[Cite as *State v. Benner*, 2016-Ohio-7496.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DAVID J. BENNER Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 16 CA 0012 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 15 CR 0294
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 17, 2016

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BRIAN T. WALTZ ASSISTANT PROSECUTOR 20 South Second Street, 4th Floor Newark, Ohio 43055	MARCUS M. VAN WEY WOLFE VAN WEY & ASSOCIATES 1350 West 5th Avenue, Suite 124 Columbus, Ohio 43212

Wise, J.

{¶1} Defendant-Appellant David J. Benner appeals from his convictions, in the Court of Common Pleas, Licking County, on charges of felonious assault and domestic violence. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows:

{¶2} On May 11, 2015, appellant got into an argument with his girlfriend, T.D., with whom he had been living for approximately fifteen years. As the events unfolded, appellant became verbally and physically abusive toward T.D., as further discussed *infra*. Appellant was arrested on May 20, 2015 as a result.

{¶3} On May 28, 2015, the Licking County Grand Jury indicted appellant on one count of domestic violence (R.C. 2919.25), a felony of the fourth degree. The Licking County Grand Jury then issued a superseding indictment against appellant on August 20, 2015 on one count of felonious assault (R.C. 2903.11(A)(1)), a felony of the second degree, and one count of domestic violence (R.C. 2919.25(A)), a felony of the fourth degree. Appellant thereafter entered pleas of not guilty to both charges.

{¶4} On August 21, 2015, appellant filed a motion to determine his competency to stand trial. On October 14, 2015, following a hearing, the trial court ruled that appellant was competent to stand trial.

{¶5} A trial date was first scheduled for September 1, 2015. However, because of the pending competency issue, the trial did not go forward. A new trial date of November 4, 2015 was scheduled, but the case was continued *sua sponte* on that date.

{¶6} The matter finally proceeded to a jury trial on December 8, 2015. At that time, appellant made an oral motion to dismiss the indictment for violation of his speedy

trial rights. After empaneling the jury, but prior to opening statements, the trial court overruled appellant's motion to dismiss the indictment.

{¶7} At the close of the State's case, appellant moved for acquittal pursuant to Crim.R. 29. The trial court denied same.

{¶8} The jury ultimately found appellant guilty on both counts, with the special finding that appellant had been previously convicted of domestic violence. *See* Tr. at 233.

{¶9} On January 22, 2016, the trial court sentenced appellant to two years in prison on Count I (felonious assault) and one year in prison on Count II (domestic violence). The terms were ordered to be served consecutively, for a total of three years. The court also ordered three years of post-release control, plus payment of the costs of prosecution, court costs, and counsel fees.

{¶10} On February 17, 2016, appellant filed a notice of appeal. He herein raises the following two Assignments of Error:

{¶11} "I. THE JURY'S VERDICTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} "II. THE TRIAL COURT ERRED BY DEPRIVING APPELLANT OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS BY DENYING APPELLANT'S MOTION TO DISMISS THE INDICTMENT FOR FAILURE TO BRING APPELLANT TO TRIAL WITHIN THE PERIOD SPECIFIED IN R.C. §2945.71."

I.

{¶13} In his First Assignment of Error, appellant argues his convictions for felonious assault and domestic violence are against the manifest weight of the evidence. We disagree.

{¶14} Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See also, State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175, 485 N.E.2d 717.

{¶15} Appellant herein was tried, on the first count, of violating R.C. 2903.11(A)(1), which states as follows: "No person shall knowingly *** [c]ause serious physical harm to another or to another's unborn." On the second count, appellant was tried for violating R.C. 2919.25(A), which states: "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶16} The trial at issue largely consisted of the testimony of prosecution witnesses Officer Justin Woodyard, Dr. Matthew Bromley, and the victim, T.D. No defense witnesses were called.[1] However, during his initial bond appearance, appellant spoke of

[1] As such, appellant's present assertion that he presented an alibi defense at trial appears to be a scrivener's error. *See* Appellant's Brief at 6.

being depressed during the time frame in question, but that his depression was "no excuse." *See* Tr. at 154-155.

{¶17} The record before us indicates Officer Woodyard, an eight-year veteran of the Granville Police Department, first testified that he responded to a "mutual aid" dispatch on May 11, 2015 to assist the Licking County Sheriff's Department in response to a reported shooting. He observed appellant at the James Road location in question, describing him as "fairly highly intoxicated." Tr. at 119. Appellant at that time claimed to have fired two pistol shots at a backyard target, and he told officers "he was not going to kill himself today but would possibly tomorrow." Tr. at 121.

{¶18} T.D. then took the stand and described to the jury appellant's actions on May 11, 2015 of repeatedly hitting her, kicking her, and pushing her to the floor. She noted that appellant had been drinking that day, and at one point physically pulled her out of the car when she tried to leave. She recalled that as the day went on, things got worse and that appellant "kept smacking [her] around and calling [her] names and saying all different types of things." Tr. at 137. While appellant inflicted his assault, he specifically called T.D. "all kinds of names, like you're a whore, you're a slut, you've taken my family away from me." Tr. at 138. At one point, appellant threw a bottle of wine on her because she refused to drink it with him. *Id.*

{¶19} T.D. was the only eyewitness to appellant's assault on her. However, the jury was also presented with numerous bodily photographs of T.D., which have also been provided in the appellate record, showing significant bruises on various part of her body. She testified that the bruises were all related to appellant's actions. *See* Tr. at 147. T.D. conceded that some of the bruises were older, but she was able to distinguish the old

from the new when going over the exhibits with the prosecutor before the jury. *See* Tr. at 142-151. She further described the pain she experienced from the assault.

{¶20} Appellant urges that T.D. "admitted multiple times to making outlandish lies." Appellant's Brief at 6, citing Tr. at 135, 164. However, as the State aptly notes in response, T.D. explained that these "lies" were often made under duress; in other words, appellant had a history of abusing her in drunken episodes until she would "admit" to sleeping around with other people or even committing bestiality. *See* Tr. at 165-167.

{¶21} Finally, Dr. Bromley, who treated T.D. at Licking Memorial Hospital on May 19, 2015, about eight days after the incident in question, testified that X-ray results indicated she had suffered two broken ribs, consistent with assault or blunt force trauma, although he could not specify the exact cause or timing of said injury. However, he testified on re-direct that her rib injuries, which did not appear fully healed at the time of his exam, were consistent with her having been physically harmed in the period alleged by the State. *See* Tr. at 181-182.

{¶22} Although it may be more in the nature of a "sufficiency of the evidence" argument, appellant in part contends that the State failed to prove beyond a reasonable doubt that appellant knowingly caused physical harm or serious physical harm to T.D. We note Ohio courts have held that "[u]nder certain circumstances, a bruise can constitute serious physical harm because a bruise may satisfy the statutory requirement for temporary serious disfigurement." *State v. Bootes,* 2nd Dist. Montgomery No. 23712, 2011–Ohio–874, ¶ 19, citing *State v. Worrell,* 10th Dist. Franklin No. 04AP–410, 2005–Ohio–1521, ¶¶ 47–51. Furthermore, we have reviewed the record under the standard of

Martin and we find the jury did not clearly lose its way and create a manifest miscarriage of justice requiring that appellant's convictions be reversed and a new trial ordered.

{¶23} Appellant's First Assignment of Error is therefore overruled.

II.

{¶24} In his Second Assignment of Error, appellant challenges the trial court's denial of his statutory speedy trial motion to dismiss.

{¶25} The right to a speedy trial is encompassed within the Sixth Amendment to the United States Constitution. The availability of a speedy trial to a person accused of a crime is a fundamental right made obligatory on the states through the Fourteenth Amendment. *State v. Ladd* (1978), 56 Ohio St.2d 197, 383 N.E.2d 579; *State v. Pachay* (1980), 64 Ohio St.2d 218, 416 N.E.2d 589. Ohio's Speedy Trial statute codifies the constitutional guarantee of a speedy trial. *Pachay, supra*. 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. McDonald*, 7th Dist. Mahoning Nos. 97CA146 and 97CA148, 1999 WL 476253. 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.* Furthermore, when reviewing the legal issues presented in a speedy trial claim, an appellate court 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.

{¶26} R.C. 2945.71(C)(2) mandates that a person against whom a felony charge is pending shall be brought to trial within two-hundred and seventy days after the

person's arrest. However, " *** each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E).

{¶27} Furthermore, R.C. 2945.72 states as follows:

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

> (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;
>
> (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;
>
> (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;
>
> (D) Any period of delay occasioned by the neglect or improper act of the accused;
>
> (E) Any period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused;

(F) Any period of delay necessitated by a removal or change of venue pursuant to law;

(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;

(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;

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

{¶29} In the case *sub judice*, appellant was arrested on May 20, 2015, and he remained incarcerated until his trial commenced on December 8, 2015. Thus, absent any extensions, the ninety-day deadline established under R.C. 2945.71(C)(2) and (E), *supra*, would have occurred on August 18, 2015. Between that date and the actual date of trial, December 8, 2015, an additional 112 days passed, for a total delay of 202 days.

{¶30} However, the trial court determined that speedy trial time was tolled for 135 of those 202 days, as follows: Five days were tolled while appellant was being appointed trial counsel in May 2015, pursuant to R.C. 2945.72(C); twenty-two days were tolled between appellant's request for discovery and the responsive service of discovery in June 2015, pursuant to R.C. 2945.72(E); seventy-four days were tolled between the filing of appellant's motion for competency and the scheduled jury trial (August 21- November 4), pursuant to R.C. 2945.72(B); and an additional thirty-four days were tolled after the

court *sua sponte* continued the November trial date until December 8, 2015, due to another jury trial previously scheduled before the same judge. *See* Tr. at 99-100.

{¶31} Appellant first maintains that because his competency evaluation was presented to the trial court on October 14, 2015, the tolling period that commenced on August 21, 2015 (the filing date of his motion for competency) should likewise have ended on October 14, 2015. We recognize the general rule that tolling under R.C. 2945.72(B) "continues until the trial court makes a competency determination ***." *See State v Palmer,* 84 Ohio St.3d 103, 1998-Ohio-507, paragraph 2 of the syllabus. However, in *State v. Pate*, 10th Dist. Franklin No. 81AP-20, 1981 WL 3285, the Tenth District Court of Appeals cogently stated: " *** [W]here a trial date has been set within the speedy trial time limits mandated by R.C. 2945.71, and the case cannot be tried on that date due to defendant having instituted proceedings to determine his competency to stand trial, then, under those circumstances, we hold that 'any period of delay necessitated by reason of a * * * proceeding * * * instituted by the accused' [R.C. 2945.72(E)] includes a period of time reasonably necessary for the court to again bring the case to trial after it has been determined that defendant is competent to stand trial."

{¶32} Similar to the defendant in *Pate*, who requested a competency review just eight days before trial, appellant herein did not file his motion for a competency evaluation until eleven days before the original trial date of September 1, 2015. We hold the additional period from October 14, 2015 to the rescheduled trial date of November 4, 2015 was a period reasonably necessary to facilitate the trial due to the competency issue; therefore, this further tolling period was not erroneous.

{¶33} Appellant secondly contends the period of the continuance of the jury trial from November 4, 2015 to December 8, 2015 should not have been tolled. We note that on November 4, 2015, the trial court issued a judgment entry that continued the trial due to the court being in trial on another previously-scheduled (and older) criminal case. Given the impossibility of a judge presiding over two unrelated trials at once, we have recognized that a continuance due to the court's involvement in another trial is generally reasonable. *State v. Richardson*, 5th Dist. Richland No. 2009-CA-00027, 2009-Ohio-4867, ¶ 57, citing S*tate v. Doane*, 8th Dist. Cuyahoga No. 60097, 1992 WL 161142.[2] Under the circumstances presented, we hold the trial court's continuance of the November 4, 2015 trial date for approximately thirty-four more days was reasonable and valid, and this additional tolling period did not constitute error.

{¶34} Accordingly, the trial court did not err in denying appellant's statutory speedy trial motion to dismiss.

[2] *Doane* technically involved a request by a prisoner, under R.C. 2941.401, for a trial on pending charges. However, as in *Richardson*, we extend its rationale to issues of speedy trial in general.

{¶35} Appellant's Second Assignment of Error is therefore overruled.

{¶36} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 0921