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Court of Appeals, Eighth Appellate District

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March 7, 2019

106111 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DONNELL D. LINDSEY

Affirmed.

Kathleen Ann Keough, J., and Larry A. Jones, Sr., J., concur; Sean C. Gallagher, P.J., concurs in part with separate concurring opinion.

KEY WORDS: *Murder; psychological evaluation; R.C. 2945.37; disqualify; counsel; mistrial; Crim.R. 16; harmless error; prosecutorial misconduct; closing arguments; isolated comments; prejudicial error; suppress; pretrial identification; photo array; unnecessarily suggestive; media; confidence statements; Evid.R. 613; impeachment; jury instructions; sufficiency and manifest weight of the evidence; circumstantial evidence.*

The defendant did not demonstrate sufficient indicia of incompetency to require a psychological evaluation and subsequent competency hearing. The trial court's denial of the defendant's motion to disqualify counsel was not unreasonable because the record supported that the day-of-trial request was made for the purpose of delay. The state's commission of a discovery violation for failing to timely disclose a witness did not warrant a mistrial because the testimony was cumulative. The prosecutor's isolated comments about credibility, when viewed in the context of the entire closing argument did not prejudice the defendant's substantial rights. Although the prosecutor's insinuation about misconduct by defense counsel was not appropriate, no demonstration of prejudice was shown. Trial court did not err in denying defendant's motion to suppress pretrial identifications because (1) the identifications were electronically recorded depicting the level of confidence; (2) the witness made the identification based on who she remembered, not based on the media; and (3) the photo array was not unnecessarily suggestive. The admission of the photo array was not admissible pursuant to Evid.R. 613, but its admission was harmless because the witness impeached his own credibility by his prior inconsistent testimony; no limiting jury instruction regarding the exhibit was necessary. Defendant's convictions upheld where the direct and circumstantial evidence proved that the defendant was the shooter.

106150 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v DERIELLE JONES

Affirmed.

Frank D. Celebrezze, Jr., J., Mary J. Boyle, P.J., and Anita Laster Mays, J., concur.

KEY WORDS: *Speedy trial; statutory speedy trial rights; R.C.*

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2945.71; R.C. 2945.72; tolling; discovery; subsequent indictment; ineffective assistance of counsel.

Appellant's statutory right to a speedy trial was not violated, and appellant was not denied his constitutional right to the effective assistance of counsel based on counsel's failure to file a motion to dismiss on speedy trial grounds.

106909 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v THOMAS K. SPELLACY

Reversed and remanded.

Kathleen Ann Keough, J., Mary J. Boyle, P.J., and Larry A. Jones, Sr., J., concur.

KEY WORDS: R.C. 4513.15; high-beam headlights; suppression; traffic stop; oncoming; approaching; momentary flicker; mistake of law; objectively reasonable; totality of the circumstances.

The trial court erred in granting defendant's motion to suppress where the record demonstrated that the officer had an objectively reasonable belief based on the totality of the circumstances that a traffic violation occurred when the defendant flashed his high-beam headlights on two separate occasions while stopped at a traffic light. Even if the officer's belief was mistaken, an objectively reasonable mistake of law can constitute reasonable suspicion to justify the traffic stop.

106967 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
AE PROPERTY SERVICES v EMILIJA SOTONJI

Affirmed.

Anita Laster Mays, J., Eileen T. Gallagher, P.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: Caveat emptor, residential property, termites, fraud, fraudulent concealment, negligence, negligent misrepresentation, R.C. 5302.30, disclosure, inspection, "as is."

Summary judgment was properly granted, when viewed in a light most favorable to the nonmoving party, there were no genuine issues of material fact and the seller was entitled to judgment as a matter of law. The record failed to establish the presence of fraud by the seller. The residential purchase agreement was clearly marked "as is." The purchaser claimed to have more than 20 years of experience in the commercial and residential construction trade but did not hire an inspector. R.C. 5302.30 requires that a seller disclose defects or issues that are within the seller's actual knowledge. In the absence of fraud, caveat emptor and the "as is" clause prevent recovery.

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107046 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v STACEY BELLE

107300 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v STACEY BELLE

Affirmed and remanded.

Michelle J. Sheehan, J., Larry A. Jones, Sr., P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Rape; joinder; prejudice; manifest weight of the evidence; SANE nurse's testimony; sexually violent predator specification.*

The trial court did not err in consolidating appellant's multiple rape cases for trial because the evidence for each case was simple and direct. Appellant's conviction of the sexually violent predator specification was supported by sufficient evidence because the record reflects compelling evidence to show appellant is likely to engage in a sexually violent offense in the future.

107082 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v CLIFFORD D. GILLESPIE

Affirmed.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: *Aggravated menacing; R.C. 2903.21(A); date of the offense; sufficiency of the evidence; manifest weight.*

The state produced sufficient evidence of aggravated menacing. Where the date of the offense is not an essential element of the crime or material to the accused's defense, the inexact date of the offense listed on the indictment is not fatal to the prosecution of the case. The conviction is not against the manifest weight of the evidence. The jury was free to believe that the evidence supported a conviction for aggravated menacing but not rape.

107110 DOMESTIC RELATIONS F CIVIL C.P.-JUV, DOM, PROBATE
L.T. C. v G. A.C.

Affirmed.

Frank D. Celebrezze, Jr., J., Eileen T. Gallagher, P.J., and Raymond C. Headen, J., concur.

KEY WORDS: *Civil protection order; sufficient, credible evidence;*

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(Case 107110 continued)

R.C. 3113.31; R.C. 2919.25; domestic violence; risk of harm; hearsay; Evid.R. 801(C).

The trial court did not err in granting the CPO because there existed sufficient, credible evidence to support a finding that appellant had engaged in acts or threats of domestic violence towards appellee and the parties' three children.

107116 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JERMAINE THOMAS

Affirmed.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Rape; postrelease control; sentence.

The record reflects the trial court considered R.C. 2929.11 and 2929.12 and placed great weight on the seriousness of appellant's conduct. Just because the trial court did not agree with appellant's argument for a less severe sentence does not mean the trial court did not consider all the relevant factors. R.C. 2953.08 does not require more, and therefore, appellant's eight-year prison sentence is not "contrary to law."

Appellant argues the imposition of postrelease control violated the Ex Post Facto Clause. At the time of appellant's offense in 1993, a defendant convicted of rape was subject to an indefinite term of a minimum of five to ten years and a maximum of 25 years and such a defendant was to be supervised by the parole board for up to 25 years after serving his prison term. Under the pre-S.B. 2 law, Thomas was originally sentenced to a minimum of eight years and a maximum of 25 years. Appellant's Ex Post Facto Clause claim disregards the fact that under a pre-S.B. 2 sentence, after his release from prison, he would be under parole supervision for up to 25 years. With his new sentence under H.B. 86, after he serves 11 years, he will be subject to only five years of postrelease control. Therefore, appellant's Ex Post Facto argument lacks merit.

107172 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV,DOM OR PRO
G&E HC REIT II PARKWAY MEDICAL CENTER, LLC v DRS. FORD & SOUD, INC., ET AL.

Affirmed in part, reversed in part, and remanded.

Mary J. Boyle, P.J., Anita Laster Mays, J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: Final appealable order, default judgment, Civ.R. 55(A), mitigation of damages.

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The trial court's default judgment is affirmed, but its damages award is reversed because the default clause obviated plaintiff-appellant of its duty to mitigate damages after defendants-appellees left the premises. As a result, plaintiff is entitled to the amount of rent that defendants-appellees owed and did not pay under the lease's term as well as attorney fees and expenses for enforcing the terms of the lease.

107174 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JESUS M. CRUZ

Affirmed.

Michelle J. Sheehan, J., Mary J. Boyle, P.J., and Eileen A. Gallagher, J., concur.

KEY WORDS: Rape; preindictment delay; guilty plea.

Appellant pleaded guilty and therefore waived his claim of preindictment delay. Even if he had not waived the issue as a result of his guilty plea, he has failed to demonstrate actual prejudice required for his claim to prevail.

107210 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v HEATHER NEAL

Affirmed.

Larry A. Jones, Sr., J., Sean C. Gallagher, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: Manifest weight; witness credibility.

The credibility of witness testimony is for the trier of fact. Confusion as to what specific item was taken does not negate the facts that appellant trespassed, broke into the residence, and stole the homeowner's property. Appellant's convictions were not against the manifest weight of the evidence.

107221 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v AHRON M. WILLIAMS

Affirmed.

Michelle J. Sheehan, J., Eileen T. Gallagher, P.J., and Patricia Ann Blackmon, J., concur.

KEY WORDS: Murder; discharge of firearm on or near prohibited premises; manifest weight; complicity; allied offenses of murder

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(Case 107221 continued)

and discharge of firearm.

Appellant's conviction is not against the manifest weight of the evidence. Sufficient evidence exists to support appellant's conviction of murder on an accomplice liability theory. Murder and discharge of a firearm upon and over a public roadway are not allied offenses because different victims were involved.

107235 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v JOHN C. WORD

Dismissed in part; affirmed in part.

Sean C. Gallagher, P.J., Larry A. Jones, Sr., J., and Kathleen Ann Keough, J., concur.

KEY WORDS: R.C. 2953.08(D); agreed sentencing range; jurisdiction; validity of plea.

The defendant is precluded from challenging his sentences in light of the jointly recommended, aggregate term of imprisonment that was imposed by the trial court and is authorized by law. The defendant cannot demonstrate prejudice even if the trial court failed to notify of the manner in which the ultimate sentence would be imposed in light of his agreement to that sentencing range.

107499 COMMON PLEAS COURT A CRIMINAL C.P.
STATE OF OHIO v MICHAEL GRANT

Affirmed in part; vacated in part; remanded.

Eileen A. Gallagher, P.J., Mary Eileen Kilbane, A.J., and Frank D. Celebrezze, Jr., J., concur.

KEY WORDS: Motion to withdraw his guilty pleas; Crim.R. 32.1; findings for imposition of consecutive sentences; prior appeal; jurisdiction; wrong sentences on wrong counts; R.C. 2971.03; remand for resentencing.

Trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty pleas under Crim.R. 32.1. In defendant's prior appeal, appellate court held that trial court made all of the necessary findings to impose consecutive sentences. Trial court had no jurisdiction to consider defendant's motion to withdraw his guilty pleas under Crim.R. 32.1 after appellate court affirmed his convictions. However, because trial court imposed the wrong sentences on two counts and the sentences as imposed do not comply with R.C. 2971.03, the sentences imposed on those two counts are vacated and case remanded for resentencing as to those counts only.

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107651 JUVENILE COURT DIVISION F CIVIL C.P.-JUV, DOM, PROBATE
IN RE: K.K., ET AL.

Affirmed.

Anita Laster Mays, J., Eileen T. Gallagher, P.J., and Sean C. Gallagher, J., concur.

KEY WORDS: *Clear and convincing evidence; best interest of the child.*

The trial court did not commit prejudicial error by considering the GAL's report in reaching its decision to grant permanent custody of the children to CCDCFS. The GAL's report was not the sole evidence used in making the permanency decision. There is clear and convincing evidence to determine that the trial court did not abuse its discretion in placing the children in the permanent custody of CCDCFS, and the decision was in the best interest of the children.

107746 COMMON PLEAS COURT E CIVIL C.P.-NOT JUV, DOM OR PRO
STATE OF OHIO v ANGELO VAUGHN

Affirmed.

Larry A. Jones, Sr., J., Sean C. Gallagher, P.J., and Kathleen Ann Keough, J., concur.

KEY WORDS: *Motion for final, appealable order; direct appeal; postconviction petition; abuse of discretion; R.C. 2953.23(A)/untimely petition; doctrine of res judicata.*

Because appellant previously filed a direct appeal, his motion for a final, appealable order is treated as a postconviction petition and, pursuant to R.C. 2953.23(A), appellant's petition is untimely. Further, appellant's arguments set forth in this appeal were or could have been raised in his direct appeal and are therefore barred by the doctrine of res judicata. It was not an abuse of discretion where the trial court denied appellant's motion.