[Cite as *State v. Watson*, 2009-Ohio-4852.]

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

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA3072
	:	
vs.	:	**Released: September 11, 2009**
	:	
JODY WATSON,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellant.	:	

APPEARANCES:

Pamela C. Childers, Chillicothe, Ohio, for Defendant-Appellant.

Michael M. Ater, Ross County Prosecuting Attorney, and Jeffrey C. Marks, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Jody Watson, appeals the decision of the Ross County Court of Common Pleas. Appellant, convicted of felonious assault, asserts there was error in the proceedings below in that: 1) his right to a speedy-trial was violated; 2) his trial counsel's failure to request a jury instruction on aggravated assault constituted ineffective assistance of counsel or, in the alternative, the trial court's failure to include the instruction constituted plain error. Because Appellant's discovery demand tolled speedy-trial time, we find his first assignment of error is unpersuasive.

Further, because the trial court's decision to omit a jury instruction on aggravated assault was not an abuse of discretion, his second assignment of error also is without merit. Accordingly, both of Appellant's assignments of error are overruled and the decision of the trial court is affirmed.

I. Facts

{¶2} On October 16, 2007, Appellant was involved in an altercation in which his girlfriend's sister and her mother confronted him regarding physical custody of his and his girlfriend's child. At some point during the dispute, Appellant struck the mother's boyfriend in the head with a pipe. The next day, Appellant was arrested for felonious assault and related misdemeanor assault, as well as for unrelated domestic violence charges which had taken place in May. Appellant was given separate bonds for each of the charges.

{¶3} He was initially held in lieu of bond on both the October charges and the May domestic violence charges. The trial court orally dismissed the domestic violence charges on November 2, 2007. On the same date, the trial court orally released Appellant on his own recognizance for the October misdemeanor charges, resulting in Appellant continuing to be held only for felonious assault. The trial court journalized that decision three days later, on November 5. Appellant was indicted for felonious

assault and the trial court set trial for January 30, 2008. On December 19, 2007, Appellant's counsel entered his appearance and demanded discovery pursuant to Crim.R. 16.

{¶4} On January 28, 2008, Appellant filed a motion to dismiss on the grounds that speedy-trial time had expired. The trial court denied the motion. Subsequently, the case proceeded to trial and the jury found Appellant guilty of felonious assault. After sentencing, Appellant timely filed the current appeal.

II. Assignments of Error

I. THE TRIAL COURT ERRED WHEN IT FAILED TO DISCHARGE APPELLANT UPON APPELLANT'S MOTION TO DISMISS FILED JANUARY 28, 2008 FOR VIOLATION OF THE SPEEDY TRIAL STATUTE.

II. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO REQUEST AN INSTRUCTION ON AGGRAVATED ASSAULT, OR ALTERNATIVELY, THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE OFFENSE OF AGGRAVATED ASSAULT WAS PLAIN ERROR.

III. First Assignment of Error

{¶5} In his first assignment of error, Appellant argues he was not tried within two hundred seventy days of his arrest as required by the speedy-trial statute. The State denies the assertion and argues that, because of Appellant's discovery demand, the statute was tolled and only two

hundred twelve speedy-trial days had run when Appellant filed his motion to dismiss.

{¶6} We begin our analysis by stating the proper standard of review. 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, we "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., citing *State v. Howard* (Mar. 4, 1994), 4th Dist. No. 93CA2136. When the defendant moves for discharge on speedy-trial grounds and demonstrates that the state did not bring him to trial within the time limits set forth in the speedy-trial statutes, the defendant has made a prima facie case for discharge under R.C. 2945.73(B). *State v. Monroe*, 4th Dist. No. 05CA3042, 2007-Ohio-1492, at ¶27. The state then bears the burden of proving that actions or events chargeable to the accused under R.C. 2945.72 sufficiently extended the time it had to bring the defendant to trial. Id.

{¶7} Under Ohio's speedy-trial statutes, if the State fails to bring a defendant to trial within the time required by R.C. 2945.71 and 2945.72, the trial court must discharge the defendant upon motion made at or prior to the start of trial. R.C. 2945.73(B). The Supreme Court of Ohio has "imposed upon the prosecution and the trial courts the mandatory duty of complying"

with the speedy-trial statutes. *State v. Singer* (1977), 50 Ohio St.2d 103, 105, 362 N.E.2d 1216. Further, the application of the speedy-trial statutes must be strictly construed against the State. *Brecksville v. Cook* (1996), 75 Ohio St.3d 53, 1996-Ohio-171, 661 N.E.2d 706, at 57.

{¶8} Under R.C. 2945.71, "a person against whom a charge of felony is pending shall be brought to trial within two hundred seventy days after his arrest." R.C. 2945.71(C)(2). Each day the defendant spends in jail solely on the pending charge counts as three days. R.C. 2945.71(E). The time limit for bringing a felony criminal defendant to trial may be extended for certain periods of time, including "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[.]" R.C. 2945.72(E).

{¶9} In the case sub judice, the parties calculate speedy-trial time differently. Appellant counts two hundred seventy seven days between his arrest and his motion to dismiss; the State counts two hundred twelve. The parties arrive at those figures as follows:

{¶10} Appellant states that sixteen days accrued from October 18, 2007, the day after the arrest, until November 2, 2007, the day the trial court orally ordered that he was to be held solely on the felonious assault charge. Because he was held solely for that charge from November 3, 2007 until

January 28, 2008, when he filed his motion to dismiss, Appellant states that each day counted three-for-one. As such, those eighty-seven days constitute an additional two hundred sixty-one days for speedy-trial purposes, for a grand total of two hundred seventy-seven days.

{¶11} The State argues that nineteen days, not sixteen as argued by Appellant, passed between the arrest date and the date the court ordered that Appellant was to be held solely for felonious assault. This discrepancy arises because the trial court did not journalize its order until November 5. Thus, the State considers November 6 to be the first three-count day. Appellant, relying on the trial court's November 2 oral pronouncement, regards November 3 as the first three-count day.

{¶12} Next, the State asserts that forty-four three-count days occurred from November 6 to December 19, constituting an additional one hundred thirty-two days. On December 19, Appellant filed a demand for discovery. The State contends this demand tolled the speedy-trial statute until January 8, 2008, when it provided Appellant with medical records of the victim and a transcribed statement. The State argues that, once it provided this information to Appellant, the speedy-trial time resumed and, from January 9 to January 28, twenty additional three-count days passed resulting in sixty more days added to the speedy-trial count. Thus,

according to the State, only a total of two hundred twelve speedy-trial days passed between Appellant's arrest and his motion to dismiss.

{¶13} As shown above, the primary discrepancy between the parties' calculations, and the issue which we must decide, is whether Appellant's December 19 discovery demand tolled speedy-trial time. Appellant argues that his discovery demand was filed pro forma, "simply to insure that the State supplement the discovery it had already provided at arraignment, a long-standing practice of the State and defense in Ross County." Appellant also states the trial court did not treat its discovery demand as a motion that required a ruling and, further, made no journal entry indicating that the discovery demand was a tolling event until after Appellant's motion to dismiss had been filed. Accordingly, Appellant argues that its December 19, 2007 demand for discovery was not a tolling event. For the reasons stated below, we do not find this argument persuasive.

{¶14} In *State v. Brown*, 98 Ohio St.3d 121, 781 N.E.2d 159, 2002-Ohio-7040, the Supreme Court of Ohio held that a discovery demand was a speedy-trial tolling event. "A demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E)." Id. at the syllabus. In *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, 853 N.E.2d 283, the Supreme Court held that the State need not prove a defendant's motion

causes a delay in order for speedy-trial time to be tolled pursuant to R.C. 2945.72(E). "It is the filing of the motion itself, the timing of which the defense can control, that provides the state with an extension. R.C. 2945.72(E) implicitly recognizes that when a motion is filed by defendant, there is a 'period of delay necessitated' - at the very least, for a reasonable time until the motion is responded to and ruled upon." Id. at ¶26.

{¶15} Following the decisions in *Brown* and *Sanchez*, we find that Appellant's December 19 discovery demand constituted a tolling event. Appellant seems to argue that, because the trial court did not treat the discovery demand as a motion that required a ruling, as would a motion to compel discovery, and because there was no journal entry indicating that speedy-trial time was tolled, Appellant's discovery demand should not have been a tolling event. However, this argument does not comport with the holding in *Brown*.

{¶16} "* * * Crim.R. 16 contemplates an informal step-that being the demand or written request for discovery of one party upon another party. It does not require court intervention. However, the fact that the court is not involved does not diminish the duty of the parties to comply with the rules at that point in the discovery process." *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, at ¶19. The *Brown* Court expressly stated

that a *demand* for discovery constitutes a tolling event. Accordingly, we find that, because a discovery demand does not require court intervention, no intervention by the trial court is necessary to begin tolling the speedy-trial statute after a defendant makes such demand.

{¶17} Appellant also argues that, because the State had already provided some discovery before Appellant made its December 19 discovery demand, any discovery delivered subsequent to December 19 was only supplemental and, as such, should not be considered a tolling event. This argument is also unpersuasive.

{¶18} Both parties concede that some discovery was provided at Appellant's arraignment on December 17, 2007. However, this was two days before Appellant filed his discovery demand. Even if the discovery the State provided on January 8, 2008 was termed "supplemental," it was, in fact, the first discovery provided after Appellant made his demand. Despite any existing arrangement between the Ross County Prosecuting Attorney's Office and the Public Defender's Office, Appellant voluntarily elected to file a demand for discovery. As the trial court noted, "Defense counsel either knew or should have known that such a demand would toll speedy-trial for a reasonable period of time." Accordingly, we find speedy-trial time was tolled once Appellant filed his demand for discovery on December 19.

{¶19} As already noted, the trial court found the State's response to the demand, twenty days later, on January 8, 2008, was made within a reasonable period of time. Assuming Appellant's own calculations, two hundred seventy-seven days had passed before his motion to dismiss was filed, the filing of which, it is uncontested, was a tolling event itself. Although we make no determination as to the specific number of days which would have been reasonable for the State to respond, even three days of tolling would have kept the matter within speedy-trial limits as of the date of Appellant's motion to dismiss. As such, when Appellant filed his motion to dismiss, fewer than two hundred seventy days had elapsed since his arrest and speedy-trial time had not run. Accordingly, Appellant's first assignment of error is overruled.

IV. Second Assignment of Error

{¶20} As his second assignment of error, Appellant asserts he received ineffective assistance of counsel in that his trial counsel failed to object to the trial court's decision not to give a jury instruction on aggravated assault. Alternatively, he states the trial court's failure to instruct the jury was plain error. However, this assignment of error is based on a false premise: Appellant's counsel did, in fact, raise the issue.

{¶21} The trial transcript clearly shows Appellant's counsel timely made the objection in question. Immediately after the trial court gave its jury instructions, the court asked if the defense had any objections. Appellant's counsel replied, "Yes, your Honor, we do. We believe that the court should have given the instruction on the lesser offense of aggravated assault. The reason for that would be that, we believe that there was enough evidence that it should go to the jury * * *." Thus, Appellant's ineffective assistance of counsel argument, based on a purported failure to request an aggravated assault instruction, obviously has no merit.

{¶22} Since Appellant's trial counsel did make the objection, Appellant's alternative argument, that the trial court's decision constituted plain error, is also incorrect. Instead, the correct standard of review, when error is asserted concerning a trial court's jury instructions, is abuse of discretion. "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Baltzer*, 4th Dist. No. 06CA76, 2007-Ohio-6719, at ¶36, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

{¶23} "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Horner*, 4th Dist. No. 02CA5, 2003-Ohio-126, at ¶8, citing *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940; *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331; *State v. Adams* (1980), 60 Ohio St.2d 151, 157, 404 N.E.2d 144. When an appellate court applies this standard, it can not substitute its judgment for that of the trial court. *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, at ¶12.

{¶24} "In a felonious assault trial, a trial court must instruct the jury on aggravated assault when sufficient evidence of serious provocation exists." *State v. Jacobs*, 4th Dist. No. 03CA24, 2004-Ohio-3393, at ¶28. "Aggravated assault contains elements identical to the felonious assault elements, except for the additional mitigating element of serious provocation. (Internal citation omitted.) Thus, when a defendant presents sufficient evidence of serious provocation in a trial for felonious assault, the jury must be given an aggravated assault instruction." *State v. Huff*, 4th Dist. No. 06CA7, 2006-Ohio-5081, at ¶19.

{¶25} In determining whether there is sufficient evidence to establish "serious provocation," a two-part test must be met. The first part is

an objective standard: the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." Id. at ¶20, quoting *In State v. Mack* (1998), 82 Ohio St.3d 198, 201, 694 N.E.2d 1328. If this first-prong is satisfied, the test shifts to a subjective standard: the defendant must have actually been under the influence of a "sudden fit of passion or rage." Id. Further, words alone are not sufficient provocation, nor is fear. *Jacobs* at ¶30. In the case sub judice, we find that Appellant failed to establish the objective standard; there was insufficient evidence to show the victim seriously provoked Appellant beyond the power of his control. In fact, there is virtually no evidence that the victim provoked Appellant in any manner whatsoever.

{¶26} Here the victim was only peripherally involved in the events of October 16. The dispute in question was actually between Appellant on one side and his girlfriend's sister and her mother on the other. The victim, the boyfriend of the mother, though present at the scene, was not actively engaged in the dispute. During trial, testimony from multiple witnesses established that the victim neither threatened, spoke to, nor even approached Appellant. Had the victim in this case been his girlfriend's mother or sister, both of whom were actively engaged with Appellant, our decision may well have been otherwise. However, by all accounts, except for a non-specific,

self-serving statement by Appellant that he felt threatened, the evidence shows that the victim was an observer of the altercation, not a participant, and that Appellant's attack on him was wholly unprovoked. In such circumstances, the trial court did not abuse its discretion is refusing to instruct the jury on the lesser charge of aggravated assault. Accordingly, Appellant's second assignment of error is overruled.

V. Conclusion

{¶27} For the foregoing reasons, we overrule both of Appellant's assignments of error. Regarding his first assignment of error, Appellant's discovery demand tolled speedy-trial time for a reasonable period of time, thus, less than two hundred seventy days had passed before he filed his motion to dismiss. Further, because the trial court's decision to omit an instruction on aggravated assault was not an abuse of discretion, Appellant's second assignment of error is also unwarranted. As such, the trial court's decision is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant 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 Ross 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 BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment and Opinion as to Assignment of Error I and Concurs in Judgment Only as to Assignment of Error II.

For the Court,

BY: _____
Judge Matthew W. McFarland

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.