[**Cite as *State v. Battle*, 2010-Ohio-4327.**]

COURT OF APPEALS
MORGAN COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

BILLY J. BATTLE

Defendant-Appellant

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 AP 0001

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 07 CR 64

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 13, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Defendant-Appellant Billy J. Battle, Sr. appeals his conviction and sentence entered in the Morgan County Court of Common Pleas following a jury trial.

{¶2} Plaintiff-Appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶3} Appellant Billy Battle was in a relationship with Estella Finley. Ms. Finley had lived with Appellant at his residence located at 4850 Pounds Road, McConnellsville, Ohio, for approximately eight months until early August, 2007, when she moved in with her mother in Huntington. In late August, Appellant picked her up and brought her back to his home for a few days in an effort to either reconcile their relationship or for Ms. Finley to gather her things and permanently move from 4850 Pounds Road.

{¶4} At about 1:00 p.m. on the afternoon of August 26, 2007, Ms. Finley decided to permanently move from the premises, and began loading her belongings into a truck. Appellant informed Ms. Finley that he wanted her to take all of her belongings with her, which angered Ms. Finley because she did not have a place to store the items. This escalated into an argument between Appellant and Ms. Finley. As a result of this argument, Appellant struck Ms. Finley in the forehead. At some point, Ms. Finley called 911.

{¶5} Deputy West responded to the 911 call, and spoke with Ms. Finley, who informed him that Appellant struck her in the head. Deputy West observed a large knot on Ms. Finley's forehead. (T. at 77). Deputy West then spoke with Appellant, who told him that Ms. Finley hit herself in the head. Deputy West also observed the smell of

alcohol on Appellant's breath. Deputy West evaluated the situation and, determining that he had probable cause for arrest, told Appellant to "turn around and place your hands behind your back." (T. at 84-86). When Deputy West began to walk toward Appellant, he ran into his residence. Id. Deputy West then attempted to follow Appellant in order to arrest him; however, Appellant attempted to shut the door on Deputy West. Id. Deputy West was able to lodge his foot into the front door of Appellant's residence before he could be locked out. Deputy West then followed Appellant into his house, where Appellant ran into the kitchen. (T. at 87). Appellant then picked up a gun from the counter and pointed it at Deputy West. Id. Deputy West was approximately 2 feet from Appellant when the gun was drawn. (T. at 88). While pointing the gun at Deputy West, Appellant yelled out "you are in my fucking house." Id. Deputy West decided he would not be able to draw his weapon before Appellant would be able to pull the trigger on his weapon, so Deputy West retreated from the household. Id. Deputy West retreated and ran out of the residence and behind his vehicle. Deputy West then drew his weapon and radioed for backup. Appellant then came out of the house with his hands in the air. Deputy West ordered Appellant to lie down on the ground and then placed handcuffs on him. (T. at 90). Appellant was then placed in a cruiser and eventually transported to jail.

{¶6} As a result of the above, Appellant was arrested on August 26, 2007, on a complaint of felonious assault in violation of R.C. §2903.11(A) (2).

{¶7} Mr. Battle remained in jail until bond was posted on October 10, 2007.

{¶8} On September 17, 2007, the Morgan County grand jury returned a five count indictment charging Appellant with felonious assault on Deputy Brian West, domestic violence against Estella Finley, aggravated menacing of Deputy West while

the deputy was in the performance of his duties, obstructing official business and creating a risk of physical harm to persons, and brandishing a firearm while resisting arrest.

{¶9} On November 14, 2007, Appellant filed several motions.

{¶10} On November 15, 2007, the trial court granted Appellant's motion to continue the trial, and reassigned the trial for March 18, 2008.

{¶11} On November 19, 2007, the trial court granted the State's motion requesting a Nolle Prosequi, and dismissed the case without prejudice.

{¶12} A new indictment was filed on November 29, 2007. This indictment was assigned Morgan County Case No. 07 CR 0064, and consisted of exactly the same charges as were stated in the original indictment, with the addition of a firearm specification under RC §2941.145 to the aggravated menacing and resisting arrest charges. The indictment was not served until December 7, 2007.

{¶13} On December 7, 2007, Appellant filed several more motions.

{¶14} On March 3, 2008, a hearing was held on Appellant's motions.

{¶15} On April 4, 2008, Appellant filed a motion to dismiss the domestic violence and resisting arrest charges.

{¶16} On, May 2, 2008, Appellant’s counsel sent the court a written waiver of the Appellant’s right to a speedy trial.

{¶17} On July 16, 2008, a hearing was held for all pending motions.

{¶18} On August 25, 2008, Appellant filed a motion to dismiss the firearm specification on Count Five (resisting arrest). A hearing was held on this motion and the motion was denied. The court then scheduled a jury trial for November 18, 2008.

{¶19} Appellant's counsel moved to withdraw as counsel of record on November 12, 2008, alleging that "the defendant has directed Attorney Wells to advance a legal argument that Attorney Wells does not believe will be successful."

{¶20} The trial court then continued the trial to February 17, 2009. Attorney Robert Miller was appointed as defense counsel on November 14, 2008.

{¶21} Appellant filed a pro se motion to dismiss based on speedy trial grounds on January 7, 2009.

{¶22} On January 9, 2009, Appellant's new counsel submitted several motions to the trial court and requested a bill of particulars.

{¶23} On February 10, 2009, Attorney Miller withdrew as defense counsel due to a medical emergency, and on February 12, 2009, Attorney Moorhead was appointed as defense counsel.

{¶24} Also on February 12, 2009, Attorney Moorhead requested discovery and a bill of particulars.

{¶25} On May 12, 2009, Attorney Moorhead filed a motion in limine. The court then set a date of May 14, 2009, to have a hearing for the defense's motions in limine. No hearing was ultimately held on May 14, 2009.

{¶26} The trial in this matter commenced on May 19, 2009, and began with a hearing on the pending motions: the Defendant's pro se motion to dismiss for speedy trial and Attorney Moorhead's motion in limine. The speedy trial motion was denied, and the motion in limine was granted in part and denied in part.

{¶27} At trial the State called Deputy Brian West, Sheriff Thomas Jenkins, Sr., and Charles P. Lumpkins, formerly of the Morgan County Sheriff's department.

{¶28} Ms. Finley was subpoenaed as a witness and did not appear.

{¶29} The Defense presented the testimony of Appellant, Appellant's cousin Benny Battle, Deputy Brett Pricket of the Clinton County Sheriff's Department and Don Wilson, a family friend of Appellant.

{¶30} In their testimony, Appellant and Benny Battle stated that Ms. Finley walked away from the argument with Appellant and walked to the neighboring property. Benny Battle then stated he saw Ms. Finley hit herself in the head repeatedly. (T. at 171). Benny Battle further stated that Deputy West spoke with Ms. Finley and Appellant for five to ten minutes, and then Appellant threw his hands up into the air and walked inside. (T. at 171). Benny Battle stated that he then saw Deputy West stick his head in the door, then come back out and take Ms. Finley around the back of the cruiser. He stated that Appellant then walked out of his residence, at which time he was hand-cuffed. Id.

{¶31} Neither Brett Pricket nor Don Wilson were present at Appellant's residence on August 26, 2007, and therefore could not testify as to what occurred on said date.

{¶32} Rob Thompson was also subpoenaed but did not appear. Defense counsel proffered that, if called to testify, Mr. Thompson would corroborate the testimony of Benny Battle and Appellant. Mr. Thompson's testimony would have conflicted with Deputy West, who testified that the only persons in the area during the crime were Deputy West, Ms. Finley, and Mr. Battle. (T. at 103-104).

{¶33} At the close of the State's case, the Defense made a Crim.R. 29 motion for judgment of acquittal. The domestic violence and aggravated menacing counts were then dismissed.

{¶34} The jury returned guilty verdicts on all remaining counts and specifications.

{¶35} By Judgment Entry filed November 25, 2009, the trial court imposed a sentence of seven (7) years on the felonious assault charges. The trial court further sentenced Appellant to eleven (11) months on each of the resisting arrest and obstructing official business charges. This was to run concurrent with the seven (7) year sentence for felonious assault. Finally, the trial court imposed a mandatory three (3) year consecutive sentence for the firearm specification, resulting in a stated prison term of ten (10) years.

{¶36} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶37} "I. THE TRIAL COURT ERRED IN DENYING MR. BATTLE'S MOTION FOR DISMISSAL ON SPEEDY TRIAL GROUNDS.

{¶38} "II. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTIONS FOR JUDGMENT OF ACQUITTAL UNDER RULE 29, OHIO RULES OF CRIMINAL PROCEDURE, AT THE CLOSE OF THE STATE'S CASE. IN THE ALTERNATIVE, THE JURY VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶39} "III. THE TRIAL COURT ERRED IN REFUSING TO GRANT A CONTINUANCE TO ALLOW THE DEFENSE TO SECURE THE PRESENCE OF A

CRITICAL WITNESS, MR. THOMPSON, TO REBUT THE TESTIMONY OF THE ARRESTING OFFICER.

{¶40} IV. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL BASED ON IRREGULARITY IN THE PROCEEDING, TO WIT: INEFFECTIVE ASSISTANCE OF COUNSEL. IN THE ALTERNATIVE, MR. BATTLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND THUS A NEW TRIAL IS REQUIRED."

I.

{¶41} In his first assignment of error, Appellant maintains the trial court erred in denying his motion to dismiss based on a speedy trial violation. We disagree.

{¶42} An accused is guaranteed the right to a speedy trial by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution. To determine whether an accused's right to a speedy trial has been violated, the United States Supreme Court has devised a balancing test that requires courts to balance and weigh the conduct of the prosecution and that of the accused by examining four factors: the length of the delay, the reason for the delay, whether the accused has asserted his speedy trial rights, and any resulting prejudice to the accused. *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101.

{¶43} 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. §2941.401 applies to defendants who are imprisoned.

{¶44} The provisions of R.C. §2945.71 *et seq.* and R.C. §2941.401 are mandatory and must be strictly complied with by the trial court. *State v. Cloud* (1997), 122 Ohio App.3d 626, 702 N.E.2d 500; *State v. Pudlock* (1975), 44 Ohio St.2d 104, 338 N.E.2d 524. This "strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial." *State v. Pachay* (1980), 64 Ohio St.2d 218, 221, 416 N.E.2d 589, 591.

{¶45} 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, we apply a de novo standard of review and thus freely review the trial court's application of the law to the facts. Id.

{¶46} R.C. §2945.72 provides the time a person is required to be brought to trial may be tolled for any period of time specified:

{¶47} "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:

{¶48} "(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;

{¶49} " * * *

{¶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} Appellant was arrested on August 26, 2007, and was not tried until May 19, 2009. As such time is well outside of the 270 day limit, the burden shifts to the State

to demonstrate that the length and reasons for the delay were justified and did not violate Appellant's speedy trial rights.

{¶52} In the case sub judice, pursuant to R.C. §2945.72, Appellant's speedy trial time was tolled during the time his various motions were pending and during the period of continuances granted upon his motions for same. Specifically, Appellant's speedy trial period tolled during the following dates:

{¶53} Date of arrest until released on bond:

{¶54} Aug. 26, 2007 – Oct. 10, 2007: 45 days x 3 **135 days elapsed**

{¶55} Oct. 11, 2007 – Nov. 9, 2007: 30 days: **165 days elapsed**

{¶56} Nov. 9, 2007, motion for change of venue filed: time tolled

{¶57} Nov. 14, 2007, defense motion for trial continuance

{¶58} Original trial date of November 20, 2007 – rescheduled to March 18, 2008: time tolled

{¶59} Nov. 19, 2007, trial court granted State's Motion for Nolle Prosequi

{¶60} Nov. 29, 2007, new indictment filed, same charges with addition of firearm specification

{¶61} Dec. 7, 2007, new indictment served on Appellant **165 days elapsed**

{¶62} Dec. 7, 2007, Appellant's motion for transcript, motion in limine, motion to compel, motion for oral hearing to present witnesses, motion to prohibit display of evidentiary exhibits filed. Hearing on motions set for March 3, 2008. Time tolled.

{¶63} March 3, 2008 – March 28, 2008: 25 days **190 days elapsed**

{¶64} March 28, 2008, Appellant's motion for discovery: time tolled

{¶65} April 4, 2008, Appellant's motion to dismiss: time still tolled

{¶66} May 2, 2008, Appellant's counsel filed a waiver of statutory right to a speedy trial: time tolled

{¶67} Jan. 7, 2009, Appellant's motion to dismiss on speedy trial grounds; re-assertion of speedy trial rights; trial set for Feb. 17, 2009. **190 days elapsed**

{¶68} Jan. 7, 2009 – Jan. 9, 2009 2 days **192 days elapsed**

{¶69} Jan. 9, 2009, Appellant's demand for discovery, request for bill of particulars, motion for disclosure of evidence; time tolled.

{¶70} Trial scheduled for May 19, 2009; motion hearing set for May 14, 2009.

{¶71} May 14, 2009 –May 19, 2009 5 days **197 days elapsed**

{¶72} May 19, 2009, trial commenced.

{¶73} While Appellant argues that the record fails to justify the continuances in this case, we find that the November 14, 2007, motion to continue was filed by Appellant and therefore would not count against the State if the time had not already tolled due to Appellant's filing of his motion for change of venue. We further find that all of the tolling as set forth above was precipitated by the filing of motions by Appellant.

{¶74} We further find Appellant's argument that his counsel did not have authority to file a time waiver on his behalf to be without merit. An accused, or his counsel, may validly waive the speedy trial provisions of R.C. 2945.71, *et seq. State v. O'Brien*, 34 Ohio St.3d 7*; State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593; *Westlake v. Cougill* (1978), 56 Ohio St.2d 230, 383 N.E.2d 599. " 'A defendant's right to be brought to trial within the time limits expressed in R.C. §2945.71 may be waived by his counsel for reasons of trial preparation[,] and the defendant is bound by the waiver even though the waiver is executed without his consent.' " *State v. Brime,* 10th Dist. No.

09AP-491, 2009-Ohio-6572, ¶ 17, quoting *State v. McBreen* (1978), 54 Ohio St.2d 315, 376 N.E.2d 593, syllabus.

{¶75} It has also been held that time is tolled even where the defendant expressly objects to a reasonable continuance requested by his or her attorney. See *State v. Wade,* 10th Dist. No. 03AP-774, 2004-Ohio-3974, ¶ 13, citing *State v. Eager* (May 2, 1996), 10th Dist. No. 95APA09-1165.

{¶76} However, we do find that Appellant re-asserted his speedy trial rights when he filed his Motion to Dismiss on January 7, 2009.

{¶77} "Once an accused has executed an express, written waiver of unlimited duration, '[he] is not entitled to a discharge for delay in bringing him to trial unless [he] files a formal written objection and demand for trial, following which the state must bring the accused to trial within a reasonable time.' " *State v. Bray,* 9th Dist. No. 03CA008241, 2004-Ohio-1067, at ¶ 8 (quoting *O'Brien,* 34 Ohio St.3d 7, at paragraph two of the syllabus). Thus, once an accused revokes his unlimited waiver, the strict requirements of Sections 2945.71 et seq. of the Ohio Revised Code no longer apply. See *O'Brien,* 34 Ohio St.3d 7, at paragraph two of the syllabus; *State v. Carr,* 2d Dist. No. 22603, 2009-Ohio-1942, at ¶ 31; *In re Fuller,* 9th Dist. No. 16824, 1994 WL 700086 at 3 (Dec. 14, 1994).

{¶78} In determining whether Appellant was brought to trial within a constitutionally reasonable time, the Ohio Supreme Court has applied a balancing test first set out by the United States Supreme Court. *State v. O'Brien,* 34 Ohio St.3d 7, 10 (1987) (citing *Barker v. Wingo,* 407 U.S. 514, 530 (1972)). The court should consider at least four factors: (1) the length of the delay, (2) the reason for the delay, (3) the

defendant's assertion of his right to a speedy trial, and (4) any prejudice to the defendant. *Id.* (quoting *Barker,* 407 U.S. at 530). The court must weigh these factors together with any other relevant circumstances. *State v. Gaines,* 9th Dist. No. 00CA008298, 2004-Ohio-3407, at ¶ 16.

{¶79} As set forth in detail above, a review of the record reveals that the delays in the case resulted almost entirely from appellant's requests for continuances, changes in counsel, and requests for discovery. In addition, appellant's counsel filed a “blanket” speedy trial waiver on May 2, 2008. This waiver was not revoked until appellant filed his motion to dismiss the indictment on speedy trial grounds on January 7, 2009. *State v. Masters,* Crawford App. No. 3-06-20, 2007-Ohio-4229, ¶ 26. Under such circumstances, we find no prejudice to appellant where he caused most of the delay and waived his speedy trial rights.

{¶80} Based on the foregoing, we conclude that appellant was not denied his constitutional or statutory speedy trial rights.

II.

{¶81} In his second assignment of error, appellant alleges that the trial court erred in not granting his Crim. R. 29 motion for acquittal at the conclusion of the State's case. He further argues that his conviction is against the manifest weight of the evidence, respectively.

{¶82} A Crim.R. 29 motion is asserted to test the sufficiency of the evidence. Accordingly, an appellate court reviews a trial court's denial of a Crim.R. 29 motion for acquittal using the same standard for reviewing a sufficiency of the evidence claim. *State v. Barron,* 5th Dist. No. 05 CA 4, 2005-Ohio-6108. Pursuant to Crim.R. 29(A), a

trial court is required to order an acquittal of “one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.” See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263.

{¶83} When reviewing a case to determine if the record contains sufficient evidence to support a criminal conviction, we must “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, paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶84} A motion for judgment of acquittal pursuant to Crim.R. 29 should be denied “if the evidence, viewed in the light most favorable to the government, is such that ‘a reasonable mind might fairly find guilt beyond a reasonable doubt.’ “ *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 263, *State v. Catlett* (July 24, 1981), 6th Dist. No. L-80-312.

{¶85} In the case sub judice, Appellant was convicted of felonious assault on a police officer, obstructing official business and resisting arrest. Appellant only moved for acquittal on the felonious assault and resisting arrest charges so we will limit our focus to those counts. Specifically, Appellant argues that his motion for acquittal should have been granted because the State failed to prove one of the elements of the

felonious assault charge, i.e. that Appellant knowingly caused or attempted to cause physical harm to Deputy West, and one of the elements of the resisting arrest charge, i.e. that there was a lawful arrest.

{¶86} The elements of felonious assault are set forth in R.C. §2903.11, which provides in pertinent part:

{¶87} "(A) No person shall knowingly:

{¶88} " * * *

{¶89} "(2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordinance, as defined in section 2923.11 of the Revised Code."

{¶90} Appellant argues there was insufficient evidence that he "attempted to cause serious physical harm" to Deputy West regarding the felonious assault conviction. "Serious physical harm to persons" as defined in R.C. §2901.01(A)(5) means any of the following in pertinent part:

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

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

{¶93} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity."

{¶94} An attempt is defined in R.C. §2923.02 as:

{¶95} "No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶96} The Ohio Supreme Court has held that one can infer from the defendant's action under the circumstances whether the defendant possessed an intent to cause serious physical harm. *State v. Seiber* (1990), 56 Ohio St.3d 4, 15, 564 N.E.2d 408. In *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059, syllabus, the Ohio Supreme Court stated that criminal attempt occurs when a defendant "purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose."

{¶97} The act of pointing a deadly weapon at another, without additional evidence regarding the actor's intention, is insufficient evidence to convict a defendant of the offense of felonious assault as defined by R.C. 2903.11(A)(2). *State v. Brooks* (1989), 44 Ohio St.3d 185, 542 N.E.2d 636. However, the act of pointing a deadly weapon at another "coupled with a threat, which indicates an intention to use such weapon," is sufficient evidence to support a conviction for felonious assault. *State v. Green* (1991), 58 Ohio St.3d 239, 569 N.E.2d 1038.

{¶98} In *Green*, supra, the defendant held a rifle aimed at a police officer's head. At the instant defendant positioned his weapon in the direction of the officers, he shouted, "If you don't have a warrant get the fuck out of my house." The Ohio Supreme Court held that under those circumstances a reasonable jury, properly instructed, could have concluded that defendant's actions were strongly corroborative of his intent to cause physical harm to the officers by means of his deadly weapon. See *State v. Brooks, supra,* at 192, 542 N.E.2d at 643.

{¶99} In this case, the victim, Deputy West, testified that Appellant pointed the gun about two feet from the deputy's face and yelled "get out of my house". We find this situation to be substantially similar to *Green*, supra, and find Appellant's action of pointing the gun at Deputy West along with the order to get out of the house constituted an ample manifestation of intent to cause injury sufficient to constitute a "threat" as that word is used in the indictment.

{¶100} Upon review, we find there was sufficient evidence of attempt to cause serious physical harm to substantiate the jury's finding of guilty as to felonious assault.

{¶101} With regard to the resisting arrest charge, the elements are set forth in R.C. §2921.33, which provides in pertinent part:

{¶102} "(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another.

{¶103} Appellant argues that because he was arrested for domestic violence, a charge that was dismissed by the trial court for insufficient evidence, the attempt to arrest him for domestic violence was unlawful and he therefore could not be convicted for resisting arrest.

{¶104} As set forth above, pursuant to R.C. §2921.33(A), "[a] lawful arrest is an essential element of the crime of resisting arrest." *State v. Vactor,* Lorain App. No. 02CA008068, 2003-Ohio-7195, ¶ 34, citing *State v. Thompson* (1996), 116 Ohio App.3d 740, 743. In order to prove a lawful arrest, the State need not prove that the defendant was, in fact, guilty of the offense. *Id.,* citing *State v. Sansalone* (1991), 71 Ohio App.3d 284, 285. Instead, the State must prove both "that there was a reasonable basis to

believe that an offense was committed, [and] that the offense was one for which the defendant could be lawfully arrested." *Id.,* citing *Thompson,* supra, at 743-44. *See,* also, *City of Xenia v. Smith* (June 30, 1995), Greene App. No. 94-CA-110.

{¶105} Domestic violence is an offense for which Appellant could be lawfully arrested. Moreover, as we discussed above, there was a reasonable basis for the officers to believe that the offense had been committed. Deputy West testified that upon arriving at Appellant's residence, he spoke with Ms. Finley who told him that Appellant struck her and grabbed her several times. Deputy West also observed a large bump on Ms. Finley's forehead and further observed that she was visibly upset. As such, we find that Deputy West had a reasonable basis to believe that an offense, domestic violence, had been committed.

{¶106} We conclude, based on the foregoing, that Appellant's conviction for resisting arrest was supported by sufficient evidence.

{¶107} Considering the evidence in a light most favorable to the State, a rational trier of fact could have found that there was sufficient evidence of each of the essential elements of felonious assault and resisting arrest to warrant submitting the case to the jury. We hold, therefore, that the state met its burden of production regarding each element of the crimes with which appellant was charged and, accordingly, there was sufficient evidence to support appellant's convictions.

{¶108} Appellant also challenges his convictions as being against the manifest weight of the evidence.

{¶109} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 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 re-weigh the evidence and reverse a lower court's holdings .” *State v. Wilson,* supra. 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, 678 N.E.2d 541. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). 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.

{¶110} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. As set forth in the statement of the facts, the jury heard testimony from three eyewitnesses: Deputy West, Appellant and Appellant’s cousin. Deputy West’s testimony was in conflict with the version of events as presented by Appellant and his cousin.

{¶111} “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, 140 L.Ed.2d 413.

{¶112} In the instant case, 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. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548; *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096.

{¶113} The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt. The jury in this case chose to believe the version of events presented by Deputy West.

{¶114} We do not find that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered. Appellant's second assignment of error is overruled.

III.

{¶115} In his third assignment of error, appellant maintains the trial court erred in denying a continuance to secure the presence of a rebuttal witness. We disagree.

{¶116} Appellant argues that the trial court should have granted him a continuance of the trial when Robert Thompson failed to appear to testify.

{¶117} The decision whether to grant or deny a continuance rests in the sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078. An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When determining whether the court's discretion to grant a continuance has been abused, a reviewing court must balance the interests of judicial economy and justice against any potential prejudice to the moving party. *State v. Scott* (Dec. 28, 2001), Stark App. No.2001CA 00004, unreported.

{¶118} In *Unger*, supra, the Supreme Court of Ohio pronounced an objective test which "balances the court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice against any potential prejudice to the defendant * * * " to determine whether a motion for continuance should be granted. *In re Kriest* (Aug. 6, 1999), Trumbull App. No. 98-T-0093, citing Unger at 67. The factors a court should consider include: * * * the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

{¶119} Initially, we note that the trial court did, in fact, grant Appellant a continuance of several hours to allow him to try to locate the witness. The trial court did however refuse to grant a continuance to the following day.

{¶120} Upon review, we find that Appellant did not serve Mr. Thompson with a subpoena to testify. Further, Appellant did not raise the issue of Mr. Thompson's failure to appear to the trial court until the State had concluded its case and the defense had presented its two witnesses, Appellant and Benny Battle. Further, there was not guarantee that an overnight continuance would result in Appellant being able to secure this witness' testimony. A continuance would have inconvenienced the jury as well as the trial court and the State of Ohio.

{¶121} Upon review of the record in this matter, we conclude the trial court did not abuse its discretion when it denied appellant's motion for a continuance.

{¶122} Appellant's third assignment of error is overruled/sustained

IV.

{¶123} In his fourth assignment of error, appellant maintains the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel. We disagree.

{¶124} Appellant argues that he should have been granted a new trial pursuant to Crim.R. 33, which states in relevant part:

{¶125} "(A) Grounds

{¶126} "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶127} "(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

{¶128} "***".

{¶129} The standard for ineffective assistance of counsel is set out in *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768. Appellant must establish the following:

{¶130} "Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶131} "To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶132} In order to show that counsel's conduct was deficient or unreasonable, the defendant must overcome the presumption that counsel provided competent representation and must show that counsel's actions were not trial strategies prompted by reasonable professional judgment. *Strickland* at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. Counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267.

{¶133} First, Appellant asserts that he was denied the effective assistance of counsel when his trial attorney failed to file a motion to dismiss based on speedy trial grounds.

{¶134} Upon review, as set forth in our review and disposition of Appellant's first assignment of error, we find that the speedy trial limits had not been violated. As such, we find that such a motion would not have been meritorious. Consequently, we cannot conclude that the performance of his trial attorneys was deficient.

{¶135} Second, Appellant argues that his counsel was ineffective in failing to subpoena Robert Thompson and in filing a speedy trial waiver.

{¶136} Upon review, we find that Appellant has failed to demonstrate that trial counsel's execution of a speedy trial waiver was not merely a trial strategy. Tactical or strategic trial decisions, even if unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965. Rather, the errors complained of must amount to a substantial violation of counsel's essential duties to his client. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623.

{¶137} As to Robert Thompson, Appellant asserts that Thompson was a critical witness to the defense, alleging that his testimony would have contradicted Deputy West's testimony and corroborated the testimony of Appellant and Benny Battle.

{¶138} Again, failure to subpoena Thompson could have been tactical. Counsel's decision regarding the calling of witnesses is within the purview of trial strategy, and the failure to subpoena witnesses for trial does not violate counsel's duty

to defendant absent a showing of prejudice. *State v. Coulter* (1992), 75 Ohio App.3d 219, 230; *State v. Hunt* (1984), 20 Ohio App.3d 310, 312. Accordingly, courts have traditionally been reluctant to find ineffective assistance of counsel in those cases where an attorney fails to call a particular witness. See *State v. Otte* (1996), 74 Ohio St.3d 555, 565-66; *State v. Williams* (1996), 74 Ohio St.3d 456.

{¶139} Appellant has the burden to show that the witness's testimony would have significantly assisted the defense and would have affected the outcome of the case. *State v. Dennis,* 10th Dist. No. 04AP-595, 2005-Ohio-1530, 2005 ¶ 22. Here, Appellant cannot demonstrate that even if Mr. Thompson would have testified, the outcome of the trial would have been different, as the proffer by defense counsel suggests that such testimony would have been cumulative to that of Appellant and Benny Battle.

{¶140} Appellant's fourth assignment of error is overruled/sustained

{¶141} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas of Morgan County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 0726

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

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
BILLY J. BATTLE	:	
	:	
Defendant-Appellant	:	Case No. 09 AP 0001

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

Costs assessed to Appellant.

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JUDGES