

[Cite as *State v. Johnson* , 2009-Ohio-6800.]

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

STATE OF OHIO,	:	APPEAL NOS. C-0801195
		C-0801196
Plaintiff-Appellee,	:	
vs.	:	TRIAL NOS. B-0801689-A
		B-0803723-A
CHRISTOPHER JOHNSON,	:	<i>DECISION.</i>
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 24, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*,
Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Bryan R. Perkins, for Defendant-Appellant.

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

J. HOWARD SUNDERMANN, Judge.

{¶1} Defendant-appellant Christopher Johnson was indicted in the case numbered B-0801689 for aggravated robbery, robbery, carrying concealed weapons, and possessing criminal tools. Both the aggravated-robbery and robbery counts included firearm specifications. Following the Ohio Supreme Court's decision in *State v. Colon*,¹ Johnson was reindicted in the case numbered B-0803723(A) for aggravated robbery and robbery relating to the same incident so that the mens rea elements were included. The state proceeded to trial on both indictments. Johnson waived his right to a jury trial and the cases were tried before the court of common pleas.

I. The State's Evidence Against Johnson

{¶2} At trial, the state presented evidence that on the morning of March 1, 2008, Johnson and his co-defendant, Landon Long, stopped at Deubber's drive-through. Johnson spoke with the clerk and told him that he had not been to a drive-through before. Both men looked around and then left. Ten minutes later, the two men returned. Johnson pulled his truck just inside the entrance to the drive-through, blocking the entrance from other vehicles. While Johnson waited in the truck, Long got out. He collected a bag of Fritos, a Dr. Pepper soft drink, and a carton of cigarettes, and took them to the register with the clerk. After the clerk had finished ringing up the items, Long pointed a loaded .45-caliber handgun at him and demanded money. The clerk complied, putting all the money in the register, along

¹ 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

with the cigarettes, in a brown paper bag. When Long heard the buzzer signaling the arrival of another patron, he ran back to the truck.

{¶3} A videotape from the store's surveillance camera was played during the trial. It showed the robbery taking place. Johnson's truck was seen edging forward as Long was threatening the clerk with the handgun. Johnson then pulled forward and slowed down, but kept rolling as Long jumped into the truck. The clerk told the next patron that he had been robbed and gave her the Illinois license-plate number for the truck, and she called for emergency assistance.

{¶4} Hamilton County Sheriff's Deputy Daniel Snow responded to the radio dispatch. He was following a truck matching the description given in the broadcast, but Long was now driving instead of Johnson. The Illinois license plate had also been replaced with a Tennessee temporary tag. After verifying the description with an officer at the scene of the robbery, Deputy Snow activated his lights. He followed the truck for quarter of a mile before it pulled over. During that time, the truck was weaving across lanes, and Johnson and Long were moving around inside the vehicle as if they were trying to hide things. Johnson and Long were removed from the vehicle and placed into custody.

{¶5} An inventory search of the truck revealed a loaded .45-caliber handgun in the center console between the driver's seat and the front passenger seat. The butt of the gun was sticking out from underneath a hat and some other property that had been placed over it. A loaded .22-caliber pistol was discovered under the front passenger seat where Johnson had been sitting. In addition to the handguns, the police recovered the Illinois license plate, a bulletproof vest, Mace, handcuffs, gloves, knit caps, pistol holders, a Tennessee State Trooper patch, a police scanner,

private security badges, maps, a cordless drill, a crowbar, knives, a mallet, a screwdriver, \$220, a carton of cigarettes, and a Dr. Pepper soft drink.

{¶6} After Johnson was read his *Miranda* rights, he stated that he wanted to talk to someone about making a deal. Johnson appeared to be in some amount of physical distress, but when the officers offered to get him medical attention, he declined. Johnson told an officer that he had taken his medications that morning and was not due to take them again until later that day. Johnson was subsequently transported to patrol headquarters. Once there, Johnson, voluntarily and without prompting, made statements about how stupid he had been and how he wished that he had never gotten involved in the incident at the drive-through. Johnson then stated he needed medical attention and life-squad personnel were contacted.

II. Johnson's Testimony

{¶7} Johnson testified in his own defense. He provided a different version of the events. Johnson is from Nashville, Tennessee, and suffers from a number of medical maladies including congestive heart failure and kidney failure. Johnson had been recently released from a week-long stay in the hospital when Long contacted him to ask for a ride to Ohio. Long told Johnson that his vehicle had broken down in Oxford, Ohio, and that he needed to retrieve it. Johnson owned a pickup truck that, if necessary, could tow Long's car. Long told Johnson that he would pay for all the expenses of the trip, and Johnson agreed to the arrangement. He picked up Long at his home in Bowling Green, Kentucky, and drove him to Oxford, Ohio.

{¶8} Once in Oxford, Long was told by a mechanic that he had been unable to repair his car, and that it would need to be towed to a dealership. At that time, Long told Johnson that he was out of money. Johnson suggested that they just drive

towards home and see what happened. Johnson drove back towards Cincinnati and ended up on the west side of town near the Indiana border. He and Long were “sightseeing” and talking about how Johnson needed something to eat and drink so that he could take his medication. They saw a number of drive-throughs and wondered what items they sold. As they came to Deubber’s drive-through, Long told him to pull in. Once inside, Long exited from the vehicle while Johnson talked with the clerk. Long then jumped into the vehicle and told Johnson, “Let’s go.” Johnson then pulled out of the drive-through, traveling westbound towards Indiana.

{¶9} Long told Johnson that he was going the wrong way and directed him to turn around. Johnson turned the vehicle around and started driving in the direction from which they had just come. At the same time, Johnson reiterated that he needed some food and a drink to take his medication. Long agreed to get Johnson a bag of chips and a Sprite. By that time, they were once again approaching Deubber’s drive-through, and Long advised Johnson to pull in again.

{¶10} When Johnson stopped in the drive-through, Long again exited from the vehicle, picked up some potato chips, and asked the clerk where the Sprite and Dr. Pepper were located. After Long had obtained the merchandise, Johnson saw Long with the clerk in the cashier’s area. Johnson did not have a good view of Long and the clerk. He was also feeling very ill and was not fully paying attention to what was going on.

{¶11} A minute later, Long returned with a brown paper bag in his hand and got back into the truck. Johnson then drove out of the establishment. Johnson saw the clerk standing with his arms crossed, but he otherwise noticed nothing unusual. Johnson was not suspicious until he saw Long take a carton of cigarettes out of the paper bag. When Johnson asked Long how he could have afforded them, Long

stated, “I had to do what I had to do, I robbed the place.” Johnson “freaked out.” Long then showed him a handful of money and the black .45-caliber pistol that was tucked into his pants.

{¶12} Both men observed a police car stopped in the middle of the road in front of them. Long then directed Johnson to turn right at a nearby intersection. They continued driving and eventually came to a road where Long told Johnson to pull into a gas station. Long ordered Johnson to pump gas while he went inside the gas station. Johnson pumped the gas, but became increasingly ill. He also feared what Long would do to him if tried to tell somebody what had happened, or if he tried to run away. Long returned from inside the gas station. He circled the vehicle, got into the back seat, and fiddled around with his duffle bag. Then he got into the driver’s seat and drove out of the gas station. Shortly afterwards, the two were pulled over by the police.

{¶13} After being read his *Miranda* rights, Johnson told the officer that he wanted to wait until they got to the station before speaking with anyone. He denied saying that he wanted to speak to someone about making a deal. He acknowledged that the flashlight, handcuffs, Mace, and badges belonged to him, that that he had used these items in prior security jobs; but he denied ownership of the remaining items recovered from his truck, including the guns. He insisted that those items belonged to Long, and that Long must have concealed them in the black duffel bag that he had brought on the trip.

III. The Trial Court’s Findings and Sentence

{¶14} The trial court found Johnson guilty of all counts in both indictments. For purposes of sentencing, the trial court merged the aggravated-robbery and

robbery counts in the case numbered B-080169 with the corresponding counts in the case numbered B-0803723. The court then merged the aggravated-robbery and robbery counts in the case numbered B-0803723 and sentenced Johnson to four years in prison for the one count of aggravated robbery. The trial court sentenced Johnson to a consecutive three-year term in prison for the weapons specification and ordered that term to be served prior to the four-year term for the aggravated robbery. The trial court sentenced Johnson to concurrent terms of one year in prison for carrying concealed weapons and possessing criminal tools in the case numbered B-080169, and those terms were also made concurrent with the sentence imposed in the case numbered B-0803723, for a total of seven years in prison. Johnson now appeals, raising eight assignments of error for our review.

IV. Sufficiency of the Indictments

{¶15} In his first assignment of error, Johnson argues that the trial court committed structural error under *State v. Colon* (“*Colon I*”)² when it tried him on the aggravated-robbery and robbery counts in the indictment in the case numbered B-0801689, because those counts failed to include the requisite mens rea.

{¶16} In *Colon I*, the Ohio Supreme Court held that the indictment against Colon was defective because it had failed to charge the mens rea of an offense.³ This defect led to multiple other errors that resulted in what the court called structural error.⁴ But in *State v. Colon* (“*Colon II*”), the Ohio Supreme Court, upon a motion for reconsideration of its holding in *Colon I*, clarified that the application of a

² 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

³ Id. at ¶44.

⁴ Id.

structural-error analysis in a defective-indictment case is rare, and that in most cases a plain-error analysis is appropriate.⁵

{¶17} In this case, Johnson cannot demonstrate plain error because there is no evidence that he was unaware of the mens rea elements of aggravated robbery and robbery. Johnson admits in his brief that when the state reindicted him for robbery and aggravated robbery in the case numbered B-0803723, those counts included the appropriate mens rea elements for the offenses. This cured any error under the first indictment. Johnson's case, moreover, was tried to the court. Courts are presumed to know and apply the correct law.⁶ The fact that Johnson's case was tried to the court further removed the possibility of any prejudicial error to him from the two indictments. As a result, we overrule his first assignment of error.

V. Doctrine of Multiplicity and Double Jeopardy

{¶18} In his second and third assignments of error, Johnson contends that the trial court erred by permitting the state to proceed to trial on two identical indictments in violation of his double-jeopardy rights and the doctrine of multiplicity.

{¶19} Multiplicity occurs when a single crime has been arbitrarily divided or separated into two or more separate counts.⁷ The danger of a multiplicitous indictment is that it may give rise to a double-jeopardy violation by resulting in multiple sentences for a single offense, or that it may prejudice a defendant by

⁵ 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, at ¶8.

⁶ *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754.

⁷ *United States v. Hart* (C.A.6, 1995), 70 F.3d 854, 859; see, also, *United States v. Nakashian* (C.A.2, 1987), 820 F.2d 549.

causing a guilty verdict on a given count solely on the strength of evidence on the remaining counts.⁸

{¶20} While we agree with Johnson that the trial court should have dismissed the aggravated-robbery and robbery counts in the first indictment before proceeding to trial on the second indictment, its failure to do so did not violate Johnson's double-jeopardy rights. Here, the trial court found Johnson guilty of the aggravated-robbery and robbery counts in both indictments, but it merged the separately indicted counts at sentencing. The trial court also merged the aggravated-robbery and robbery counts in the second indictment. As a result, Johnson was convicted of only one count of aggravated robbery in the second indictment. Because the trial court merged the offenses and Johnson was punished only once, there was no double-jeopardy violation.⁹ As a result, we overrule his second and third assignments of error.

VI. Right to a Speedy Trial

{¶21} In his fourth assignment of error, Johnson maintains that his right to a speedy trial was violated in the case numbered B-0803723 because the state did not bring him to trial within 90 days of his arrest. He contends that 103 days chargeable to the state had passed before his trial began.

{¶22} The record reveals that Johnson was arrested on March 1, 2008. He requested his first continuance on March 31, 2008. He filed two more requests for continuances before the second indictment was reported and filed on May 13, 2008.

⁸ *United States v. Gibbons* (C.A.6, 1993), 994 F.2d 299, 301; *United States v. Gullett* (C.A.6, 1983), 713 F.2d 1203, 1211-1212.

⁹ See *State v. Henderson* (1979), 58 Ohio St.2d 171, 389 N.E.2d 494, syllabus (holding that the term "conviction" includes both the finding of guilt and the imposition of sentence); see, also, Crim.R. 32(B).

On May 16, 2008, Johnson pleaded not guilty and was released on his own recognizance under the second indictment. Because Johnson did not remain in jail awaiting trial on the second indictment, the triple-count rule did not apply.¹⁰ Thus, the state had 270 days from the date of his arrest, instead of the 90 days Johnson claims, to bring him to trial.

{¶23} The record further reveals that from May 21, 2008, to September 16, 2008, Johnson requested five more continuances. On September 16, 2008, he filed a motion to reduce his bond, which the trial court overruled on September 22, 2008. His case was then tried to the court on October 7, 2008.

{¶24} Johnson argues that under *State v. Adams*¹¹ any waiver of his speedy trial rights under the first indictment could not have been applied to the charges in the second indictment. Thus, he contends that the 82 days that elapsed from the time of his arrest to the time of the second indictment must be counted against the state. In *Adams*, the Ohio Supreme Court held that a speedy-trial waiver for an initial charge does not apply to additional charges arising from the same facts.¹²

{¶25} The state argues that *Adams* did not apply in this case for two main reasons. First, Johnson's case, unlike *Adams*, did not involve "additional" charges, and second, Johnson's case did not involve speedy-trial waivers. We agree.

{¶26} Johnson was not charged with one offense in the first indictment and then charged with another offense in the second indictment. The second indictment merely added the mens rea elements for aggravated robbery and robbery that had been left out of the first indictment. Johnson's case, moreover, did not involve speedy-trial

¹⁰ See R.C. 2945.71(E).

¹¹ (1989), 43 Ohio St.3d 67, 538 N.E.2d 1025, syllabus.

¹² Id. at syllabus.

waivers, but various tolling events. In *State v. Blackburn*, the Ohio Supreme Court held that “periods of delay resulting from motions filed by the defendant in a previous case also apply in a subsequent case in which there are different charges based on the same underlying facts and circumstances of the previous case.”¹³ Thus, under *Blackburn* the 82 days attributable to Johnson’s continuances under the first indictment operated to toll time for the second indictment.¹⁴

{¶27} Finally, in adding all the periods of delay not attributable to Johnson’s motions or requests for continuances, we conclude that only 45 days chargeable to the state had elapsed from Johnson’s arrest on March 1, 2008, to his trial date of October 7, 2008. Because Johnson was brought to trial within the 270-day period required by R.C. 2945.71(C)(2), his speedy-trial rights were not violated. We, therefore, overrule his fourth assignment of error.

VII. Ineffective Assistance of Counsel

{¶28} In his fifth assignment of error, Johnson argues that his counsel was ineffective for failing to object to the defective and multiplicitous indictments, for stating in opening argument that Johnson’s testimony might “strain credibility,” for eliciting prejudicial statements and other-acts evidence from two of the state’s witnesses during cross-examination, and for failing to move for a dismissal of the indictment in the case numbered B-0803723 on speedy-trial grounds.

{¶29} To establish ineffective assistance of counsel, Johnson must show that his trial attorney’s performance “fell below an objective standard of reasonableness”¹⁵ and that he was prejudiced by his attorney’s deficient

¹³ 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, syllabus.

¹⁴ See *State v. Jenson*, 4th Dist. No. 07CA21, 2008-Ohio-5228, at ¶13-18 (where the Fourth Appellate District adopted a similar position).

¹⁵ *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct.2052.

performance.¹⁶ Prejudice is demonstrated by showing “that there is a reasonable probability that, but for * * * [the] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”¹⁷ Both elements must be met to demonstrate ineffective assistance of counsel.¹⁸ Moreover, “it is presumed that a properly licensed attorney is competent, and ineffective assistance cannot be based on debatable tactical decisions * * *.”¹⁹

{¶30} Johnson’s claims of ineffectiveness are without merit. As we held in response to the first, second, and third assignments of error, any defect in the aggravated-robbery and robbery counts in the first indictment was cured by the addition of the mens rea elements for those charges in the second indictment. While Johnson’s counsel was arguably deficient for not seeking dismissal of at least part of the first indictment, Johnson’s case was tried to the court, which found Johnson guilty of all four aggravated-robbery and robbery counts but, by merging the charges, only sentenced Johnson to four years in prison on the aggravated-robbery count in the second indictment. As a result, Johnson was not subjected to multiple punishments for the offenses. Thus, Johnson cannot demonstrate that he was prejudiced by his counsel’s failure to raise these issues.

{¶31} Next, Johnson argues that defense counsel’s admission in opening argument that Johnson’s testimony “m[ight] strain credibility, but that “the defense would have an explanation when the defense goes forward” seriously undermined his case. While the wisdom of defense counsel’s statement may be debatable, it was a

¹⁶ Id. at 687.

¹⁷ Id. at 694.

¹⁸ Id. at 697.

¹⁹ *State v. Bond* (Oct. 29, 1999), 1st Dist. No. C-990195.

matter of trial strategy.²⁰ Johnson next argues that defense counsel improperly elicited from Deputy Snow on cross-examination that Johnson wanted to “make a deal.” But we fail to see how Johnson was prejudiced because the state later sought to and did elicit the same testimony from Corporal Pete Prybal on direct examination.

{¶32} Johnson further argues that defense counsel’s elicitation of other-acts evidence from two state’s witnesses during cross-examination constituted ineffective assistance of counsel. But Johnson has failed to show how these statements contributed to his conviction. In a bench trial, we must presume that the trial court considered only proper evidence.²¹ Furthermore, the state presented overwhelming eyewitness, circumstantial, and video evidence of Johnson’s guilt.

{¶33} Finally, as we explained in response to the fourth assignment of error, Johnson was not tried beyond the speedy-trial limits in the case numbered B-0803723. Thus, counsel’s failure to file a motion to dismiss the indictment in that case for a violation of Johnson’s speedy-trial rights did not constitute ineffective assistance. Having found no merit in Johnson’s arguments, we overrule the fifth assignment of error.

VIII. Weight and Sufficiency of the Evidence

{¶34} In his sixth and seventh assignments of error, Johnson argues that his convictions were based upon insufficient evidence and were against the manifest weight of the evidence.

²⁰ *State v. Clayton* (1980), 62 Ohio St.2d 45, 402 N.E.2d 1189.

²¹ *State v. Eley* (1996), 77 Ohio St.3d 174, 1996-Ohio-323, 672 N.E.2d 640; see, also, *State v. Lane* (1995), 108 Ohio App.3d 477, 671 N.E.2d 272.

{¶35} Johnson first argues that the trial court erred in finding him guilty of aggravated robbery and robbery because the evidence was insufficient to show that he had purposefully or knowingly committed the offenses. We disagree. Johnson and Long had been riding in Johnson's vehicle in the two days preceding the robbery. On the day of the robbery, neither man had any money. They were on their way home when they decided to stop at Deubber's drive-through not once but two times. The first time, Johnson talked with the clerk for several minutes, while Long got out of their vehicle and looked around.

{¶36} When they returned a second time, Johnson parked the truck at the entrance to the drive-through so that no other vehicles could enter. Long exited from the vehicle, grabbed a number of items, and then followed the clerk to the register, where he pointed a gun at him and demanded money. Johnson then pulled the truck forward and slowed down, but kept the truck moving as Long jumped in with the money. After they pulled out, Johnson drove away from an officer in the area and then switched the truck's license plate.

{¶37} When Johnson and Long were apprehended by the police, they found a loaded gun under Johnson's seat and another gun on the seat between him and Long, as well as an assortment of criminal tools, including a bulletproof vest, law enforcement badges, guns, a police scanner, knit hats, gloves, and multiple license plates. Once in custody, Johnson made statements to police about how he wanted to cut a deal and how stupid he had been to get involved in the robbery. This evidence was sufficient to show that Johnson had purposely committed a theft offense with Long.

{¶38} Johnson next argues that the trial court erred in convicting him of carrying a concealed weapon because the evidence was insufficient to show that the

gun had been concealed or “ready at hand.” A weapon is “ready at hand” when it is “so near as to be conveniently accessible and within immediate reach.”²² Shortly after the robbery, a police officer saw both Johnson and Long making furtive movements inside the vehicle. Police recovered a loaded and operable .45-caliber handgun in Johnson’s truck on the center console between Johnson and Long. The butt of the gun was sticking out from underneath a hat and some other property that had been placed over the gun in an effort to conceal it. Police also found a loaded and operable .22-caliber pistol underneath the passenger’s seat where Johnson had been sitting. Bullets were also recovered from inside the truck. This evidence was sufficient to prove that the guns had been concealed and “ready at hand” as contemplated by the statute.²³

{¶39} Johnson also argues that the trial court erred in convicting him of possessing criminal tools because there was no direct evidence that he had possessed the bulletproof vest and the police scanner for a criminal purpose. But the state’s case against Johnson was not based upon direct evidence. It was based on circumstantial evidence.

{¶40} Our review of the record reveals that the state presented sufficient circumstantial evidence to sustain his conviction. Both items were located in Johnson’s truck, which he had been driving during the drive-through robbery. Two police officers testified that a scanner and a bulletproof vest were common tools in criminal activity: a scanner could detect the approach of police, and a bulletproof vest could protect a wrongdoer if he expected to get into a gunfight with police. This

²² See *In re Wright*, 1st Dist. No. C-060603, 2007-Ohio-2951, at ¶9.

²³ See *State v. Morgan*, 1st Dist. No. C-030490, 2004-Ohio-651, at ¶12.

evidence was sufficient to show that Johnson had possessed the items with a criminal purpose.

{¶41} Johnson also argues that his convictions were against the manifest weight of the evidence because he testified that Long had planned and perpetrated the robbery without his knowledge. But the trial court, as the trier of fact, was in the best position to judge Johnson's credibility. The trial court stated that it did not believe Johnson's testimony. Based upon our review of the record, we cannot conclude that the trial court lost its way and created a manifest miscarriage of justice when it chose to believe the testimony of the state's witnesses over Johnson's testimony. As a result, we overrule the sixth and seventh assignments of error.

IX. Jury Trial Waiver

{¶42} In his eighth assignment of error, Johnson argues the trial court violated his state and federal constitutional rights to a jury trial. He claims that his jury waivers were invalid because they were executed after his trial had begun. Shortly after the state had begun examining its first witness, the following transpired:

{¶43} "THE COURT: You know what, I forgot to get a jury waiver. Had you made a jury demand in this?"

{¶44} "MR. DAUGHERTY: Your honor, we'll represent on the record that we want to go forward with a bench trial. We discussed that."

{¶45} "Is that right sir?"

{¶46} "THE DEFENDANT: Affirmative nod."

{¶47} "THE COURT: I'm sorry to interrupt you, but I forgot."

{¶48} “MR. DAUGHERTY: He’ll gladly sign a waiver. I was going to ask myself, Judge.

{¶49} “THE COURT: I’d like to do that right now.

{¶50} “MR. DAUGHERTY: That’s fine. That’s fine.

{¶51} “MR. HICKENLOOPER: Should we have the witness step down for a moment?

{¶52} “MR. DAUGHERTY: It’ll only take a second, Judge.

{¶53} “THE COURT: Yeah. I’m a new judge, and forgot to do this. So bear with me for a moment. We’ve got to go over this jury waiver. Okay?

{¶54} “THE WITNESS: Uh-huh.

{¶55} “THE COURT: Thanks. And I need two of them. One for each case number.

{¶56} “MR. DAUGHERTY: Judge, I’m going to put both case numbers on them.

{¶57} “THE COURT: Okay. Actually I need two of them. I need one for each, because they’ll file them.

{¶58} “MR. HICKENLOOPER: Yeah. They’re both re-indicts.

{¶59} “MR. DAUGHERTY: Approach, Judge?

{¶60} “THE COURT: Yes, thank you. Mr. Johnson, I’d like you to stay where you are, but I’m just going to ask you some questions, okay?

{¶61} “THE DEFENDANT: Yes, ma’am.

{¶62} “THE COURT: I’m holding in my hand an Entry on Waiver of Trial by Jury, one in Case Number B0801689, and one in Case Number B0803723. They’re identical in nature other than the different case numbers. You had

previously pled not guilty and wanted a jury. And now it's my understanding that you want to waive that jury and try the case to me; is that correct?

{¶63} "THE DEFENDANT: Yes, ma'am.

{¶64} "THE COURT: Have you read over each of these forms and gone over them with your attorney?

{¶65} "THE DEFENDANT: Yes, ma'am.

{¶66} "THE COURT: Did he explain to you what they mean and what you're giving up?

{¶67} "THE DEFENDANT: My right to a jury trial.

{¶68} "THE COURT: And did you sign each of these forms? Is your signature on each of these?

{¶69} "THE DEFENDANT: Yes, ma'am.

{¶70} "THE COURT: You signed them of your own free will?

{¶71} "THE DEFENDANT: Yes, ma'am.

{¶72} "THE COURT: And you did that voluntarily?

{¶73} "THE DEFENDANT: Yes, ma'am.

{¶74} "THE COURT: That's what you want to do today, is waive a jury and have me hear the case and decide whether you're guilty or not guilty; is that right?

{¶75} "THE DEFENDANT: Yes, ma'am.

{¶76} "THE COURT: Thank you very much. They'll be accepted. I'm sorry. Continue back."

{¶77} The state then resumed its examination of its first witness. Johnson's jury waivers were filed in both cases the same day that they were executed.

{¶78} Johnson now argues that his jury waivers were invalid under Crim.R. 23 because they were not executed until after the bench trial had begun. While

Crim.R 23(A) provides that a defendant may waive in writing his right to a jury trial before the commencement of trial, the rule further provides that a jury “waiver may also be made during the trial with the approval of the court and the consent of the prosecuting attorney.” The record reveals that Johnson’s waivers were clearly executed with the approval of the court and the consent of the prosecuting attorney. Johnson’s counsel additionally represented that Johnson wanted this done.

{¶79} R.C. 2945.05, likewise, contains no requirement that to be valid a jury waiver be filed prior to the commencement of the trial.²⁴ Because Johnson’s jury waivers were in writing, signed by both Johnson and his counsel, and because they were filed and made a part of the record in open court,²⁵ the waivers were valid, even though they were executed and filed shortly after the commencement of the trial. As a result, we overrule Johnson’s eighth assignment of error.

X. Cumulative Errors

{¶80} In his ninth assignment of error, Johnson contends that cumulative errors denied him the right to a fair trial. But Johnson has failed to establish the existence of multiple nonreversible errors (i.e., harmless errors or plain errors not individually requiring a reversal). Thus, he cannot benefit from the cumulative-error doctrine. As a result, we overrule the ninth assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

HENDON, P.J., and DINKELACKER, J., concur.

Please Note:

The court has recorded its own entry this date.

²⁴ See *State v. Soto*, 8th Dist. No. 86390, 2006-Ohio-2319, at ¶33-41; see, also, *State v. Barr*, 8th Dist. No. 89740, 2008-Ohio-2176, at ¶17-23.

²⁵ See *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, 872 N.E.2d 279, paragraphs one and two of the syllabus.