[Cite as *State v. Hughes*, 2010-Ohio-2969.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 08CA19
vs.	:	
ANDREW HUGHES,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Michael D. Miller, 19½ South Court Street, Athens, Ohio 45701[1]

COUNSEL FOR APPELLEE: C. David Warren, Athens County Prosecuting Attorney, and George Reitmeier, Athens County Assistant Prosecuting Attorney, 1 South Court Street, Athens, Ohio 45701

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 6-23-10

ABELE, J.

{¶ 1} This is an appeal from an Athens County Common Pleas Court judgment of conviction and sentence. A jury found Andrew Hughes, defendant below and appellant herein, guilty of failing to comply with the order or direction of a police officer in violation of R.C. 2921.331(B).

{¶ 2} Appellant does not assign errors for review pursuant to App.R. 16(A)(3),

[1] Different counsel represented appellant during the trial court proceedings.

but does set out the following five "issues presented for review" that we treat as assignments of error:

> FIRST ASSIGNMENT OF ERROR:
>
> "WAS THE DEFENDANT DENIED HIS RIGHT TO A SPEEDY TRIAL UNDER R.C. 2945.71, THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION AND ART. I, SEC. 10 OF THE OHIO CONSTITUTION[?]"
>
> SECOND ASSIGNMENT OF ERROR:
>
> "WAS THE VERDICT AGAINST APPELLANT SUPPORTED BY INSUFFICIENT EVIDENCE[?]"
>
> THIRD ASSIGNMENT OF ERROR:
>
> "WAS THE GUILTY VERDICT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[?]"
>
> FOURTH ASSIGNMENT OF ERROR:
>
> "WAS THE DEFENDANT DENIED DUE PROCESS OF LAW WHEN THE COURT ALLOWED A LATE AMENDMENT OF THE CHARGE PRIOR TO TRIAL[?]"
>
> FIFTH ASSIGNMENT OF ERROR:
>
> "WAS THE DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GAURANTEED [sic] BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND THE OHIO CONSTITUTION[?]"

{¶ 3} In the early morning hours of April 18, 2008 someone broke into the premises at 226 West Washington Street in Athens and attacked the resident, who fought the assailant and called the police. Shortly thereafter, the Athens Police Department notified Lieutenant Ralph Harvey about the incident and provided a description of the assailant's vehicle. When Lt. Harvey passed a vehicle that matched the description, he turned to follow the vehicle and activated his pursuit lights. The

vehicle, however, quickly accelerated and Lt. Harvey gave chase. Eventually, the vehicle crashed into a barrier wall on State Route 682. When Lt. Harvey and other officers at the scene approached the vehicle, they found a man, later identified as appellant, slumped into the passenger seat.

{¶ 4} The Athens County Grand Jury returned an indictment that charged appellant with aggravated burglary and the failure to comply with a police officer's order. At the jury trial, the prosecution dismissed the aggravated burglary charge because two witnesses did not appear at the trial. After Lt. Harvey testified concerning his version of events in question, the jury returned a guilty verdict on the charge of the failure to comply with the officer's order. The trial court sentenced appellant to serve four years in prison. This appeal followed.

I

{¶ 5} In his first assignment of error, appellant asserts that he was not brought to trial within the R.C. 2945.71 statutory time frame. We disagree with appellant.[2]

{¶ 6} Generally, speedy trial rights are not self-executing. Thus, a defendant must raise the issue in the trial court or the issue will be deemed to be waived. See State v. Huber, Clarke App. No. 07-CA-122, 2009-Ohio-1637, at ¶17; State v. Bishop, Vinton App. No. 02CA573, 2003-Ohio-1385, at ¶16. In the case sub judice, because appellant did not raise this issue in the trial court, the issue has been waived. However, because appellant also raises this issue in his fifth assignment of error

[2] The text of the "assignment of error" also assert that appellant was denied his constitutional speedy trial rights. Because appellant restricts his argument to the statutory speedy trial right, we do the same in our analysis.

concerning his claim of ineffective assistance of counsel, we will address the merits of the assignment of error.

{¶ 7} R.C. 2945.71 provides that a person against whom a felony charge is pending shall be brought to trial within two hundred seventy days after arrest. Id. at (C)(2). If an accused is held in jail in lieu of bail solely on the pending charge, the statute's triple count provision mandates that each day count as three days. Id. at (E). If an accused's trial is not held within the statutory time limit, the accused must be discharged. R.C. 2945.73(B). However, it is important to recognize that the R.C. 2945.71 time limits may be extended for the reasons set out in R.C. 2945.72.

{¶ 8} The prosecution concedes that appellant was incarcerated awaiting trial. Thus, appellant's confinement triggered the triple-count mechanism. Consequently, because appellant was first in police custody on April 18, 2008, he had to be brought to trial by July 17, 2008. The trial court originally scheduled appellant's trial on June 26, 2008, well within this time frame. However, a review of the record reveals that several continuances intervened. First, the prosecution requested a continuance of both the pre-trial and the trial date. The trial court rescheduled the trial for August 26, 2008 and noted in its entry that the speedy trial deadline would be tolled during the continuance.[3] The court issued a later continuance due to a conflict with a trial in a different criminal case.

{¶ 9} R.C. 2945.72(H) provides that speedy trial time may be tolled for the

[3] The prosecution argues that this continuance was "upon motion of the defendant." However, on June 20, 2008 the prosecutor filed a motion and requested a continuance of both the pretrial and the trial. The trial court's entry, filed five days

period of any reasonable continuance "granted other than upon the accused's own motion." Here, the prosecution requested a continuance of the trial. Generally, speedy trial time may be tolled if the request is "reasonable." We note that other Ohio courts in analogous contexts have concluded that a relatively short delay is reasonable. See generally State v. Perry, Ross App. No. 05CA2833, 2006-Ohio-219; State v. Williamson, Licking App. No. 2005CA46, 2005-Ohio-6198 (continuance at prosecution's request due to arresting officer's vacation was reasonable and necessary); State v. Myers, 97 Ohio St.3d 335, 780 N.E.2d 186, 2002-Ohio-6058 (prosecution's continuance request for scientific test was reasonable and could not be charged against the State). See, also, State v. Morgan, Medina App. No. 07CA0124-M, 2008-Ohio-5530, citing State v. Thorn, Wayne App. No. 98CA20, (Dec. 23, 1998). We are cognizant of the burdensome caseloads in Ohio trial courts and do not believe that a two month continuance is necessarily unreasonable. That said, we further note that speedy trial time tolled between June 26th and August 26th. On August 26, 2008, another entry continued the scheduled trial date to September 2, 2008. Although nothing in the record indicates that a particular party requested a continuance, the trial court noted that it granted the continuance due "to defendant's delay." We find nothing in the record to contradict that statement.

{¶ 10} In any event, we believe that even if the second continuance was not charged to appellant, the speedy trial time would not have expired. We count sixty-nine (69) days from the time of appellant's arrest to the first trial date. After tolling

---

later, was presumably issued in response to that motion.

the time during the first continuance, only seven days elapsed after the end of that continuance until the trial commenced on September 2, 2008. Thus, appellant's trial occurred within the required ninety day time frame.

{¶ 11} For these reasons, appellant's statutory speedy trial time had not expired and, consequently, trial counsel's failure to raise this issue did not prejudice appellant.

{¶ 12} Accordingly, based upon the foregoing reasons we hereby overrule appellant's first assignment of error.

II

{¶ 13} In his second "assignment of error," appellant asserts that insufficient evidence supports his conviction. Again, we disagree with appellant.

{¶ 14} When appellate courts review claims regarding the sufficiency of the evidence, the court must look to adequacy of the evidence and whether that evidence, if believed, supports a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. In other words, after viewing all the evidence, and each inference reasonably drawn therefrom, in a light most favorable to the prosecution, would any rational trier of fact have found all essential elements of the offense beyond a reasonable doubt? State v. Were, 118 Ohio St.3d 448, 890 N.E.2d 263, 2008-Ohio- 2762; at ¶132; State v. Hancock, 108 Ohio St.3d 57, 840 N.E.2d 1032, 2006-Ohio-160, at ¶34.

{¶ 15} The failure to comply with a police officer's order offense occurs if one operates a motor vehicle to willfully elude or flee a police officer after having received a

visible or audible signal to bring the vehicle to a stop. R.C. 2921.331(B). Here, Lt. Harvey testified that when he drove behind appellant and activated his pursuit lights, appellant, rather than stop his vehicle, opted to speed up and attempt to elude the officer. This evidence is sufficient to support appellant's conviction.

{¶ 16} Appellant's argues that neither Lt. Harvey nor any other prosecution witness could affirmatively identify appellant as vehicle's driver. Although Lt. Harvey was in hot pursuit and arrived at the scene moments after the accident, and although Lt. Harvey found appellant slumped over in the vehicle, the defense raised the possibility that another person could have been driving the vehicle, was thrown from the vehicle during the crash and thereafter fled the scene. However, in light of the fact that only a few seconds elapsed before Lt. Harvey arrived at the scene, and in light of the fact that appellant was slumped in the vehicle, we believe that the trier of fact could reasonably infer that appellant was the vehicle's driver. Additionally, Athens Police Investigator David Olexa testified that no footprints or other evidence suggested that any other person was at the scene. Once again, the evidence adduced at trial, if believed, provided a sufficient basis for the trier of fact to conclude that appellant was the vehicle's driver.

{¶ 17} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's second assignment of error.

III

{¶ 18} In his third assignment of error, appellant asserts that even if sufficient evidence supports his conviction, the verdict is nevertheless against the manifest weight of the evidence. Again, we disagree with appellant.

{¶ 19} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." State v. Eskridge (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus. "The discretionary power to grant 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 (citations omitted). Generally, an appellate court will not reverse a conviction on the grounds that it is against the manifest weight of the evidence unless it is obvious that the trier of fact clearly lost its way and created a manifest miscarriage of justice that requires reversal and a new trial. See State v. Earle (1997), 120 Ohio App.3d 457, 473, 698 N.E.2d 440; State v. Garrow (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814. Manifest weight arguments typically arise when "competing theories of the case" are presented to a jury, and the jury must choose which argument is more persuasive. See e.g. State v. Cooper, 170 Ohio App.3d 418, 867 N.E.2d 493, 2007-Ohio-1186, at ¶3.

{¶ 20} In the case sub judice, our review of the record reveals that not only was Lt, Harvey's testimony unrebutted, but the testimony of other Athens and Ohio University police officers corroborated Lt. Harvey's version of the events, either by recounting a radio transmission from Lt. Harvey that he was in pursuit or, in the case of Officer Johnson, actually witnessing the pursuit. Thus, we are not persuaded that the jury lost its way. Rather, we believe that the record contains substantial competent, credible evidence upon which the trier of fact could reasonably conclude that all of the

elements of the offense have been proven beyond a reasonable doubt.

{¶ 21} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's third assignment of error.

IV

{¶ 22} Appellant's fourth assignment of error involves the prosecution's amendment of the indictment. Appellant asserts that the amendment of the charge of failing to obey the police officer's order from a fourth degree felony to a third degree felony deprived him of due process. Appellee, however, points out that the Grand Jury's indictment actually specified that the R.C. 2921.331(B) violation for the failure to obey the police officer's order constitutes a third degree felony. Moreover, appellee notes that the language used to spell out the elements of the offense, the amended bill of particulars and the trial court's Judgment of Conviction and Sentence all indicate that appellant's charge constituted a third degree felony. Appellee concedes, however, that a typographical error in the indictment's caption listed the offense as a fourth degree felony rather than a third degree felony. Thus, the indictment was amended on the first day of the jury trial.

{¶ 23} Initially, we note that our review of the transcript reveals that appellant did not object to the indictment's amendment. Therefore, appellant waived any alleged error concerning this issue. Second, this amendment did not prejudice the appellant in any manner. Appellant had ample notice concerning the crime charged in the indictment. The language in the body of the indictment correctly set forth the elements of the offense and the degree of the offense. The amendment to the indictment simply corrected a typographical error in the caption. Once again, appellant suffered no

prejudice in this situation.

{¶ 24} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's fourth assignment of error.

V

{¶ 25} In his fifth assignment of error, appellant asserts that he received ineffective assistance of counsel.

{¶ 26} Our analysis begins with the premise that a criminal defendant has a constitutional right to counsel, including the right to the effective assistance from counsel. McCann v. Richardson (1970), 397 U.S. 759, 770, 25 L.Ed.2d 763, 90 S.Ct. 1441; State v. Lytle (Mar. 10, 1997), Ross App. No. 96CA2182. To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived the defendant of a fair trial. See Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052; also, see, State v. Issa (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904. It is important to recognize that both prongs of the Strickland test need not be analyzed if the claim can be resolved under just one. See State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52. Accordingly, if nothing appears in the record to establish prejudice, courts need not address the question of deficient performance. With this standard in mind, we turn to the prejudice prong of the Strickland test.

{¶ 27} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that, but for counsel's errors, the result of the trial would have been

different. State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus. Further, courts may not simply assume the existence of prejudice, but instead, must require that prejudice be affirmatively demonstrated. See State v. Clark, Pike App. No. 02CA684, 2003-Ohio-1707, at ¶ 22; State v. Tucker (Apr. 2, 2002), Ross App. No. 01 CA2592.

{¶ 28} In the case sub judice, appellant's claim of constitutionally ineffective assistance includes a series of arguments that raise many issues that he claims should have been handled differently. We have already considered the speedy trial issue in appellant's first assignment of error and the failure to object to the indictment's amendment in the fourth assignment of error, and found no merit in those arguments. The remainder of appellant's arguments involve various evidentiary issues (e.g. failure to file motions in limine or to make objections), and we likewise find no merit in these arguments. Furthermore, even assuming, arguendo, that trial counsel's performance was deficient, in light of Lt. Harvey's uncontradicted testimony that appellant refused to stop his vehicle when signaled to do so, we cannot conclude that had these various issues been pursued, the outcome of the trial would have been different.

{¶ 29} Accordingly, based on the foregoing reasons, we hereby overrule appellant's fifth assignment of error.

{¶ 30} Having considered all of the errors assigned and argued in the appellate brief, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.