[Cite as *State v. Bishop*, 2019-Ohio-4963.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES K. BISHOP,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 JE 0005

Application for Reopening

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Application Denied.

Atty. Jane M. Hanlin, Jefferson County Prosecutor, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee.

James K. Bishop, *Pro se*, #A704375, Richland Correctional Institution, P.O. Box 8107, Mansfield, Ohio 44901-8107.

Dated: November 21, 2019

PER CURIAM.

{¶1} Appellant James K. Bishop has filed an application to reopen his appeal pursuant to App.R. 26(B). In so doing, he asserts nine assignments of error raising various issues related to both his conviction and his sentence. For the reasons provided, Appellant's application to reopen his appeal is denied.

Factual and Procedural History

{¶2} On November 8, 2017, a grand jury indicted Appellant on: one count of theft, a felony of the fourth degree in violation of R.C. 2913.02(A)(1), (B)(2); one count of receiving stolen property, a felony of the fifth degree in violation of R.C. 2913.51(A), (C); one count of burglary, a felony of the second degree in violation of R.C. 2911.12(A)(1), (D); and one count of safecracking, a felony of the fourth degree in violation of R.C. 2911.31(A), (B).

{¶3} The charges stemmed from an incident that occurred while Appellant was employed with a construction company that was completing a project at the victim's house. After Appellant left the victim's house, the victim learned that someone had pried open two of her locked jewelry boxes and removed the contents. After an investigation and Appellant's subsequent confession to his boss, he was eventually arrested.

{¶4} A jury convicted Appellant on all charges following a one-day trial. However, the jury determined that the state did not prove the value of the jewelry exceeded $17,000, so the theft conviction was reduced from a felony of the fourth degree to a felony of the fifth degree.

{¶5} On January 18, 2018, the trial court sentenced Appellant to an aggregate total of nine and one-half years of incarceration.

{¶6} We affirmed Appellant's convictions and sentence in *State v. Bishop,* 7th Dist. Jefferson No. 18 JE 0005, 2019-Ohio-2720 ("*Bishop I*"). This timely application to reopen his appeal followed.

Reopening

{¶7} Pursuant to App.R. 26(B)(1), a criminal defendant "may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." An applicant must demonstrate that "there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). If the application is granted, the appellate court must appoint counsel to represent the applicant if the applicant is indigent and unrepresented. App.R. 26(B)(6)(a).

{¶8} In order to show ineffective assistance of appellate counsel, the applicant must meet the two-prong test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Pursuant to *Strickland*, the applicant must first demonstrate deficient performance of counsel and then must demonstrate resulting prejudice. *Id*. at 687. See also App.R. 26(B)(9).

Non-Conforming Brief

{¶9} We note that while Appellant's merit brief falls within the applicable page limits, he has attached forty-seven additional pages of handwritten notes, and various proposed exhibits that also contain handwritten notes. As this additional material is clearly designed to further Appellant's arguments, it exceeds the page limit as described within App.R. 26(B)(4), none of this material will be considered by us. Additionally, Appellant has largely failed to provide this Court with any substantive arguments or legal

citations. However, in the interest of fairness and justice, we will attempt to address his "arguments."

ASSIGNMENT OF ERROR NO. 1

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE CONVICTION FOR THEFT, BURGLARY, RECEIVING STOLEN PROPERTY, AND SAFE CRACKING [SIC].

ASSIGNMENT OF ERROR NO. 5

TRIAL COURT ERRED WHEN IT DENIED MOTION FOR RULE 29 FOR ACQUITAL [SIC] OF BURGLARY, THEFT AND SAFECRACKING CHARGES.

{¶10} In his first assignment of error, Appellant claims that the state failed to present sufficient evidence to support his convictions for theft, burglary, receiving stolen property, and safecracking. In his fifth assignment of error, Appellant argues that the trial court erroneously denied his Crim.R. 29 motion for acquittal, based on his assertion that the state failed to present sufficient evidence. Appellant contends in these assignments that the state failed to produce evidence demonstrating the victim owned the jewelry at issue. As these issues are intertwined, they will be jointly addressed.

{¶11} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine

whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶12} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*. Applying these principles to Appellant's application, it is difficult to determine whether he believes the state did not prove that any of the jewelry belonged to the victim, or that the state failed to prove that jewelry subsequently recovered from pawn shops belonged to the victim. In either event, the record reflects that the state produced sufficient evidence to prove that the jewelry in question belonged to the victim.

{¶13} The victim testified that she was able to determine which of her pieces of jewelry were missing from the locked box on her dresser because the entire top tray of the box contained her fine jewelry and the custom jewelry designed by her late husband. When she testified that the contents had been removed from her husband's lockbox, it appears she referred to all of the contents. (Trial Tr., p. 154.) According to the victim,

these pieces were easily identifiable due to the customized designs. Regarding the pieces specifically recovered from the pawn shops, the description of the recovered jewelry matched the descriptions the victim provided to law enforcement. (Trial Tr., p. 176.)

{¶14} Law enforcement presented evidence that it was Appellant who pawned these specific pieces of jewelry. One piece of evidence consists of a photograph of Appellant at the pawn shop counter. Also presented were receipts that included a description of the items pawned and a copy of Appellant's driver's license.

{¶15} Accordingly, the state provided sufficient evidence that the jewelry at issue belonged to the victim. As such, Appellant's first and fifth assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED BY ENTERING A JUDGMENT OF CONVICTION AS TO THE BURGLARY COUNT AS A FELONY OF THE SECOND DEGREE, AND SENTENCING ACCORDINGLY, AS THE VERDICT FORM WAS SUFFICIENT ONLY FOR THE LESSER OFFENSE OF THIRD OF [SIC] FOURTH DEGREE FELONIES.

{¶16} Appellant claims that the jury verdict form convicting him of burglary did not specify that he had been charged with a felony of the second degree, thus, he could be convicted only of the least serious degree, a felony of the fifth degree, in accordance with *State v. Pelfrey,* 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

{¶17} In *Pelfrey,* the Ohio Supreme Court explained that:

> R.C. 2945.75(A) plainly requires that in order to find a defendant guilty of "an offense * * * of more serious degree," the guilty verdict must either state "the degree of the offense of which the offender is found guilty" or state that "additional element or elements are present." R.C. 2945.75(A)(2) also provides, in the very next sentence, what must occur if this requirement is not met: "Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

Id. at ¶ 12.

{¶18} Here, Appellant correctly notes that the verdict form does not state the degree of the offense. However, the verdict form need not specifically state the degree of the offense if it provides the additional element. The additional element of a second-degree burglary offense is "when another person other than an accomplice of the offender is present." R.C. 2911.12(A)(1). Here, the exact language of the additional element is found on the verdict form. The form complies with both R.C. 2945.75(A) and *Pelfrey.*

{¶19} Accordingly, Appellant's second assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 3

> THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A SENTENCE OF 96 MONTHS IN VIOLATION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 9, ARTICLE I OF THE OHIO CONSTITUTION.

{¶20} In this assignment, Appellant provides a one-line argument that merely alleges that his sentence violates the Eighth Amendment of the U.S. Constitution.

{¶21} An appellate court is permitted to review a felony sentence to determine if it is contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1.

{¶22} We previously reviewed the trial court's analysis of the factors contained in R.C. 2929.12(B) and the court's imposition of consecutive sentences in *Bishop I.* We found no error in either regard. Appellant does not now assert any specific error as to his sentence and none is apparent. In addition to the trial court's review of R.C. 2929.12(B) and R.C. 2929.14(C), the record reveals that the court expressly stated that it considered the purposes and principles of sentencing pursuant to R.C. 2929.11. Thus, the trial court properly considered the relevant sentencing statutes.

{¶23} Importantly, Appellant's sentence falls within the sentencing guidelines. While each of Appellant's individual sentences represent the maximum sentence, they clearly fall within the statutory mandates.

{¶24} As Appellant's sentence is within the statutory guidelines and the trial court properly considered the relevant sentencing statutes, Appellant's claim that his sentence is contrary to law is baseless. Accordingly, Appellant's third assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 4

TRIAL COURT ERRED WHEN 2947.71 SPEEDY TRIAL RIGHT WAS NOT ENFORCED UNDER 7TH AMENDMENT.

{¶25} Appellant states that he was not tried within the time prescribed by the applicable speedy trial statute, R.C. 2945.71. Again, Appellant does not provide any argument to support this assignment.

{¶26} Ohio provides a statutory speedy trial right. Pursuant to R.C. 2945.73(B), "[u]pon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." "A person against whom a charge of felony is pending: * * * (2) Shall be brought to trial within two hundred seventy days after the person's arrest." R.C. 2945.71(C)(2). "For purposes of computing time * * * 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). This rule is known as the "triple count provision."

{¶27} The prosecution and the trial court are required to try an accused within the time frame provided by the statute. *State v. Singer*, 50 Ohio St.2d 103, 105, 362 N.E.2d 1216 (1977); see also *State v. Cutcher*, 56 Ohio St.2d 383, 384, 384 N.E.2d 275 (1978). However, the general assembly recognized that some degree of flexibility is necessary, thus extensions of the time limits are given in certain circumstances. *State v. Lee*, 48 Ohio St.2d 208, 209, 357 N.E.2d 1095 (1976). R.C. 2945.72 provides an exhaustive list of events and circumstances that extend the speedy trial limit.

{¶28} It does not appear that Appellant was released on bail. It also does not appear that he was held on any charges other than the instant charges. As such, the triple count provision applies, meaning the state was required to bring Appellant to trial within 90 days of his arrest. *State v. Kitzmiller,* 7th Dist. Columbiana No. 17 CO 0018, 2018-Ohio-3769, ¶ 7, citing R.C. 2945.71(E).

{¶29} The speedy trial clock begins to run the day after a defendant is arrested. *State v. Brown*, 7th Dist. Mahoning No. 03-MA-32, 2005-Ohio-2939. Appellant was

arrested on September 29, 2017 and his speedy trial clock began to run on September 30, 2017. The speedy trial clock stopped on December 22, 2017 when defense counsel filed both a discovery request and a request for a bill of particulars. A defendant's discovery request tolls the speedy trial clock. *State v. Perry,* 2018-Ohio-3940, 120 N.E.3d 446, ¶ 16, (7th Dist.), citing *State v. Helms*, 7th Dist. Mahoning No. 14 MA 96, 2015-Ohio-1708, ¶ 20; *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, ¶ 26. To this point, 83 days of time had run for purposes of speedy trial calculation. The state responded to both motions on January 2, 2018. At that point, the clock resumed. Appellant's trial commenced on January 9, 2018, seven days later. Excluding tolled time, Appellant was brought to trial exactly 90 days after his arrest date. As such, the state complied with the applicable speedy trial provisions.

{¶30} Accordingly, Appellant's fourth assignment is also without merit.

ASSIGNMENT OF ERROR NO. 6

JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE DUE TO CREDIBILITY ISSUES WITH WITNESS.

{¶31} Appellant argues generally that his convictions are against the manifest weight of the evidence based on his belief that the witnesses lacked credibility. However, Appellant does not contest the credibility of any one specific witness.

{¶32} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins*, *supra*, at 387, 678 N.E.2d 541 (1997). It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id.*

Weight of the evidence involves the state's burden of persuasion. *Id*. at 390, 678 N.E.2d 541 (Cook, J. concurring).

{¶33} The appellate court reviews 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶34} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶35} At trial, the following witnesses provided testimony: Appellant's former employer, Appellant's former coworker, the victim, and Officer Jack Henderson. The record fails to demonstrate any obvious issue regarding the credibility of any of these witnesses. As such, Appellant's sixth assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 7

TRIAL COURT ERRORED [SIC] WHEN IT DIDN'T RECUNIZE [SIC] THE VICTUM [SIC] TAMPERING WITH EVIDENCE.

{¶36} Appellant claims that one of the witnesses tampered with evidence. Appellant does not specify which witness tampered with evidence nor does he state what evidence was tampered with. It can be gleaned from the entirety of his application that he is referring to the victim's valuation of the jewelry. Appellant appears to base his assignment on the fact that the jury found that the state had failed to prove the value of the jewelry rose to the level charged in the indictment, which reduced the degree of his theft conviction from a felony of the fourth degree to a felony of the fifth degree.

{¶37} While the jury determined that the state had not met its burden to prove the value of the stolen jewelry rose to the level charged within the indictment, nothing in this record suggests that the victim or the state fabricated the value of the jewelry or intentionally misled the jury as to its value. Accordingly, Appellant's seventh assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 8

TRIAL COURT ERRORED [SIC] WHEN IT DID NOT WITHDRAW SIAD [SIC] EVIDENCE EXHIBIT #6 AFTER PROVING IT WAS FALSE.

{¶38} Appellant contends that the trial court erroneously admitted exhibit six after it was proven to be false. Appellant does not describe exhibit six, however, the record indicates that it is a "LEADS" printout, used to show that Appellant pawned jewelry belonging to the victim.

{¶39} Despite Appellant's claims, there is no evidence that the pawned jewelry did not belong to the victim and his eighth assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 9

> SENTENCE WAS NOT RELED [SIC] BASED ON HOUSE BILL 86 THAT GIVES DRUG ADDICTS LESSOR SENTENCES AND OR REHAB. THEY MENTIONED I COULD NOT FOLLOW BEING ON PROBATION WICH [SIC] THEY ALSO MENTION [SIC] 2 OF THEM WERE BASED ON DRUG OFFENCESS [SIC] AND OVERDOSE, DRUG USE DRUG POSSESSION AND PARRAFENILIA [SIC] CHARGES RESULTING IN PROBATION.

{¶40} It appears that Appellant urges, here, that he should have received a lesser sentence due to his drug addiction.

{¶41} We have previously determined that Appellant's sentence is not contrary to law. There is no legal precedent to support Appellant's contention that evidence of his drug addiction should result in a lesser sentence. While addiction is certainly a factor a trial court may consider when determining a defendant's sentence, it does not automatically reduce a defendant's sentence. Accordingly, Appellant's ninth assignment of error is meritless.

Conclusion

{¶42} As previously stated, in order to show ineffective assistance of appellate counsel, Appellant must demonstrate deficient performance of counsel and resulting prejudice. Appellant has failed to show that any of the issues he attempts to raise constituted error, hence, counsel cannot have been ineffective for failing to raise these issues. As there is no genuine issue regarding whether Appellant was deprived of effective assistance of counsel on appeal, Appellant's application for reopening is denied.

JUDGE CHERYL L. WAITE

JUDGE GENE DONOFRIO

JUDGE CAROL ANN ROBB

NOTICE TO COUNSEL

This document constitutes a final judgment entry.