[Cite as *State v. Nichols*, 2009-Ohio-3160.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. Sheila G. Farmer, P.J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2009-CA-0032
WILLIAM A. NICHOLS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Criminal appeal from Richland County Court of Common Pleas, Case No. 2007CR0330

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 26, 2009

APPEARANCES:

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Gwin, J.,

{¶1} Defendant-appellant William A. Nichols, Sr. appeals from his convictions and sentences in the Richland County Court of Common Pleas on one count of safecracking, a felony of the fourth degree, in violation of R.C. 2911.31(A); one count of receiving stolen property, a felony of the fifth degree, in violation of R.C. 2913.51(A); one count of possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.211, one count of aiding and abetting theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1); and one count of engaging in a pattern of corrupt activity, a felony of the second degree, in violation of R.C. 2923.32(A)(1). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} The police became suspicious of appellant's involvement in criminal activity in April 2005 after his son, Ryan, was implicated in a series of break-ins at businesses around Richland County. This crime spree culminated in the theft of a safe from an Arby's restaurant located on Interstate Circle in the area of Hanley Road and Interstate 71. (1T. at 139; 142-151).

{¶3} Christopher Meyers, who participated in the break-in, testified that they threw a brick through the window. He and Ryan then entered the restaurant while Sue Ellen Camp waited in the car. (2T. at 172). They wheeled the safe out of the restaurant; however, they could not lift it to put it into the back of Ryan Nichols' black Chevy Cavalier. (2T. at 172-173). Ryan went over to a nearby construction site, and stole a hydraulic jack, which they used to lift the safe into the trunk. They then tied it up with belts and sweatshirts to keep it from falling out of the car. (2T. at 173-174).

{¶4} During the ride back to the house on Louis Street, Mr. Meyers testified that he also stretched across the back seat and held onto the safe. (2T. at 175). When they got to the house, they backed the car up to the steps and rolled the safe into one of the bedrooms where Deanna Hamm was sleeping. (2T. at 176-177). Mr. Meyers testified that Ryan tried to open the safe with a crow bar; however, the bar slipped and hit him in the head. (2T. at 177). At that point, Ryan called appellant to come over and help open the safe. (2T. at 178).

{¶5} Appellant arrived and, after looking at the safe, called his other son, Ronald, to bring over his magnetic drill. (2T. at 179-180).

{¶6} When Ronald arrived with the magnetic drill, Mr. Meyers saw appellant plug it in and drill several holes into the safe. Mr. Meyers fell asleep while they were drilling the safe. (2T. at 180-181). When he woke up, the safe was open and there was a bag full of money. (2T. at 180-181). By that time, appellant had already left; however, Mr. Meyers was sure appellant got a cut of the money from the safe. He and Ryan divided the rest of the money. (2T. at 182-183).

{¶7} Jackie Weyhmeller, the manager of the Arby's restaurant, testified that the safe had contained approximately $3,000 or $3,400 at the time she closed the restaurant the night before the break-in. (1T. at 149-150). That money was missing when the police recovered the safe at 328 Lewis Street. Ms. Weyhmeller also testified that the restaurant had to replace the safe, which cost more than $500, but less than $5,000, although she could not recall the exact amount. (1T. at 150).

{¶8} Shortly after the theft of the safe from Arby's, Ryan Nichols, Christopher Meyers, Deanna Hamm and Sue Ellen Camp were arrested. (3T. 368-369). After his

arrest, Mr. Meyers gave several statements to police detailing appellant's involvement in other thefts or purchases of stolen property.

{¶9} On one occasion, Christopher Meyers and Ryan Nichols went to a house on Trimble Road, which was under construction, and disassembled the garage door. (2T. at 185-186). While they were doing that, appellant drove around in his blue Chevy Caprice, which resembled a police car. His job was to listen to the scanner and let them know if any police were coming. (2T. at 186-187). After the door was disassembled, appellant picked Ryan up and took him back to his house on Fairfax Avenue to get appellant's black minivan. Mr. Meyers testified that he remained behind with the door. (2T. at 187). When they returned, Ryan was driving the van and appellant was driving the Caprice. They loaded the garage door into the back of the minivan, and drove it back to appellant's house. (2T. at 187-188). This information was verified by a police report from February 24, 2005, in which a garage door valued at $500 was reported stolen from a residence on North Trimble Road that was under construction. (3T. at 380-381).

{¶10} On another occasion, Mr. Meyers, along with Tony Brown, broke into the basement storage area of Chelsea Square Apartments on Cline Avenue. (2T. at 189). Mr. Meyers testified that they were trying to get some money to buy crack, and were specifically looking for stuff to fix up houses. (2T. at 189). They stole door fixtures, smoke detectors, and other miscellaneous home improvement items. (2T. at 190). After they took the items to Mr. Brown's apartment, Mr. Brown called appellant because they knew he was interested in stuff to fix up his house or his rental properties. (2T. at 190-191). Appellant came over and bought all of the stolen property. (2T. at 190).

{¶11} The police also received information from a confidential informant named Marvin Ott. On December 17, 2005, Mr. Ott was seen on surveillance tape stealing two Sony video cameras, valued at $299 and $249, from the Best Buy store in Ontario, Ohio. (2T. at 207-214). On February 20, 2006, Mr. Ott was captured on surveillance video at the Macy's store in Ontario, Ohio, stealing two women's fur coats, valued at $2,495 each. (2T. at 215-221; 235-242).

{¶12} After Mr. Ott was apprehended for these thefts, he gave a statement to police implicating appellant in the purchase of the stolen property. (2T. at 248-250). At that time, the police decided to conduct a "reverse sting operation." (2T. at 249). Detective Eric Bosko contacted Sherry Devinney, the asset protection coordinator for the Wal-Mart on Possum Run Road in Mansfield, Ohio. (2T. at 221; 249). Ms. Devinney provided the police with a P200 digital camera valued at $299.97, an H1 digital camera valued at $399.98, and an F10 digital camera valued at $278.96.(2T. at 223-224; 250). Mr. Ott was fitted with a wire, and was given the cameras from Wal-Mart.

{¶13} The police then followed him to appellant's house, where Mr. Ott attempted to sell the cameras to appellant as stolen property. (2T. at 250-251). When Mr. Ott first went to appellant's house on March 3, 2006, appellant's son, Ronald, told him that appellant was not home because he was working for some type of welfare program on West Longview. He arranged for Mr. Ott to return later that afternoon. (2T. at 254; 386).

{¶14} At 4:00 p.m., Mr. Ott returned to appellant's home with the digital cameras. He was once again wearing a wire and was followed by the police. (2T. at 254; 3T. at 386). He made contact with appellant and Ronald Nichols, and ultimately sold the three

allegedly stolen cameras to appellant. In exchange, he received $100 and a Sony Cybershot megapixel digital camera. (2T. at 255; 260). After Mr. Ott left appellant's home, he turned over the money, the camera he received in trade, and the recording device to the police. (2T. at 255).

{¶15} As a result of this sting operation, the police obtained a search warrant for appellant's home at 887 Fairfax Avenue. (2T. at 256-257). That search warrant was served at 6:00 p.m. on March 3, 2006. When the police knocked on the door, Ronald Nichols answered and asked what was going on. At that point, appellant said "[t]he problem just left here a couple of minutes ago," referring to Mr. Ott. (3T. at 356). Both Ronald Nichols and appellant were taken into custody, and were searched incident to arrest. On appellant's person, police found $1,621.20 in cash and change, and a receipt from Mechanics Savings Bank. In the appellant's bedroom closet, the police located the two women's fur coats that Mr. Ott had stolen from Macy's with the store tickets still on them. (2T. at 262). In the master bedroom and throughout the house, they found large amounts of brand new clothing, also with the retail tags on. This clothing included twenty-eight pairs of jeans in various sizes with brand names such as Levis and U.S. Polo. (2T. at 263-264; 266; 285-287). Police also located a diamond tester in appellant's bedroom. (2T. at 266). In total, fifty-eight items were seized from appellant's residence during the search warrant, including the cameras that were loaned by Wal-Mart for the sting operation. (2T. at 266-268).

{¶16} Based upon the Mechanics Bank receipt that appellant had in his possession, the police obtained another search warrant for a safety deposit box under the name of Ashley Nichols, with appellant listed as guardian. (2T. at 227-233; 268-

269). Inside the safety deposit box, they located various collector's items, sports cards, coins, and various women's and men's rings. (2T. at 269-271). Two of the rings inside the box had retail tags on them listing values of $860 and $280. (2T. at 271-272). These rings were traced to Finlay Fine Jewelry Corporation, which leased space at the Macy's store in Ontario, Ohio. (3T. at 310-317).

{¶17} Following appellant's arrest, police recorded several jail phone calls that appellant made from the Mansfield City Jail from March 5-13, 2006. (2T. at 272-274). In those phone calls, appellant referred to some coins and rings, as well as police scanners that were taken from the house. (2T. at 274-275). Appellant also talked about the electromagnetic drill that the police believed was used in opening the Arby's safe. (2T. at 276).

{¶18} As a result, police obtained and executed a second search warrant on 887 Fairfax Avenue on March 15, 2006. (2T. at 276-277). The drill was found hidden behind a large amount of clothing in the closet underneath the stairs. (3T. at 388-389). During the execution of the second search warrant, police also searched appellant's dark blue Ford Crown Victoria automobile. (2T. at 277-11; 279). Inside the car, they found tools, gloves, a hooded sweatshirt, and knit hats with eyeholes cut out. (2T. at 278-279).

{¶19} As a result of his March 3, 2006 arrest, appellant was indicted in case number 2006-CR-261 for three counts of receiving stolen property. These charges related to his purchase of the three digital cameras and the two fur coats from Marvin Ott. Appellant was released on bond in this case on March 6, 2006. On January 10, 2007, the State moved to dismiss the indictment in order to present it to the Richland County Grand Jury for further investigation. The trial court granted the State's motion

and dismissed the case without prejudice on January 12, 2007. The offenses charged in this case were later re-indicted as Count VI in case number 2007-CR-330.

{¶20} On March 13, 2006, appellant was arrested in case number 2006-CR-187. He was charged with one count of receiving stolen property. This charge related to the two stolen rings from Macy's that were discovered during the search of the safety deposit box. Appellant was released on bond in this case on April 4, 2006. On February 20, 2007, the State moved to dismiss the case because it had been re-indicted and all charges had been consolidated into case number 2007-CR-64. The trial court granted the State's motion on February 26, 2007. The offense charged in this case was later re-indicted as Count VII in case number 2007-CR-330.

{¶21} On November 22, 2006, appellant was arrested in case number 2006-CR-1007 and charged with one count of safecracking, one count of receiving stolen property, and one count of possessing criminal tools. These charges related to his involvement in opening the Arby's safe stolen by his son Ryan Nichols. Appellant was released on bond on December 14, 2006. The State moved to dismiss the case on February 20, 2007 because it had been re-indicted and all charges had been consolidated into case number 2007-CR-64. The trial court granted the State's motion on February 26, 2007. The offenses charged in this case were later re-indicted as Counts II, III, and IV in case number 2007-CR-330.

{¶22} On January 16, 2007, appellant was indicted in case number 2007-CR-64. This re-indictment consolidated the charges against appellant and added a charge for engaging in a pattern of corrupt activity charge. The pattern of corrupt activity charge alleged the following predicate acts: 1) receiving stolen property, to wit: one safe valued

at $1,790 from Arby's, 2) safecracking, to wit: drilling the Arby's safe at 328 Lewis Street, 3) theft, to wit: $4,344.85 in cash from the Arby's safe, 4) receiving stolen property, to wit: three digital cameras valued at $978.91 and two fur coats valued at $4,990, 5) receiving stolen property, to wit: two women's sapphire rings from Macy's found in Mechanic's Bank safety deposit box, and 6) receiving stolen property, to wit: hot water heaters, plywood, garage doors, lumber, smoke detectors, costume jewelry and power tools.

{¶23} The pattern of the corrupt activity charge also contained specifications for the forfeiture of: 1) real property known as 887 Fairfax Avenue in Mansfield, Ohio, 2) real property known as 328 Louis Street in Mansfield, Ohio, 3) real property known as 328 Crystal Springs in Mansfield, Ohio, 4) a 1996 Ford Crown Victoria, VIN: 2FALP71W1TX134242, and 5) $1,600 in cash.

{¶24} On April 27, 2007, the State moved to dismiss case number 2007-CR-64 because it had been re-indicted under case number 2007-CR-330. The trial court granted the State's motion on April 30, 2007. Following the re-indictment in case number 2007-CR-330, appellant's case was set for trial on June 11, 2007. However, it was continued five times by the trial court due to conflicts with other criminal trials.

{¶25} Appellant's trial was delayed a final time by a defense motion to dismiss, alleging that appellant's speedy trial rights were violated. The State conceded a speedy trial violation as to Counts VI and VII, and those counts were dismissed. The trial court denied appellant's motion as to Counts I through V on May 23, 2008 and set appellant's case for trial on July 14, 2008.

{¶26} On July 18, 2008, the jury found appellant guilty of all counts, predicate acts, and forfeiture specification charged in the indictment. On July 23, 2008, the trial court sentenced appellant to six years on the pattern of corrupt activity charge, and six months on each of the remaining four charges. The sentences were run consecutive for a total sentence of eight years in prison.

{¶27} It is from these convictions and sentences appellant appeals, raising the following assignments of error[1]:

{¶28} "I. APPELLANT WAS DEPRIVED OF A FAIR TRIAL BY THE REFERENCE TO THE FACT THAT APPELLANT HAD PREVIOUSLY SPENT TIME IN PRISON.

{¶29} "II. APPELLANT WAS DENIED HIS RIGHT TO A SPEEDY TRIAL ON COUNTS TWO THROUGH FIVE.

{¶30} "III. IN COUNT FIVE, THE APPELLANT WAS CONVICTED OF A CRIME FOR WHICH HE WAS NOT CHARGED."

I.

{¶31} Appellant first challenges the admission of Russell Owens' testimony that he served prison time with the appellant, arguing that this testimony was prejudicial in light of the pattern of corrupt activity charge. We disagree.

{¶32} In the course of Mr. Owens' testimony, the following colloquy took place:

{¶33} "[Prosecutor]: How long have you known Billy Nichols, Sr.?

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[1] Appellant initially filed a direct appeal of his conviction in case number 2008-CA-0073. This Court dismissed that appeal on February 2, 2009 for lack of a final appealable order pursuant to the Ohio Supreme Court's decision in *State v. Baker* (2008), 119 Ohio St.3d 197. Thereafter, the trial court issued an amended sentencing entry on February 11, 2009, stating the manner of conviction. Appellant has timely appealed from that sentencing entry in the above-captioned case.

{¶34} "Mr. Owens: Since probably back in the '70's.

{¶35} "[Prosecutor]: How did you come to know him?

{¶36} "Mr. Owens: We kind of growed up in the same neighborhood out there in Roseland. We was in prison together before.

{¶37} ""[Prosecutor]: And...

{¶38} "[Defense counsel]: Your Honor, I'll object to the prison statement,

{¶39} "The Court: I'm sorry? The Objection is noted. Proceed.

{¶40} ""[Prosecutor]: Thank you. You ever been involved in criminal activity with Billy Nichols, Sr.?

{¶41} "Mr. Owens: Yes, sir. Back around '89, '90, '91, something like that."

{¶42} (3T. at 325).

{¶43} Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that "[a]ny *error* * * * which does not *affect substantial rights* shall be disregarded."(Emphasis added). Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"-i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called "harmless error" inquiry-to determine whether the error "affect[ed] substantial rights" of the criminal defendant. In *U.S. v. Dominguez Benitez* (June 14, 2004), 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157, the Court defined the prejudice prong of the plain error analysis. "It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without

regard to the mistake's effect on the proceeding. See *Arizona v. Fulminante,* 499 U.S. 279, 309-310 (1991) (giving examples). "Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as 'error that affects substantial rights,' used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States,* 328 U.S. 750 (1946). To affect "substantial rights," see 28 U.S.C. § 2111, an error must have "substantial and injurious effect or influence in determining the ... verdict." *Kotteakos,* supra, at 776."124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240; *State v. Fisher,* 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶ 7, 789 N.E.2d 222, 224-225. Thus, a so-called "[t]rial error" is "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Fulminante,* 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302; *State v. Ahmed,* Stark App. No. 2007-CA-00049, 2008-Ohio-389 at ¶ 23.

{¶44} "When a claim of harmless error is raised, the appellate court must read the record and decide the probable impact of the error on the minds of the average juror." *State v. Young* (1983), 5 Ohio St.3d 221, 226, 450 N.E.2d 1143 (citing *Harrington v. California* (1969), 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284).

{¶45} In *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, the Ohio Supreme Court clarified the standard by which a reviewing court must review an error in the admission of evidence:

{¶46} "To be deemed non-prejudicial, error of constitutional dimension must be harmless beyond a reasonable doubt.

{¶47} "Where constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt."

{¶48} *State v. Williams,* supra, paragraphs three and six of the syllabus.

{¶49} We are firmly convinced that any error in the admission of Mr. Owens's statement was harmless beyond a reasonable doubt. The statement concerning prison was an isolated reference. While a curative instruction was not immediately given during Mr. Owens' testimony, the trial court informed counsel at the resulting bench conference that such an instruction would be a part of its final jury instructions. (3T. at 327). The trial court did instruct the jury prior to deliberations, "There was some evidence that the Defendant has a criminal record. Since the Defendant did not testify, you may not consider that testimony that he previously served time for any purpose." (4T at 477). The jury is presumed to follow instructions given to it by a trial court, including instructions to disregard testimony. See, *State v. Ahmed* (2004), 103 Ohio St.3d 27, 42, 813 N.E.2d 637; citing, *State v. Loza* (1994), 71 Ohio St.3d 61, 75, 641 N.E.2d 1082; and *State v. Zuern* (1987), 32 Ohio St.3d 56, 62, 512 N.E.2d 585.

{¶50} Additionally, it is clear that had Mr. Owens' statement been excluded, the remaining evidence constituted overwhelming proof of appellant's guilt. The result of the trial was not unreliable nor was the proceedings fundamentally unfair because of the single, isolated reference to appellant's past prison time.

{¶51} Appellant's first assignment of error is overruled.

II.

{¶52} In this assignment of error, appellant contends the trial court erred and violated his constitutional rights by denying his speedy trial motion to dismiss as to Counts II through V of the indictment, which charged him with receiving stolen property, safecracking, possession of criminal tools, and theft. We disagree.

{¶53} "We begin by noting our lengthy history of Sixth Amendment jurisprudence, including the application of R. C. 2945.71. 'The right to a speedy trial is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution, made obligatory on the states by the Fourteenth Amendment. Section 10, Article I of the Ohio Constitution guarantees an accused this same right. *State v. MacDonald* (1976), 48 Ohio St. 2d 66, 68, 2 O.O.3d 219, 220, 357 N.E.2d 40, 42. Although the United States Supreme Court declined to establish the exact number of days within which a trial must be held, it recognized that states may prescribe a reasonable period of time consistent with constitutional requirements. *Barker v. Wingo* (1972), 407 U.S. 514, 523, 92 S.Ct. 2182, 2188, 33 L.Ed.2d 101, 113.'" *State v. Parker*, 113 Ohio St.3d 207, 2007-Ohio-1534 at ¶11. [Quoting *State v. Hughes* (1999), 86 Ohio St.3d 424, 425, 715 N.E.2d 540.].

{¶54} As Chief Justice Moyer wrote in *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 55-56, 661 N.E.2d 706:

{¶55} "Ohio's speedy trial statute was implemented to incorporate the constitutional protection of the right to a speedy trial provided for in the Sixth Amendment to the United States Constitution and in Section 10, Article I of the Ohio Constitution. *State v. Broughton* (1991), 62 Ohio St.3d 253, 256, 581 N.E.2d 541, 544;

see *Columbus v. Bonner* (1981), 2 Ohio App.3d 34, 36, 2 OBR 37, 39, 440 N.E.2d 606, 608. The constitutional guarantee of a speedy trial was originally considered necessary to prevent oppressive pretrial incarceration, to minimize the anxiety of the accused, and to limit the possibility that the defense will be impaired. *State ex rel. Jones v. Cuyahoga Cty. Ct. of Common Pleas* (1978), 55 Ohio St.2d 130, 131, 9 O.O.3d 108, 109, 378 N.E.2d 471, 472.

{¶56} "Section 10, Article I of the Ohio Constitution guarantees to the party accused in any court 'a speedy public trial by an impartial jury.' 'Throughout the long history of litigation involving application of the speedy trial statutes, this court has repeatedly announced that the trial courts are to strictly enforce the legislative mandates evident in these statutes. This court's announced position of strict enforcement has been grounded in the conclusion that the speedy trial statutes implement the constitutional guarantee of a public speedy trial.' (Citations omitted.) *State v. Pachay* (1980), 64 Ohio St. 2d 218, 221, 18 O.O.3d 427, 429, 416 N.E.2d 589, 591.

{¶57} "We have long held that the statutory speedy-trial limitations are mandatory and that the state must strictly comply with them. *Hughes*, 86 Ohio St. 3d at 427, 715 N.E.2d 540. Further, 'the fundamental right to a speedy trial cannot be sacrificed for judicial economy or presumed legislative goals.' Id." *State v. Parker*, supra 2007-Ohio-1534 at ¶12-15.

{¶58} In Ohio, the right to a speedy trial has been implemented by statutes that impose a duty on the state to bring a defendant who has not waived his rights to a speedy trial to trial within the time specified by the particular statute. R.C. 2945.71 *et seq.* applies to defendants generally. R.C. 2945.71 provides:

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

{¶60} "(1) * * *

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

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

{¶63} A speedy-trial claim involves a mixed question of law and fact. *State v. Larkin,* Richland App. No. 2004-CA-103, 2005-Ohio-3122. As an appellate court, we must accept as true any facts found by the trial court and supported by competent, credible evidence. With regard to the legal issues, however, we apply a de novo standard of review and thus freely review the trial court's application of the law to the facts. Id.

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

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

{¶66} "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:

{¶67} "(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;

{¶68} "(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;

{¶69} "(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;

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

{¶71} "(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;

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

{¶73} "(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;

{¶74} "(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;

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

{¶76} "When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the appellant was properly brought to trial within the time limits set forth in R.C. 2945.71." *State v. Riley,* 162 Ohio App.3d 730, 2005-Ohio-4337, 834 N.E.2d 887, ¶ 19.

{¶77} When dealing with multiple indictments, the Supreme Court of Ohio has held that, "[i]n issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment." *State v. Baker* (1997), 78 Ohio St.3d 108, 111, 676 N.E.2d 883 at syllabus. "The Ninth District Court of Appeals has described the disjunctive nature of the 'or' in *Baker* as creating two distinct exceptions to the speedy trial timetable. *State v. Skorvanek,* 9th App. No. 05CA008743, 2006-Ohio-69; *State v. Armstrong,* 9th App. No. 03CA0064-M, 2004-Ohio-726; *State v. Haggard* (Oct. 6, 1999), 9th App. No. 98CA007154. The first exception is that there are different facts supporting a new charge. Id. The second exception, and the one relevant to our analysis in the present case, is that there were additional facts that the State was unaware of at the time of the original charge. Id." *State v. Brown*, Stark App. No. 2007CA00129, 2008-Ohio-4087 at ¶ 23.

{¶78} In *Baker,* the second set of charges resulted from the complex and time-consuming process of checking the defendant's financial records. The state could not have known if additional charges were appropriate until that process was completed.

The two sets of charges were based on separate sets of facts and did not arise from the "same sequence of events." The court reasoned that "to require the state to bring additional charges within the time period of the original indictment, when the state could not have had any knowledge of the additional charges until investigating later-seized evidence, would undermine the state's ability to prosecute elaborate or complex crimes." *Baker,* supra at 111, 676 N.E.2d 883, 676 N.E.2d at 886.

{¶79} We find *Baker* to be controlling in this case. In the case at bar, the State continued to investigate appellant's involvement in the Arby's safecracking after his initial arrest on March 3, 2006 for receiving stolen property i.e., the cameras and fur coats. During the course of this investigation, the State found the magnetic drill in appellant's home on March 15, 2006. Later in 2006, the State obtained a statement from an accomplice, and his agreement to testify against appellant. (2T. at 170; 202-203).

{¶80} Pursuant to this record, we find the indictment on the safecracking, receiving stolen property and possession of criminal tools with respect to the Arby's case was based on evidence that was not available at the time of the original charge. Accordingly, the state was not subject to the speedy-trial timetable of the original charges.

{¶81} Appellant was held from November 22, 2006 until December 14, 2006. As the triple count provision applied to this time, a total of sixty-nine (69) days elapsed for speedy trial purposes. Following his release, appellant was out on bond for thirty-six (36) days, which was calculated at one for one. He was re-indicted on January 20,

2007, and was released on bond on January 25, 2007. Therefore, applying the triple count provision, a total of eighteen (18) days elapsed for speedy trial purposes.

{¶82} Appellant spent the next eighty-seven (87) days released either on bond or, for one day, in jail on unrelated charges. All of this time was counted one for one. On April 23, 2007, appellant was arrested on related charges and released the same day, which constituted three (3) days for speedy trial purposes. Appellant was again out on bond until his case was set for trial on June 11, 2007. Accordingly, the State exhausted 261 days of the allowed 270 days.

{¶83} As to each of the six continuances occurring after that date, the trial court sua sponte filed a judgment entry continuing the matter.

{¶84} Five of the continuances were the result of the trial court's engagement in other criminal trials. A sua sponte continuance must be properly journalized before the expiration of the speedy trial period and must set forth the trial court's reasons for the continuance. *State v. Weatherspoon*, Richland App. No. 2006CA0013, 2006-Ohio-4794. "The record of the trial court must ... affirmatively demonstrate that a sua sponte continuance by the court was reasonable in light of its necessity or purpose." *State v. Lee* (1976), 48 Ohio St.2d 208, 209, 357 N.E.2d 1095. Further, the issue of what is reasonable or necessary cannot be established by a per se rule, but must be determined on a case-by-case basis. *State v. Saffell* (1988), 35 Ohio St.3d 90, 518 N.E.2d 934; *State v. Mosley* (Aug. 15, 1995), Franklin App. No. 95APA02-232. However, a continuance due the trial court's engagement in another trial is generally reasonable under R.C. 2941.401. *State v. Doane* (July 9, 1992), Cuyahoga App. No. 60097; See also *State v. Judd,* Franklin App. No. 96APA03-330, 1996 WL 532180.

However, a continuance because the court is engaged in trial may be rendered unreasonable by the number of days for which the continuance is granted. See *State v. McRae* (1978), 55 Ohio St.2d 149, 378 N.E.2d 476.

{¶85} This court finds that each of the sua sponte continuances in the case sub judice were for good cause and were necessary and reasonable, given that the trial court entered upon the record that it was engaged in other trials and the number of days for which the trial was continued was not unreasonable.

{¶86} The final continuance was based upon appellant's filing his motion to dismiss. In *State v. Bickerstaff* (1984), 10 Ohio St.3d 62, 461 N.E.2d 892 the Ohio Supreme Court noted with respect to R.C. 2945.72(E): "[i]t is evident from a reading of the statute that a motion to dismiss acts to toll the time in which a defendant must be brought to trial." Id. at 67, 461 N.E.2d 892. Accordingly, the period between the filing of the motion on March 7, 2008 and the trial court's ruling upon that motion on May 23, 2008 is not included for speedy trial purposes. In *Bickerstaff,* supra, the Court found no prejudice from a five-month delay between the filing of the Motion to Dismiss and the trial court's ruling upon the motion. Id.

{¶87} The trial court correctly ruled that appellant's right to a speedy trial was not abridged. Accordingly, appellant's second assignment of error is overruled.

III.

{¶88} In his final assignment of error, appellant contends that because he was not charged with aiding and abetting theft in Count V of the indictment, it was error to charge the jury on complicity. We disagree.

{¶89} "The Supreme Court of Ohio clarified Ohio's position on the issue of complicity in *State v. Perryman* (1976), 49 Ohio St. 2d 14, vacated in part on other grounds sub nom, *Perryman v. Ohio* (1978), 438 U.S. 911. The court unequivocally approved of the practice of charging a jury regarding aiding and abetting even if the defendant was charged in the indictment as a principal. Id. The court held that the indictment as principal performed the function of giving legal notice of the charge to the defendant. Id. Therefore, if the facts at trial reasonably supported the jury instruction on aiding and abetting, it is proper for the trial judge to give that charge. *Perryman,* supra at 27, 28." *State v. Payton* (April 19, 1990), 8th Dist. Nos. 58292, 58346.

{¶90} R.C. 2923.03(F) adequately notifies defendants that the jury may be instructed on complicity, even when the charge is drawn in terms of the principal offense. *United States v. McGee* (6th Cir 2008), 529 F.3d 691, 695; *State v. Herring* (2002), 94 Ohio St.3d 246, 251 762 N.E.2d 940, 949; *State v. Keenan* (1998), 81 Ohio St.3d 133, 151, 689 N.E.2d 929, 946; *State v. Templeton,* Richland App. No. 2006-CA-33, 2007-Ohio-1148 at ¶ 63.

{¶91} In the case at bar, the facts at trial, as previously set forth, reasonably supported the jury instruction on aiding and abetting theft. Therefore, it was not error for the jury to convict appellant of aiding and abetting theft when he was charged in the indictment as a principal offender.

{¶92} Appellant's third assignment of error is overruled.

{¶93} Accordingly, the judgment of the Court of Common Pleas, Richland County, Ohio is affirmed.

By Gwin, J., and

Farmer, P.J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY

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[Cite as *State v. Nichols*, 2009-Ohio-3160.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
WILLIAM A. NICHOLS	:	
Defendant-Appellant	:	CASE NO. 2009-CA-0032

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

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY