June 20, 2019

106794 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JOHN R. TIEDJEN

Reversed and remanded.

Patricia Ann Blackmon, J., and Mary Eileen Kilbane, A.J., concur; Sean C. Gallagher, J., dissents. See attached dissenting opinion.

KEY WORDS: Motion for leave; motion for new trial; newly discovered evidence; missing evidence; App.R. 9; sua sponte; Brady violation; expert witness testimony; res judicata.

Denial of defendant's motion for leave to file motion for new trial reversed. Defendant filed a motion based on newly discovered photographs that allegedly show that the police manipulated crime-scene photographs from the 1989 murder and that the police, the prosecutor, or both withheld it from discovery. Court properly found that the evidence was newly discovered, but erred by failing to find that defendant was unavoidably prevented from discovering the photographs. Court also abused its discretion by excluding expert testimony regarding whether the photographs were exculpatory and material.

However, the parties concede that the newly discovered photographs are missing from the appellate record. Compliance with App.R. 9 is impossible without the missing photographs or copies of the photographs. Without the missing evidence, this court cannot conduct a meaningful appellate review of whether defendant should receive a new trial based on newly discovered evidence. Case remanded under State v. Jones, 71 Ohio St.3d 293, 643 N.E.2d 547 (1994), to determine whether defendant is substantially responsible for the missing evidence.

107054 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JERMAEL BURTON

Affirmed.

Michelle J. Sheehan, J., Frank D. Celebrezze, Jr., P.J., and Raymond C. Headen, J., concur.

KEY WORDS: Drug trafficking, sufficiency of evidence; manifest weight of the evidence; ineffective assistance of counsel; motion to suppress.

The state's evidence showing appellant constructively possessed the drugs found by the police in an attic appellant had keys to was sufficient for his convictions of the drug offenses and his convictions were not against the manifest weight of the evidence. Appellant's trial counsel did not provide ineffective assistance in not filing a motion to suppress the evidence because a motion to

(Case 107054 continued)

suppress would be premised on a legitimate expectation of privacy regarding the premises where the drugs were found and it would be incompatible with appellant's defense at trial - that he did not live or stay in the attic - should the trial court deny his motion to suppress and the case went to trial.

107226 ROCKY RIVER MUNI. C CRIMINAL MUNI. & CITY
CITY OF WESTLAKE v Y. O.

Affirmed.

Kathleen Ann Keough, J., Mary Eileen Kilbane, A.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Sufficiency of the evidence; manifest weight of the evidence; domestic violence; parental discipline; corporal punishment; reasonable and proper; totality of the circumstances; jury instruction; jury interrogatory; hearsay.

Defendant's conviction for domestic violence upheld where the evidence demonstrated that the defendant slapped his ten-year-old son in the face five times, causing injury to the child's eye. The use of parental discipline was neither reasonable nor proper under the totality of the circumstances. The trial court's use of a jury interrogatory was not plain error because it ensured the jury was not criminalizing defendant's conduct that would be reasonable and proper. Trial court did not abuse its discretion in allowing the officer to read the defendant's statement at trial and subsequently admitting the statement into evidence.

107241 CLEVELAND MUNI. C CRIMINAL MUNI. & CITY
CITY OF CLEVELAND v DAMIONNE DANCY

Affirmed.

Anita Laster Mays, J., Patricia Ann Blackmon, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: Speedy trial rights; R.C. 2945.71; R.C. 2945.72; hearsay; Evid.R. 803(6); Crim.R. 52(B); plain error; Evid.R. 403(A); ineffective assistance of counsel.

The appellant's speedy trial rights were not violated under R.C. 2945.72 because the number of days between appellant's arrest and trial were tolled under R.C. 2945.71. The appellant did not receive ineffective assistance of counsel. Trial counsel's lack of filing a motion to dismiss as a result of the appellant's speedy trial rights being violated was unnecessary. The trial court did not consider inadmissible, hearsay evidence. The evidence and testimony were admissible under Evid.R. 803(6). Trial counsel did not render ineffective assistance of counsel by not objecting to evidence of Dancy's current driving suspensions because the suspensions

(Case 107241 continued)

were evidence of an element of the crime for which Dancy was charged.

107245 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
KEVIN E. HOWELL v CONSOLIDATED RAIL CORPORATION, ET AL.

Affirmed.

Raymond C. Headen, J., Patricia Ann Blackmon, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: FELA; asbestos; negligence; causation; occupational exposure; motion for a directed verdict; Prof.Cond.R. 4.2; witness testimony; conflict; Evid.R. 404(B); OSHA violations; foreseeability; treating physician; expert testimony; Evid.R. 702; closing argument; cumulative error.

The trial court did not err in denying defendant's motion for a directed verdict where plaintiff presented sufficient evidence to create a jury question as to whether defendant's negligence played any part in plaintiff's development of lung cancer. The trial court did not abuse its discretion in precluding a defense witness from testifying where the witness was represented by plaintiff's counsel in an unrelated action against parties represented by defense counsel. The trial court did not abuse its discretion in admitting evidence of defendant's OSHA violations in another state because they were relevant, established that defendant had knowledge that it was exposing its employees to asbestos, and the evidence was not substantially more prejudicial than probative. The trial court did not abuse its discretion in allowing plaintiff's treating physician to testify as to the cause of his lung cancer. Counsel's remarks during closing argument were not improper. Defendant is not entitled to a new trial.

107367 CLEVELAND MUNI. G CIVIL MUNI. & CITY
BARKER INVESTMENTS LLC v CLEVELAND PLATING LLC

Affirmed.

Sean C. Gallagher, J., Eileen T. Gallagher, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: Forcible entry and detainer; magistrate's decision; object; Civ.R. 53(D)(3)(b); waive; plain error; App.R. 9(C) statement; Civ.R. 53(D)(4)(c).

Trial court's judgment in favor of the defendant on complaint for forcible entry and detainer was affirmed. Because the plaintiff did not timely and specifically object to the magistrate's decision as required by Civ.R. 53(D)(3)(b), it waived the right to appellate review of all but plain error, which was not demonstrated in the matter. The fact that an App.R. 9(C) statement was filed was of no

(Case 107367 continued)

consequence since appellate review of the factual findings to which no objections were filed was precluded.

107393 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v HERMAN R. DUNCAN

Affirmed.

Raymond C. Headen, J., Eileen T. Gallagher, P.J., and Michelle J. Sheehan, J., concur.

KEY WORDS: Felonious assault; R.C. 2929.11; R.C. 2929.12; R.C. 2953.08(G)(2).

The defendant's sentence was valid where it was within the statutory range and the trial court's sentencing findings were supported by the record.

107440 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
GREGORY GORDON v GEICO INSURANCE COMPANY

Dismissed.

Anita Laster Mays, J., Sean C. Gallagher, P.J., and Michelle J. Sheehan, J., concur.

KEY WORDS: Final appealable order, motion to stay discovery, R.C. 2505.02(B)(4).

The trial court's order that denied the appellant's motion to stay discovery in the appellee's bad faith claim was not a final, appealable order under R.C. 2505.02(B)(4), because the order did not compel production of any particular evidence, it did not determine the privilege issue, and the insurer retained the ability to litigate its privilege claim.

107587 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DARNELL D. INGRAM

107588 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DARNELL D. INGRAM

Affirmed.

Kathleen Ann Keough, J., Sean C. Gallagher, P.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Plea; competency evaluation; consecutive sentences; effective assistance of counsel.

(Case 107588 continued)

Sufficient indicia of incompetence did not exist to warrant the trial court to sua sponte order a competency evaluation. The consecutive sentence findings were supported by the record. Counsel cannot be declared ineffective when no error occurred at the plea hearing or during sentencing.

107612 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: M.H

107613 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: A.H

Affirmed and remanded.

Larry A. Jones, Sr., J., Mary Eileen Kilbane, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Guardian ad litem; abuse of discretion; in camera interview; change in circumstances; custody; manifest weight; R.C. 3109.04(E)(1)(a)/modification of parental rights.

The guardian ad litem conducted a thorough investigation and Mother had the opportunity to cross-examine the GAL regarding the contents of the GAL's report and the basis of the GAL's custody recommendation; the report was filed prior to trial and available to Mother for review. The trial court did not abuse its discretion where it relied on the report.

Although Mother made a request for an in camera interview prior to trial, Mother did not renew her request during relevant proceedings or during trial. Mother waived this issue for appeal purposes.

A change in circumstances in the time since the issuance of the original order existed. Mother had not lived with the children in the two years prior to trial; she had engaged in drug use; she did not have proper housing and was living in the streets and in and out of institutions and jail. There was sufficient competent, credible evidence to support the trial court's decision to modify custody.

107623 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
FATIHA HOPKINS v GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY

Affirmed.

Larry A. Jones, Sr., J., Mary Eileen Kilbane, A.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Civ.R. 56/summary judgment; open-and-obvious doctrine; duty to warn; negligent retention claim.

The weather conditions were sufficient such that appellant should have been aware of the possibility of a wet floor on an RTA bus. Appellee therefore had no duty to warn. Accordingly, appellant's

(Case 107623 continued)

negligent retention claim also fails.

107672 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TERRELL REDDIX

Affirmed.

Sean C. Gallagher, P.J., Kathleen Ann Keough, J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Gross sexual imposition; joinder; motion to sever; renew; plain error; Crim.R. 8(A); Crim.R. 14; Evid.R. 404(B); other acts; simple; distinct; R.C. 2907.05(E); bench trial; presumed.

Appellant's convictions for gross sexual imposition and other offenses involving two different victims were affirmed. Appellant did not renew his motion to sever at trial, and no plain error was found on appeal. The state's witnesses provided straightforward, detailed testimony of the separate incidents, and the evidence at trial was simple and distinct. A judge in a bench trial is presumed not to have considered improper evidence in reaching a verdict, and appellant has not shown, nor does it affirmatively appear, that the trial court considered improper evidence in determining guilt.

107675 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v RICHARD SCHOENHOLZ

Affirmed and remanded.

Raymond C. Headen, J., and Eileen A. Gallagher, J., concur; Eileen T. Gallagher, P.J., concurs in judgment only.

KEY WORDS: Drug possession; aggravated burglary; felonious assault; domestic violence; R.C. 2929.11; R.C. 2929.12; R.C. 2953.08(G)(2); court costs; nunc pro tunc.

The defendant's sentence was valid where it was within the statutory range, the trial court's sentencing findings were supported by the record, and the trial court stated that it considered the purposes and principles of felony sentencing. The case is remanded for the trial court to issue a nunc pro tunc entry reflecting that no court costs or fines were imposed.

107759 COMMON PLEAS COURT F CIVIL C.P.-JUV, DOM, PROBATE
ANN MARIE KMET v EDWARD PETER KMET

Reversed and remanded.

Larry A. Jones, Sr., J., Patricia Ann Blackmon, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Magistrate's decision; separation agreement; contempt; good-faith belief.

Appellant maintained a good-faith belief that the calculated amount of his premarital portion of his Thrift Savings Plan was correct. That amount was included in the separation agreement and accepted by the court. The terms of the separation agreement were unambiguous. Where appellant's premarital amount was recalculated based on a corrected date of marriage, appellant was not in contempt of court for his failure to sign the QDRO. The trial court abused its discretion where it overruled appellant's objections to the magistrate's decision.

107772 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v TEACO A. CROSKEY

Reversed and remanded.

Sean C. Gallagher, P.J., Kathleen Ann Keough, J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Sufficiency of the evidence; R.C. 2911.11; aggravated burglary; Fifth Amendment; postarrest or trial silence; Crim.R. 52(A); harmless error.

The state did not have a valid justification for pinning the victims' credibility to the defendant's postarrest and trial silence when only the lack of a prearrest investigation was challenged and there is no evidence the defendant asserted his Fifth Amendment rights during the prearrest investigation.

107797 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
CITY OF PARMA v LAZARO BURGOS

Affirmed.

Sean C. Gallagher, P.J., Kathleen Ann Keough, J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Sex offender registration; residency restriction; R.C. 2950.034; injunction; distance measurement.

R.C. 2950.034 precludes sex offenders from establishing a residence "within 1,000 feet" of any school, preschool, or child

(Case 107797 continued)

day-care center premises, and the method of measuring as contemplated in R.C. 2950.034(A) is calculated "as a crow flies," or through the "straight-line" approach.

108158	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE: C.M.			
108159	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE: C.M.			
108160	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE: C.M.			
108161	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE: C.M.			
108162	JUVENILE COURT DIVISION	F	CIVIL C.P.-JUV, DOM, PROBATE
IN RE: C.M.			

Reversed and remanded.

Raymond C. Headen, J., Mary Eileen Kilbane, A.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: R.C. 2151.356(C)(2)(d)(iii); seal juvenile records; hearing after prosecuting attorney objects.

Where a prosecuting attorney objects to the sealing of a juvenile's records, the court must hold a hearing pursuant to R.C. 2151.356(C)(2)(d)(iii) before rendering a decision.