

[Cite as *State v. Henderson*, 2010-Ohio-5730.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-100021
	:	TRIAL NO. B-0900821
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
JONATHAN HENDERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 24, 2010

Joseph T. Deters, Prosecuting Attorney, and *Judith Anton Lapp*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Presiding Judge.

{¶1} Defendant-appellant, Jonathan Henderson, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of aggravated burglary, felonious assault, having weapons while under a disability, and three counts of kidnapping, with firearm specifications. He was convicted after a jury trial.

A Home Invasion

{¶2} One morning, at around 3:00 a.m., four armed intruders entered the townhouse shared by Charise Rosemond, Raymond Hill, and their four-year-old daughter. The men, who were wearing bandanas over their faces, demanded money.

{¶3} One of the men was wearing multicolored shoes and a brown jacket with fur around its hood. Rosemond testified that the man had ordered her to turn off the alarm system and had taken her to an upstairs bedroom where he had restrained her and the child.

{¶4} Hill testified that, after the men had demanded money, they had retrieved \$1,400 in cash from his pants pocket. One of the men struck Hill in the head with a gun, and then they bound Hill's hands with duct tape, forced him onto a bed, and placed a pillow over his head. At some point, one of the men stole Rosemond's handgun from a closet.

{¶5} When police officers arrived on the scene, the men fled through a window at the rear of the residence. A man with a brown jacket and multicolored shoes was apprehended within blocks of the crime scene, and Rosemond confirmed that he had been one of the assailants. That man was identified as Henderson.

{¶6} Investigating officers found a handgun and a glove in the rear courtyard of the townhouse. Tests for deoxyribonucleic acid (DNA) indicated the

likelihood that Henderson had worn or handled the glove. Gary Schmid, one of Henderson's accomplices, testified that Henderson had been involved in the offenses.

{¶7} Henderson rested without presenting evidence, and the jury found him guilty. The trial court then sentenced him to an aggregate term of 23 years' imprisonment.

Speedy Trial

{¶8} In his first assignment of error, Henderson now argues that the trial court erred in overruling his motions to dismiss the charges on speedy-trial grounds.

{¶9} Under 2945.71(C)(2), a defendant facing felony charges must be brought to trial within 270 days of arrest. Where, as in this case, the defendant is incarcerated while awaiting trial, the time is reduced to 90 days.¹

{¶10} In the case at bar, the trial court granted a number of continuances, two of which are now at issue. Henderson requested one of the continuances to accommodate his attorney's schedule for trial, and the state requested the other continuance to conduct DNA testing on items that had been omitted from initial testing.

{¶11} We begin with Henderson's request. Under R.C. 2945.72(H), the time within which an accused must be brought to trial may be extended 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." Here, it is undisputed that Henderson occasioned the delay of the trial based on the unavailability of his attorney. Although Henderson explicitly refused to waive time

¹ R.C. 2945.71(E).

in conjunction with his request, the delay nonetheless fell within the purview of R.C. 2945.72(H), and the time was accordingly not chargeable to the state.

{¶12} We turn next to the state’s request for time to complete the DNA testing. In *State v. Austin*,² we held that a continuance for DNA testing tolled the speedy-trial time because the continuance was “both a reasonable and proper exercise of the court’s own initiative pursuant to R.C. 2945.72(H), especially since the results could have been either inculpatory or exculpatory for the defendant.”³

{¶13} While Henderson argues that repeated requests for such continuances could give rise to abuses on the part of the state in delaying trial, we find no bad faith or other impropriety in this case. The speedy-trial time was tolled for the testing, and the trial court did not err in denying Henderson’s motions to dismiss. We overrule the first assignment of error.

Sufficiency and Weight of the Evidence

{¶14} In his second, third, and fourth assignments of error, Henderson argues that his convictions were based on insufficient evidence and were against the manifest weight of the evidence.

{¶15} In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁴ To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts

² (1998), 131 Ohio App.3d 329, 335, 722 N.E.2d 555.

³ Id., citing *State v. Mincy* (1982), 2 Ohio St.3d 6, 441 N.E.2d 571.

⁴ *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.⁵

{¶16} The aggravated-burglary statute, R.C. 2911.11(A)(2), provides that “[n]o person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense, if * * * [t]he offender has a deadly weapon or dangerous ordnance on or about the offender’s person or under the offender’s control.” R.C. 2903.11(A)(2), governing felonious assault, provides that “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.” The kidnapping statute, R.C. 2905.01(A)(2), states that “[n]o person, by force, threat, or deception, or, in the case of a victim under the age of thirteen * * * by any means * * * shall remove another from the place where the other person is found or restrain the liberty of the other person * * * [t]o facilitate the commission of any felony or flight thereafter.”

{¶17} In the case at bar, the convictions were in accordance with the evidence. The state presented ample evidence that Henderson was part of the group of men who had burglarized the home, restrained the liberty of its occupants, and assaulted Hill with a deadly weapon. Henderson was apprehended near the scene of the offenses, and Rosemond identified him as one of the perpetrators based on his clothing. Forensic evidence as well as the testimony of accomplice Schmid further established Henderson’s involvement in the crimes, and Henderson stipulated that he had been under a legal disability. Although Henderson asserts certain shortcomings or inconsistencies in the identification evidence, we cannot say that the

⁵ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

jury lost its way in finding him guilty. We overrule the second, third, and fourth assignments of error.

Sentencing

{¶18} In his fifth assignment of error, Henderson contends that the 23-year aggregate sentence was excessive.

{¶19} Under *State v. Foster*,⁶ a trial court has full discretion to impose a sentence within the applicable statutory range. A reviewing court must first determine whether the sentence was clearly and convincingly contrary to law.⁷ If the sentence was not contrary to law, the appellate court then reviews the sentence under an abuse-of-discretion standard.⁸ Where the trial court does not explicitly put on the record its consideration of applicable sentencing statutes, it is nonetheless presumed that the court properly considered those statutes.⁹

{¶20} In this case, the sentence was within the statutory range, and the trial court did not abuse its discretion. Henderson perpetrated a brazen armed burglary that involved a four-year-old victim, and his criminal record included two prior prison terms for felony convictions. Under these circumstances, the sentence was not arbitrary, unreasonable, or unconscionable, and we overrule the fifth assignment of error.

Allied Offenses of Similar Import

{¶21} In the sixth assignment of error, Henderson contends that the trial court erred in imposing sentences for felonious assault and the kidnapping involving Hill. He argues that the offenses were allied offenses of similar import.

⁶ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

⁷ *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14-17.

⁸ *Id.*

⁹ *Id.* at fn. 4.

{¶22} We find no merit in the assignment. The elements of felonious assault and kidnapping do not align to the extent that the commission of one would necessarily result in the commission of the other.¹⁰ And in any event, the offenses in this case were committed with a separate animus. There was evidence that Hill had offered no resistance when accosted by the intruders and that he had been under the assailants' control when one of them struck him in the head with the gun. The record thus supported the inference that the blow to the head had been intended to injure Hill and not to restrain him. The trial court did not err in imposing sentences for both felonious assault and kidnapping, and we overrule the sixth assignment of error.

Court Costs

{¶23} In his seventh assignment of error, Henderson contends that the trial court erred in assessing court costs because he had demonstrated that he was indigent. A trial court may order a defendant to pay court costs regardless of indigency, and the denial of a motion to waive court costs will not be reversed absent an abuse of discretion.¹¹ Here, Henderson has failed to show that the trial court abused its discretion, and we overrule the seventh assignment of error.

Motion for a New Trial

{¶24} In his eighth and final assignment of error, Henderson argues that the trial court erred in overruling his motion for a new trial on the basis that two jurors had seen him in handcuffs. This assignment is without merit. One of the prospective jurors who had allegedly seen Henderson in handcuffs was excused from

¹⁰ *State v. Blankenship* (1988), 38 Ohio St.3d 116, 118, 526 N.E.2d 816. Although the *Blankenship* court addressed the issue in the context of a felonious-assault conviction under R.C. 2903.11(A)(1), its analysis applies with equal force in the case at bar.

¹¹ *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, paragraph four of the syllabus.

service before the jury was empanelled. The other juror affirmatively stated that he had not seen Henderson in handcuffs or in any other compromising position that would have affected his deliberations. Under these circumstances, the trial court did not abuse its discretion in overruling the motion for a new trial,¹² and we overrule the eighth assignment of error.

Conclusion

{¶25} We affirm the judgment of the trial court.

Judgment affirmed.

HENDON and DINKELACKER, JJ., concur.

Please Note:

The court has recorded its own entry this date.

¹² See, generally, *State v. Dority-Trapp*, 1st Dist. No. C-081114, 2009-Ohio-4058.