[Cite as *State v. Farnsworth*, 2009-Ohio-4642.]

STATE OF OHIO, MONROE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 MO 7
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
LARRY L. FARNSWORTH	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Monroe County, Ohio Case No. 2006-357

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Dated: August 31, 2009WAITE, J.

{¶1} Appellant, Larry L. Farnsworth appeals his conviction by the Monroe County Court of Common Pleas on two counts of rape, in violation of R.C. 2907.02, felonies of the first degree, one count of rape with specification, in violation of R.C. 2907.02, a felony of the first degree, twelve counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), felonies of the third degree, and eleven counts of kidnapping, in violation of R.C. 2905.01, felonies of the second degree.

{¶2} Appellant contends that the trial court erred when it permitted his victims to testify by way of closed circuit television, because the state failed to meet its burden of proving that they would suffer "serious emotional trauma" if they were required to testify in court. The victims in these consolidated cases were Appellant's great nieces, who were ages ten, nine and seven at all times relevant to the first and second indictments. Appellant further argues that his conviction on charges alleged in the second indictment should be reversed because his right to a speedy was violated.

{¶3} Because Appellant has failed to demonstrate that the outcome of the trial would have been different if the victims were forced to testify in court, or, in the alternative, that the state failed to meet its burden under R.C. 2945.481(E), his first assignment of error is overruled. Likewise, Appellant's speedy trial argument is not supported by the facts of this case, and his second assignment of error is overruled. The judgment of the trial court is affirmed.

FIRST ASSIGNMENT OF ERROR

{¶4} "The trial court erred in allowing the victims' testimony to be presented by closed-circuit television."

{¶5} R.C. 2945.481(E) provides, in pertinent part:

{¶6} "[A] judge may order the testimony of a child victim to be taken outside the room in which the proceeding is being conducted if the judge determines that the child victim is unavailable to testify in the room in the physical presence of the defendant due to one or more of the following:

{¶7} "* * *

{¶8} "(2) The inability of the child victim to communicate about the alleged violation because of extreme fear, failure of memory, or another similar reason;

{¶9} "(3) The substantial likelihood that the child victim will suffer serious emotional trauma from so testifying."

{¶10} This record reflects that Appellant's trial counsel did not object to the closed circuit television presentation of the victims' testimony at trial, and, therefore, he has waived all but plain error on appeal. *State v. McConnell* , 2nd Dist. No. 19993, 2004-Ohio-4263, ¶48, citing *State v. Ballew* (1996), 76 Ohio St.3d 244, 251, 667 N.E.2d 369. Counsel's failure to object at trial, " 'constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise.' " Id.

{¶11} The only objection raised by Appellant's trial counsel regarding the victims' testimony involved the physical placement of the television monitors. Appellant's trial counsel stated:

{¶12} "I'm just going to proffer my objection on the monitor. I think the statute says that the victim – there has to be a monitor in place so they can look at it if you position it, so they can look at it, or even lean over and look it [sic] then you're effectively saying, or you're effectively minimizing the statutory language on that.

{¶13} "Secondly, there's a distinction between whether or not they don't want to see [Appellant] or they're afraid of [Appellant].

{¶14} "I think the case law is the whole reason we're doing it outside of the view of the jury is because [sic] the girls are afraid of him. It's not because they don't want to see him. And I think that is a distinction." (Trial Tr., p. II-110.)

{¶15} However, Appellant has not raised the placement of the monitor as an issue on appeal.

{¶16} The state presented the testimony of John Joseph Leindecker, an outpatient private practice licensed professional clinical counselor who dedicates approximately one half of his practice to the treatment of children and young adults. (3/22/07 Tr., p. 27.) According to his testimony, Leindecker has treated more victims of sexual abuse than any other counselor in the tri-county area that is served by his previous employer, Community Mental Health.

{¶17} Leindecker testified that he had been treating the victims in this case for approximately five months prior to the hearing on the state's motion. He further testified that participating in a proceeding where the accused is present can have a "dramatic effect" on children that are the victims' ages. (3/22/07 Tr., p. 29.) Based upon his sessions with these children, he concluded that in-court testimony was, "not

going to be possible." He predicted that the children would, "shut down and not be able to talk at all." (3/22/07 Tr., p. 30.) He responded in the affirmative when asked whether the girls would exhibit "extreme fear" if they were forced to testify in front of Appellant and whether their memories might fail. (3/22/07 Tr., p. 30.)

{¶18} When asked whether the children would suffer "extreme emotional trauma" from testifying in the presence of Appellant, Leindecker responded:

{¶19} "The terminology that I like to use, while its very symbolic, it is my opinion that these children have cuts on their heart because of what has been done to them. Tearing open those cuts or causing more cuts is simply unwarranted, and I would hope that those situations could be avoided." (3/22/07 Tr., pp. 30-31.)

{¶20} On cross-examination, Leindecker stated that the children were afraid of Appellant, and do not want to be near him. (3/22/07 Tr., pp. 32-33.) More specifically, he testified that the youngest victim, "does an awful lot of baby talking whenever [he] bring[s] up [Appellant]." (3/22/07 Tr., p. 39.)

{¶21} Appellant contends that Leindecker's testimony fell short of establishing that the children would suffer "serious emotional trauma" if they were forced to testify in the courtroom. Appellant argues that Leindecker's testimony was conclusory, "without sufficient explanations of the bases therefor." (Appellant's Brf., p. 4.) Appellant also challenges Leindecker's failure to differentiate his analysis with respect to each of the three children.

{¶22} Despite his arguments, Appellant has failed to demonstrate that the outcome of the trial would have been different if the children testified in the

courtroom. There is no evidence on the record that he would have been acquitted but for the closed circuit testimony.

{¶23} Even if we were not relying on the plain error standard, Appellant has not demonstrated that the trial court failed to meet its burden under R.C. 2945.401(E). When the victims in this case gave testimony at trial, they were ages eleven, ten, and eight. (Tr., p. II-113.) Leindecker testified that the girls were afraid of Appellant and did not want to be near him. He opined that the girls would not be able to communicate about the facts giving rise to the indictment because of that fear. The foregoing testimony fulfills the requirements of R.C. 2945.481(E).

{¶24} Likewise, Leindecker confirmed that the girls would suffer extreme emotional trauma if they were forced to testify in from of Appellant. The "cuts on their hearts" analogy, which Leindecker himself characterized as "symbolic," was sufficient to establish that the girls had suffered extreme emotional trauma as a result of Appellant's conduct, and that there was a substantial likelihood that they would experience additional extreme emotional trauma if they were forced to testify in his presence.

{¶25} Appellant also argues that Leindecker's testimony contravenes documentary evidence admitted at trial in the form of cards and letters sent to Appellant by his victims. However, the state correctly pointed out at trial that Appellant did not provide a time frame for the correspondence, and Leindecker explained at trial that a victim's affection for the accused typically changes once the abuse is discovered. (Trial Tr. p., II-241.)

{¶26} Because Appellant has failed to demonstrate that the outcome of the trial would have been different but for the presentation of the victims' testimony by closed circuit television or that the state has failed to meet its burden under R.C. 2945.481(E), his first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶27} "The trial court erred in denying Farnsworth's speedy trial motion with respect to the second indictment."

{¶28} The Sixth Amendment to the United States Constitution provides that an "accused shall enjoy the right to a speedy and public trial." Section 10, Article I of the Ohio Constitution provides a criminal defendant the right to a speedy public trial by an impartial jury.

{¶29} R.C. 2945.73(B) codifies a criminal defendant's right to a speedy trial and states: "Upon 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 defendant charged with a felony must be brought to trial within 270 days of his or her arrest. R.C. 2945.71(C)(2). 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).

{¶30} Ohio's speedy trial statute must be strictly construed against the state. *State v. Singer* (1977), 50 Ohio St.2d 103, 109, 4 O.O.3d 237, 362 N.E.2d 1216. Further, a defendant establishes a prima facie case for dismissal once the statutory time limit has expired. *State v. Butcher* (1986), 27 Ohio St.3d 28, 30-31, 500 N.E.2d

1368. At that point, the state has the burden to demonstrate any extension of the time limit. Id. It is uncontroverted that Appellant was incarcerated throughout the pendency of these consolidated cases, and more than ninety days passed (270 ÷ 3) between the filing of the second indictment and the first day of trial.

{¶31} Statutory speedy trial issues present mixed questions of law and fact. *State v. Hiatt* (1997), 120 Ohio App.3d 247, 261, 697 N.E.2d 1025. Therefore, courts must, "accept the facts as found by the trial court on some competent, credible evidence, but freely review the application of the law to the facts." Id. Courts then independently review whether an accused was deprived of his statutory right to a speedy trial, strictly construing the law against the state. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 57, 661 N.E.2d 706.

{¶32} Appellate courts review a trial court's decision on speedy trial claims for an abuse of discretion. *State v. Kuriger*, 7th Dist. No. 07 JE 48, 2008-Ohio-1673, at ¶13, 175 Ohio App.3d 676, 888 N.E.2d 1134. The phrase "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. Furthermore, when applying the abuse of discretion standard, an appellate court may not generally substitute its judgment for that of the trial court. *State v. Herring* (2002), 94 Ohio St.3d 246, 255, 762 N.E.2d 940.

{¶33} To review an alleged speedy trial violation, we must count the number of days that have passed and determine which party is responsible for any delay. *State v. DePue* (1994), 96 Ohio App.3d 513, 516, 645 N.E.2d 745. R.C. 2945.72

provides extensions of speedy trial time for hearings, and subsection (H) specifically extends an accused's speedy trial time by, "[t]he 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."

{¶34} The time for speedy trial begins to run when an accused is arrested; however, the actual day of the arrest is not counted. *State v. Cross*, 7th Dist. No. MA 74, 2008-Ohio-3240, ¶17. Appellant was arrested November 22, 2006, (11/22/06 Warrant on Indictment, p. 2), and the first indictment, charging him with three counts of rape and three counts of gross sexual imposition, was filed on November 21, 2006.

{¶35} On December 19, 2006, Appellant executed an open-ended waiver of his speedy trial rights in order to afford his counsel additional time to prepare for trial. (12/19/06 Waiver of Speedy Trial Rights, p. 1.) The parties agreed to a trial date of April 5, 2007. The Ohio Supreme Court has held that following an express written waiver of unlimited duration, like the one in this case, the defendant is not entitled to a discharge due to any delay in bringing him to trial unless he files a written objection to further continuances and registers a formal demand for trial. *State v. O'Brien* (1987), 34 Ohio St.3d 7, 9, 516 N.E.2d 218.

{¶36} On March 21, 2007, the second indictment was filed charging Appellant with twenty-eight additional felony counts, including kidnapping and gross sexual imposition, committed against the same victims and occurring during the same time period. On March 23, 2007, Appellant was arraigned on the second indictment, and the trial court granted the state's motion to consolidate the cases.

{¶37} The state concedes that the second indictment included new charges, and, therefore, the speedy trial waiver executed on December 19, 2006 cannot be applied to the second indictment. See *State v. Adams* (1989), 43 Ohio St.3d 67, 538 N.E.2d 1025. However, upon Appellant's oral motion at his arraignment, the trial was continued to May 29, 2007. (3/23/06 J.E., p. 3.) The period of any continuance granted on the accused's own motion tolls the speedy trial time. Therefore, the speedy trial clock ran for one day before it was tolled from March 22, 2007 until May 29, 2007. *State v. Brown*, 7th Dist. No. 03-MA-32, 2005-Ohio-2939, ¶41. Because Appellant was incarcerated for the charges in these consolidated cases, three days accrued.

{¶38} Appellant filed numerous motions throughout the pendency of this action. First, on March 22, 2007, Appellant filed a motion to interview the child victims in order to prepare his response to the state's motion to allow the victims to testify via closed circuit television, which was filed on March 8, 2007. On March 26, 2007, the trial court granted the state's motion to permit the victims to testify via closed circuit television.

{¶39} On April 16, 2007, Appellant filed a motion for a psychological evaluation. On April 18, 2007, he filed a motion for the expense of an independent investigator. On April 19, 2007, the trial court issued an order requiring Appellant to provide the names of persons performing the evaluation and investigation and the estimated cost of both services within five days. On April 23, 2007, Appellant filed a

motion to dismiss, a motion for disclosure of grand jury proceedings, a motion for a change of venue, and a motion in limine.

{¶40} On April 25, 2007, following a pre-trial conference, the trial court filed a new case management schedule which set new deadlines, and a new trial date of September 11, 2007. According to the judgment entry, the new dates were entered "[b]y agreement of the parties." (4/25/07 J.E., p. 1.) Neither Appellant nor his counsel signed the judgment entry. In a separate order dated April 25, 2007, the court directed the state to provide a bill of particulars to Appellant.

{¶41} On May 1, 2007, Appellant filed a motion for a reduction of bail. On May 2, 2007, he filed a motion for forensic evaluation and for an expert witness, as well as three discovery requests marked "A" through "C." The accused's discovery request is a tolling event under the statute. *State v. Catlin*, 7th Dist. No 06 BE 20, 2006-Ohio-6247, ¶20. On June 18, 2007, the trial court conducted a competency hearing, and determined that the victims were competent to provide testimony at trial.

{¶42} On June 29, 2007, the state filed its response to Appellant's discovery requests, as well as its response to the motions to dismiss, for change of venue, and for reduction of bail, as well as the responses to Appellant's motion in limine and the trial court's order for a bill of particulars. Appellant does not argue that the state's response to his motions was unreasonable. *State v. Driver*, 7th Dist. No. 03 MA 210, 2006-Ohio-494, ¶18.

{¶43} The trial court conducted a hearing on the foregoing motions on July 20, 2007, and entered an order ruling on the motions on July 24, 2007. Appellant

does not argue that the amount of time that passed between the filing of the motions and the issuance of the court's judgment entry was unreasonable. Therefore, the speedy trial time is tolled from May 29, 2007 through July 24, 2007. From July 24, 2007, through August 24, 2007, thirty days expired, which is multiplied by three, for a total of ninety-three days. On August 24, 2007, Appellant filed a fifth discovery motion marked "D." The state filed its response to the discovery motion on August 30, 2007.

{¶44} On September 4, 2007, Appellant filed a motion for jury view, and a motion to dismiss based upon speedy trial grounds. As a consequence, an additional five days expired, for a total of 108 days. In the motion to dismiss, Appellant's counsel did not acknowledge the trial court's April 25, 2007 judgment entry. Appellant also filed his fifth and sixth responses to the state's request for reciprocal discovery on September 4, 2007.

{¶45} The trial court addressed the motion to dismiss on the first day of trial. The trial court asked Appellant's counsel if he would like to add anything to the written motion. Appellant's counsel responded:

{¶46} "I don't believe I have anything additional.

{¶47} "My recollection was, Your Honor, that the Court continued [the trial] on its own motion, but I understand there is a [sic] entry that someone found, that said the parties had agreed to the continuance.

{¶48} "And I would just simply renew my motion for, you know, proffer it for the record today." (Trial Tr., pp. I-3-4.)

{¶49} The state indicated that the trial court had given Appellant's counsel time to obtain names and estimates regarding the furnishing of expert opinions to the state, and that the April 25, 2007, judgment entry continuing the trial was the result of the time provided to Appellant's counsel to acquire information on expert witnesses. Counsel for the state added that the trial was continued by agreement of the parties.

{¶50} First, it is clear from the record that the speedy trial clock did not expire with respect to the second indictment. Even if we do not consider the April 25, 2007, continuance, only 46 days (46 x 3 = 108) passed between the filing of the second indictment and the September 11, 2007 trial date, when the time attributable to motions and discovery requests is subtracted.

{¶51} Appellant cites *State v. Behnen* (December 13, 1979), 10th Dist. Nos. 79AP-375, 79AP-376 for the proposition that, "the [April 25, 2007 judgment] entry cited by the court * * * is insufficient to constitute a valid waiver of [Appellant's] speedy trial rights." (Appellant's Brf., p. 6.) In *Behnen*, the Tenth District Court of Appeals held that a judgment entry setting a trial beyond the speedy trial deadline without explanation cannot survive a motion to dismiss.

{¶52} Citing *State v. McRae* (1978), 55 Ohio St.2d 149, and *State v. McBreen* (1978), 54 Ohio St.2d 315, the *Behnen* Court concluded that, although defense counsel may waive the right on behalf of his client, such a waiver requires a tacit agreement by counsel to the trial date as opposed to mere silence, and further requires that the reasonableness and necessity of such extension be established by the record. The Tenth District relied on representations made by Behnen's trial

counsel on the record. He stated, "I would note for the record at that time neither counsel nor the defendant waived time of that -- waived speedy trial rights. Merely, we stood there and were given a date by the Court." Id. at *9.

{¶53} Here, Appellant's trial counsel was given an opportunity to supplement his motion before the court made its ruling. He simply conceded the existence of the April 25, 2007, judgment entry continuing the trial by agreement of the parties, and did not argue that the judgment entry did not reflect the agreement of the parties. Furthermore, he did not object to the state's characterization of the reasons underlying the continuance.

{¶54} Unlike *Behnen*, the facts in this case do not establish that the trial court continued the trial without the agreement of the parties. Although the judgment entry is not signed by counsel for Appellant, nor does it contain any other reason for the continuance, the record indicates that Appellant's counsel did not object to the continuance and, instead, apparently agreed to the continuance.

{¶55} Finally, R.C. 2945.72(H) allows for the tolling of an accused's speedy trial time upon the issuance of a sua sponte continuance by the trial court as long as the continuance is reasonable. *State v. Richardson*, 7th Dist. 08 MA 108, 2008-Ohio-644, ¶108. Based upon the number of charges, the ongoing exchange of discovery, and the numerous pre-trial motions, the April 25, 2007, continuance of the trial in this case was reasonable. "Where the trial record affirmatively demonstrates the necessity for a continuance and the reasonableness thereof, such a continuance will

be upheld." *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186, ¶62.

{¶56} Because there was no speedy trial violation in this case, Appellant's second assignment of error is overruled.

{¶57} In summary, both of Appellant's assignments of error are meritless, and his convictions are affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.