[Cite as *State v. Hill*, 2010-Ohio-3103.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-26
KENNETH HILL	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Richland County Court of Common Pleas, Case No. 2005CR0148
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 30, 2010
APPEARANCES:	
For Plaintiff-Appellee	For Defendant-Appellant
JAMES J. MAYER Richland County Prosecutor BY: Kirsten L. Pscholka-Gartner 38 South Park Street Mansfield, OH 44902	RANDALL E. FRY 10 West Newlon Place Mansfield, OH 44902

Gwin, P.J.

{¶1} Defendant-appellant Kenneth L. Hill appeals his convictions and sentences entered by the Richland County Court of Common Pleas on one count of felonious assault and one count of having weapons while under a disability. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} In January 2005, Keyonia Autrey and her girlfriend Scottea Brooks lived in apartment A-3 of the apartment complex on Burns Avenue in Mansfield, Ohio. Cha Cha Smith lived in the same building in apartment A-8, and Lisa Strock lived in apartment F-4, which was in a different building within the same apartment complex. All four of these women were crack cocaine users, and they often congregated in each other's apartments to get high. Lisa Strock would also frequently rent out her apartment to drug dealers in exchange for free drugs. If one dealer left, even to go to the store or to pick up a new supply of drugs, Lisa would allow another drug dealer to replace him.

{¶3} Up until mid January 2005, Lisa had been allowing appellant to sell drugs out of her apartment. He was from Chicago and went by the street name "Wood." However, appellant left Lisa's apartment for a short period, and she allowed drug dealers from Chicago to move into her apartment in appellant's absence. When the appellant returned, one of the drug dealers pulled a gun on appellant and told him to get out of the apartment.

{¶4} Appellant remained in the apartment complex. On January 17, 2005, he was in Cha Cha Smith's apartment with a gun, making threats against Lisa Strock. Cha Cha became concerned and went over to Lisa's apartment to warn her.

{¶5} Scottea Brooks and Keyonia Autrey were at Lisa Strock's apartment. Earlier that day, they had been in Cha Cha Smith's apartment smoking crack cocaine with her, appellant, and several other people; however, Keyonia noticed the tense atmosphere and they returned to their apartment. Shortly thereafter, Scottea told Keyonia that she was leaving and would be back in a few minutes. When she did not return, Keyonia went looking for her. Keyonia found Scottea sitting in the living room of Lisa's apartment talking to William Green, one of the drug dealers. Scottea was planning to go upstairs and have sex with Green in exchange for free drugs. They told Keyonia that they would give her some drugs too if she waited for them in the living room. Before heading upstairs, Green handed Lisa his gun to put up for him. Lisa took it upstairs and then returned downstairs with Keyonia.

{¶6} Scottea and William Green were still upstairs when Cha Cha Smith knocked on Lisa's door to warn her about appellant's threats. Lisa told Cha Cha to tell appellant that she was sorry and to ask for his help getting the drug dealers out of her apartment because they were carrying guns around all the time and making her nervous.

{¶7} Cha Cha returned to her apartment to convey this message to appellant; however, he was not there. She went back to Lisa's apartment. William Green had come back down to the living room, but Scottea was still upstairs.

{¶8} Cha Cha initially knocked on the back door, but Lisa directed her to go around to the front. When Cha Cha knocked on the front door, appellant and another black male came up from behind her. When Lisa opened the door to let Cha Cha inside, appellant and the other man pushed their way inside the apartment. Cha Cha

grabbed Lisa and pushed her out of the way. Appellant continued past them straight into the living room.

{¶9} As soon as appellant walked past, Cha Cha grabbed Lisa and took her out of the apartment. Keyonia remained standing against the wall near the entrance to the kitchen and the hallway, with the other man standing next to her. From that vantage point, she saw appellant pull a gun and order William Green to lie down on the floor. Scottea was coming down the stairs at that time; however, she ran back upstairs when she saw appellant pull out a gun. Keyonia heard appellant order Green to "run his pockets" before shooting him in the back. Appellant and the other man then fled the apartment, leaving Keyonia downstairs with William Green and Scottea hiding in an upstairs bedroom. She eventually retrieved Scottea from upstairs, and they left William Green alone in the apartment because they were afraid the men would come back and kill them.

{¶10} Andrea Bach, Lisa Strock's next-door neighbor called 911 after Cha Cha and Lisa ran to her apartment. When the police arrived, they found William Green lying on the living room floor with a bullet wound to his abdomen. A .40 caliber shell casing was lying next to him on the floor. When they searched the apartment, they also located a crack pipe on the stairs where Scottea claimed she was standing at the time of the shooting, and a .38 caliber revolver hidden between the mattress and box spring in one of the upstairs bedrooms, which they believed, belonged to William Green.

{¶11} The police eventually located and took statements from Keyonia, Scottea, Cha Cha, and Lisa. All four women indicated that the shooter was a drug dealer from Chicago that went by the street name "Wood." When they were shown a

photo lineup, they all identified appellant. The victim William Green was uncooperative in the investigation because he was also a drug dealer. He checked himself out of MedCentral Hospital against medical advice and returned to Detroit.

{¶12} Based on the identifications and statements from Keyonia Autrey, Scottea Brooks, Cha Cha Smith, and Lisa Strock, the Richland County Grand Jury indicted appellant for one count of felonious assault with a deadly weapon, one count of aggravated robbery with a firearm specification, and one count of having weapons under disability. Although the indictment was issued on March 8, 2005, appellant could not be located to be served with that indictment until March 5, 2008, when he was arrested and extradited from Chicago, Illinois. Appellant pled not guilty to the charges at arraignment and was held in the Richland County Jail on the charges in this case, as well as charges arising from an unrelated shooting in case number 2005-CR-147D.

{¶13} Appellant's jury trial on this case was originally set for May 15, 2008; however, that date was continued several times by the trial court due to conflicts with the trial of other cases. Appellant was brought to trial on this case on August 28, 2008. Prior to the start of that trial, his counsel raised a motion to dismiss on his behalf, alleging a violation to his right to a speedy trial. The trial court overruled the motion and the case proceeded to trial.

{¶14} At the conclusion of the trial, the jury found appellant guilty of the felonious assault and having weapons under disability charge, but acquitted him of the aggravated robbery charge and the attached firearm specification. The trial court sentenced appellant to eight (8) years on the felonious assault charge, and five (5) years on the weapons under disability charge. The court ran the sentences consecutive

to each other and consecutive to the eighteen (18) year sentence he was serving for attempted murder with a firearm specification and having weapons under disability in case number 2005-CR-147D.

{¶15} Appellant has timely appealed raising the following two assignments of error for our consideration[1]:

{¶16} "I. THE JURY'S VERDICT IN FINDING THE DEFENDANT-APPELLANT GUILTY OF FELONIOUS ASSAULT AND HAVING A WEAPONS UNDER DISABILITY WAS CONTRARY TO THE MANIFEST WEIGHT OF EVIDENCE, THUS THE CONVICTION WAS IN VIOLATION OF ARTICLE I, 10 OF THE OHIO CONSTITUTION AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶17} "II. APPELLANT-DEFENDANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I , SECTION 10 OF THE OHIO CONSTITUTION."

I.

{¶18} In his first assignment of error, appellant argues that his convictions for felonious assault and having a weapon while under a disability are against the weight of the evidence.

{¶19} While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest-weight challenge questions

[1] We note that the Assignments of Error set forth at page 5 of appellant's brief are not the same as the Assignments of Error set forth at page 8 and page 14 of his brief.

whether the state has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541, 548-549 (Cook, J., concurring).

{¶20} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. “In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings.” *State v. Wilson*, supra.

{¶21} In making this determination, we do not view the evidence in the light most favorable to the prosecution. Instead, we must "review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the Trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). However, an appellate court may not merely substitute its view for that of the jury, but must find that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v Thompkins,* supra, 78 Ohio St.3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721).

{¶22} Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶23} In *State v. Thompkins*, supra the Ohio Supreme Court further held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." 78 Ohio St.3d 380 at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id., paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶24} In the case at bar, there is no dispute that a shooting had in fact occurred. Appellant's main argument is that there was insufficient evidence to identify him as the assailant in the shooting of Mr. Green.

{¶25} Although there were inconsistencies between the testimony of eyewitness, Scottea Brooks, and Keyonia Autry, about the circumstances leading up to the shooting, both agreed on the central issue of the case – that appellant was the man who forced his way into Lisa Strock's apartment and shot William Green.

{¶26} From the verdicts in this case, it is clear that the jury did weigh the witnesses' credibility based on its observations of their demeanor on the stand. While Scottea Brooks was often confused on the sequence of events and reluctant to fully disclose her drug use or prostitution on the night of the shooting, the basic details of her testimony about the shooting were consistent with the version of events provided by Keyonia Autrey and Cha Cha Smith. Keyonia and Cha Cha's testimony contained

only minor discrepancies that can easily be accounted for by the lapse of time and differences in their perception of events.

{¶27} Upon careful review of the record, we are persuaded that the state adduced credible probative evidence that appellant was the person who shot Mr. Green.

{¶28} "A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891)." *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶29} Although the appellant argued that there were inconsistencies between the testimonies of the eyewitness about the circumstances leading up to the shooting, the jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v.*

Raver, Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; State v. Burke, Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶30} After reviewing the entire record, weighing the evidence and all reasonable inferences, considering the credibility of witnesses and resolving the conflicts in the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes of felonious assault and having a weapon while under a disability.

{¶31} Based upon the foregoing and the entire record in this matter, we find appellant's convictions were not against the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before it. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶32} Appellant’s first assignment of error is overruled.

II.

{¶33} In his second assignment of error, appellant argues the trial court erred in denying his motion to dismiss the indictment based upon a violation of his right to a speedy trial. We disagree.

{¶34} 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.

{¶35} When reviewing the legal issues presented in a speedy-trial claim, we must strictly construe the relevant statutes against the state. In *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706, 709, the court reiterated its prior admonition "to strictly construe the speedy trial statutes against the state."

{¶36} In Ohio, the right to a speedy trial has been implemented by statutes that impose 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. 2945.71 provides:

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

{¶38} "(1) * * *

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

{¶40} "(D) A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section."

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

{¶42} "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:

{¶43} "(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;

{¶44} "(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;

{¶45} "(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;

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

{¶47} "(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;

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

{¶49} "(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;

{¶50} "(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;

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

{¶52} "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.

{¶53} In this case, appellant was indicted on March 8, 2005 for two separate cases. The first case, 2005-CR-147D, arose from an unrelated shooting that occurred on October 8, 2004. The second case, 2005-CR-148D, from which this appeal stems, arose from the January 17, 2005 shooting of William Green. Appellant was not served with those indictments until March 5, 2008, after he was located and extradited from Chicago, Illinois. Pursuant to R.C. 2045.72(A), any time that he spent in jail awaiting extradition does not count against the State for purposes of calculating his speedy trial time.

{¶54} Appellant's speedy trial time began to run when he was served with the indictment on March 5, 2008. From that date, he was continuously incarcerated in the Richland County Jail until September 5, 2008. However, since he was being held on

two separate cases, the triple-count provision of R.C. 2945.71(E) does not apply. Thus, only 185 of the allotted 270-days elapsed during that time. Based on these calculations, appellant's statutory speedy trial time was set to expire on November 29, 2008.

{¶55} Appellant's jury trial in case number 2005-CR-148D was initially set for May 15, 2008, well within the 270-day period.

{¶56} The May 15, 2008 trial date was continued by the trial court *sue sponte*. The continuance was journalized in an entry filed on May 16, 2008, before the expiration of appellant's speedy trial time. In that entry, the trial court stated that the reason for the delay was due to a conflict with the case of *Janet I. Welch v. Coca-Cola Enterprises*, *Inc.*, case number 06-CV-1083 was in trial on that date.

{¶57} Following the May 16, 2008 continuance, appellant's trial was rescheduled for June 5, 2008. The trial court issued a *sue sponte* continuance of the appellant's June 5, 2008 trial date. In an entry journalized on that date, the trial court stated that the continuance was again due to a conflict with the trial of a civil case, *Robin and William Walker v. Erie Insurance Company,* which continued in trial on that date. The trial court re-scheduled appellant's trial to July 10, 2008.

{¶58} Appellant's case in 2005-CR-147D proceeded to trial on July 10th through 11th, 2008. Therefore, the trial court issued a *sue sponte* of the trial in case number 2005-CR-148D which was scheduled for the same date. Because of this continuance, appellant's trial in the case at bar was rescheduled for July 24, 2008.

{¶59} The trial court issued a final *sue sponte* continuance due to a conflict with the case of *State of Ohio v. Raymond Sayre v. MedCentral*, case number 07-CV-

259D, which was in trial on July 24, 2009. Because of this continuance, appellant's trial was rescheduled for August 28, 2008.

{¶60} 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. *State v. Weatherspoon*, Richland App. No. 2006CA0013, 2006-Ohio-4794. "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. A continuance due 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.

{¶61} 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 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. *State v. Ison*, Richland App. No. 2009CA0034, 2009-Ohio-5885 at ¶ 39.

{¶62} 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. According to the judgment entries, the civil cases that prompted the continuance of the appellant's case had commenced trial prior to the date the appellant's case was scheduled to commence. *State v. Ison,* supra at ¶ 41; *State v. Foster*, Richland App. No. 2007CA0031, 2007-Ohio-6626 at ¶ 18. Appellant makes only a generalized argument with no factually specific and compelling prejudice argued or demonstrated by the record.

{¶63} Accordingly, we find no abuse of discretion in the trial court's overruling appellant's motion to dismiss, as appellant's right to a speedy trial was not violated.

{¶64} Appellant's second assignment of error is overruled.

{¶65} For the foregoing reasons, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Farmer, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

WSG:clw 0621

[Cite as *State v. Hill*, 2010-Ohio-3103.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
KENNETH HILL	:	
Defendant-Appellant	:	CASE NO. 2009-CA-26

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, of Richland County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER