89-CA-3430, 1994 WL 369895.

{¶68} In both *Moses* and *Bivens*, this Court relied upon the fact that a jury, when a firearm is not admitted into evidence, may reasonably find that State failed to prove the gun was operable or capable of being rendered operable for a conviction on the gun specification but still find, based upon witness testimony, that a defendant committed aggravated robbery by having a deadly weapon on or about the offender’s person or that the person displayed a weapon.

{¶69} Similar circumstances are presented in this case. The Dairy Mart store clerk, Jo Sharon Gartner, positively identified Appellant at trial as the man who robbed the store, and stated that he lifted up his shirt, showed her the butt of a gun in his front waist band, and told her he wanted all of the money out of the register. Her belief that he had a gun influenced her to give him the money. She described him as wearing

small glasses, like the kind John Lennon used to wear, a hat, t-shirt and nylon jogging pants. This individual is reflected in the store surveillance pictures at the counter with the victim. The pictures show the Coke Freeze on the counter while the individual searches his pockets, leaves the store, and then returns to counter. The clerk testified she saw this individual drink out of the Coke Freeze. There was no one else in the store when the robbery occurred. The individual then left the store with the money, leaving the Coke Freeze behind, which years later, was shown to contain evidence of Appellant's DNA.

{¶70} Although Appellant questions the clerk's credibility and recollection due to the lapse of time, we cannot say that the jury lost its way in finding him guilty of the aggravated robbery of the Dairy Mart.

{¶71} The first and second assignments of error are overruled.

{¶72} The judgment of the trial court is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS

PAD:kgb

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

STATE OF OHIO	:	
	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BRYAN K. HAWK	:	
	:	
	:	Case No. 2009 CA 000028
Defendant-Appellant	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Knox County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. JOHN W. WISE

HON. JULIE A. EDWARDS