

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 08AP-755
	:	(C.P.C. No. 08CR-04-3067)
v.	:	No. 08AP-756
	:	(C.P.C. No. 08CR-01-33)
Robert E. Easley,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on June 23, 2009

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*Ron O'Brien*, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

*W. Joseph Edwards*, for appellant.

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APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Robert E. Easley, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of three counts of robbery, in violation of R.C. 2911.02, and one count of receiving stolen property, in violation of R.C. 2913.51. Because (1) the trial court did not violate defendant's due process rights and (2) sufficient evidence supports defendant's conviction on the third robbery count, we affirm.

## I. Factual History

{¶2} Defendant's convictions arise out of two separate robberies in the German Village area of Columbus, Ohio. On December 31, 2007, a short, stocky African-American male grabbed 73-year-old Mary Bishop's purse as she walked down Berger Avenue on her way to a church to help make lunch for homeless persons. As she neared the intersection of Berger and Lazelle Street, a car turned onto Berger from Lazelle. Moving slowly, the car's bumper "kind of hit" Bishop's leg. (May 15, 2008 Tr. 96.) The car's driver then got out and reached for Bishop's purse. She yelled and hit the man with her purse, but he knocked her down and took the purse from her.

{¶3} After the man left, another car stopped and assisted Bishop. Police were called, and Bishop gave them a physical description of the man. She also described the involved vehicle as a blue car that might have had a luggage rack. Bishop suffered a "great big knot" on her head from hitting the ground. (Tr. 98.)

{¶4} Five days later Detective Thomas Clark showed Bishop a photo array, but she was not able to identify anyone. During a follow-up several days later, Bishop was able to pick defendant from a photo array. Defendant's photograph in the second photo array was more recent; the photograph in the first array was taken more than five years earlier. At trial, Bishop also was able to identify defendant, stating she was "very sure" he was the man who robbed her. (Tr. 108.)

{¶5} While Clark was investigating Bishop's robbery, Detective Stevie Billups was looking into a second robbery that occurred on January 5, 2008, five blocks south of the spot where Bishop was robbed. On that date, Julie Maclellan was sitting outside the Mohawk restaurant after running errands all morning. She and her son's girlfriend,

Danielle Fientes, were smoking cigarettes and waiting for the restaurant to open for lunch. A man walked up to the two women, asked them what time the restaurant opened, and then grabbed Maclellan's purse. As he ran away, Maclellan pursued him. The man got into a nearby car, but before he could close the car door, Maclellan dove into the car in an attempt to retrieve her purse.

{¶6} Although Maclellan's upper body was inside the car, her legs hung outside the still-open car door. As the man drove away, the car collided with a parked vehicle, and the open car door repeatedly hit Maclellan while the car slipped on the slushy road. Once the car gained traction, Maclellan flew out of the vehicle and hit a raised curb, losing a front tooth and suffering severe bruising over her body. Despite her efforts, she was unable to recover her purse.

{¶7} When police responded to the scene, Maclellan provided them a description of the man and of the vehicle, which she described as a teal green Chevy. Fientes corroborated the information, specifying the vehicle was a Chevy Cavalier. As a previous Cavalier driver, Fientes was very familiar with the model and, based on the shape of the car, believed it was built sometime before 1998. Fientes also saw the car's license plate and remembered "ECE or ECY" and the numbers 7 and 9 on the plate. (Tr. 213.) Police later encountered a bluish-green Cavalier at defendant's residence, registered to his girlfriend, with the license plate "ECE 2637." After viewing pictures of the car, Maclellan and Fientes testified it was the same vehicle the robber used to escape.

{¶8} During the investigation into both robberies, police found that credit cards stolen from each victim were used at the same clothing store. The store's surveillance cameras recorded defendant shopping in the store, and the store manager was able to

match the purchases defendant or his companions made with the stolen credit cards. The store's assistant manager testified at trial that she assisted defendant while shopping, and both of the store's employees were able to identify defendant from photo arrays.

{¶9} Defendant was indicted on two counts of robbery as a second-degree felony, two counts of robbery as a third-degree felony, one count of receiving stolen property, and one count of felonious assault. Following *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, defendant was re-arraigned on the robbery counts so that the required mental element of recklessness could be added. At trial, the jury convicted defendant of the robberies of both Bishop and Maclellan as second-degree felonies, the robbery of Bishop as a third-degree felony, and receiving stolen property through the use of Maclellan's credit cards. He was acquitted of the other robbery and the felonious assault of Maclellan.

{¶10} After receiving a presentence investigation of defendant, the trial court sentenced defendant to eight years on each of the robbery convictions as second-degree felonies, and one year on the receiving stolen property conviction, merging the robbery conviction as a third-degree felony with one of the second-degree felony robbery convictions. The trial court ordered all three sentences to be served consecutively, for a total sentence of 17 years.

## II. Assignments of Error

{¶11} Defendant appeals, assigning two errors:

I. BY ARTICULATING NO RATIONALE FOR IMPOSING A CONSECUTIVE SENTENCE, THE TRIAL COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE OHIO AND FEDERAL CONSTITUTIONS AS HE IS

DEPRIVED OF EFFECTIVE AND MEANINGFUL APPELLATE REVIEW OF THE SENTENCE IMPOSED.

II. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

### III. First Assignment of Error

{¶12} In his first assignment of error, defendant contends that because the trial court's judgment entry sentencing defendant to consecutive sentences totaling 17 years did not explain the court's reasoning for imposing the consecutive terms, defendant's due process rights under the federal constitution were violated. Defendant maintains meaningful appellate review of his sentence cannot occur when the rationale behind the trial court's decision is not included in its judgment entry.

{¶13} Defendant's argument lacks merit under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, paragraph seven of the syllabus, and *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. In *Foster*, the Ohio Supreme Court held "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences"; in *Kalish*, the Supreme Court explained that *Foster* does not prevent meaningful appellate review.

{¶14} R.C. 2953.08 governs appellate review of a trial court's sentence. Pursuant to R.C. 2953.08(G), an appellate court may modify a sentence or may remand for resentencing if the court clearly and convincingly finds the sentence is contrary to law. *State v. Webb*, 10th Dist. No. 06AP-147, 2006-Ohio-4462, ¶11, citing *State v. Maxwell*,

10th Dist. No. 02AP-1271, 2004-Ohio-5660. This court held that R.C. 2953.08(G) requires us, in post-*Foster* cases, to continue to review felony sentences under the clearly and convincingly contrary to law standard. *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19. "In applying the clear and convincing as contrary to law standard, we would 'look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.'" *Id.*, quoting *State v. Vickroy*, 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶16. After *Burton*, the Ohio Supreme Court issued its decision in *Kalish*, *supra*. In it, the plurality opinion established a two-step analysis of sentencing issues. Whether we apply *Burton* or *Kalish*, the result is the same.

{¶15} Once the appellate court satisfies the first step of the analysis by determining the sentence is not clearly and convincingly contrary to law because the trial court complied with applicable statutes and rules, the second step under *Kalish* is to review whether the trial court abused its discretion in rendering the defendant's sentence. *Kalish*, *supra*. 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.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶16} The first step of *Kalish*, not unlike *Burton*, requires the appellate court to examine the sentencing court's compliance with all pertinent applicable rules and statutes to determine whether the sentence is clearly and convincingly contrary to law. In particular, the appellate court must determine whether the trial court complied with R.C. 2929.11 and 2929.12, as well as any statutes specific to the case itself. *Id.* at ¶13, citing

*State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, ¶38. R.C. 2929.11 requires any sentence be guided by the overriding purposes of felony sentencing: protection of the public from the offender's or others' future crime and punishment of the offender. Under R.C. 2929.11(B), the sentencing court also must consider the seriousness of the offense, impact upon the victim, and consistency between sentences for similar crimes. In addition, R.C. 2929.12 requires the sentencing court to consider the likelihood of the offender's recidivism and any other relevant factors, including a nonexclusive list of factors.

{¶17} As is true in the first step of the *Kalish* analysis, the trial court's failure to issue findings does not preclude meaningful review in the second step. R.C. 2929.19(B)(1) requires the trial court to consider the record, any information presented at the sentencing hearing, and any presentence investigation reports or victim impact statements before rendering a sentence. In turn, R.C. 2953.08(F)(3) specifies that the record upon appeal includes "[a]ny oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed." A reviewing court thus can examine all the evidence the trial court relied upon in determining the appropriate sentence, including the transcript of the trial court's sentencing hearing.

{¶18} As a result, even though *Foster* removed the need for trial court findings prior to the court's imposing maximum or consecutive sentences, a sufficient basis remains for an appellate court to review a sentencing decision. Under *Kalish*, a sentence can be overturned upon appeal if the sentencing court failed to comply with the applicable statutes and rules, as well as if the court abused its discretion in the sentence imposed.

{¶19} Application of the *Kalish* factors to defendant's sentence demonstrates that the trial court's failure to issue pre-*Foster* statutory findings does not prevent meaningful appellate review of defendant's sentence. Initially, defendant's sentence was not clearly and convincingly contrary to law. The judgment entry notes the trial court complied with R.C. 2929.11 by considering the purposes and principles of sentencing and the factors listed in R.C. 2929.11 and 2929.12, as well as the applicable provisions of R.C. 2929.13 and 2929.14. A trial court's rote recitation that it has considered applicable factors satisfies the court's duty to follow the relevant statutes in sentencing an offender. *State v. Morales-Gomez*, 10th Dist. No. 08AP-336, 2008-Ohio-6513, citing *State v. Daniel*, 10th Dist. No. 05AP-564, 2006-Ohio-4627; *State v. Braxton*, 10th Dist. No. 04AP-725, 2005-Ohio-2198; and *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448. In addition, the trial court properly applied post-release control, and the sentences were all within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law under either *Kalish* or *Burton*.

{¶20} The second step of *Kalish* requires we determine whether the trial court abused its discretion in rendering the sentence, and here again the absence of findings does not prevent meaningful review. According to the judgment entry, the trial court more than complied with R.C. 2929.19(B)(1) during the sentencing hearing when it explained prior to announcing its sentence why it would impose consecutive and maximum sentences, a fact the hearing transcript corroborates.

{¶21} The transcript further indicates both the crime victims and defendant were given an opportunity to speak prior to the court's imposing sentence. Defendant denied committing the robberies, although he admitted using one of the stolen credit cards. In

response, the trial court stated, "I remember the trial well, and I guess what is troubling to me is your continued denial." (July 9, 2008 Tr. 14.) Noting that one of the purposes of sentencing is to protect society, the trial court found that point to be "a real concern" in this case, especially given Bishop's age when she was robbed and defendant's striking her with his car as part of the crime. (Tr. 14.)

{¶22} In the end, the trial court succinctly summarized its reasons for imposing maximum and consecutive terms by stating that "when I consider what is in front of the Court, together with your prior record, together with your statements here today, I think following the purposes and principles of sentencing, I don't believe rehabilitation is realistic in this case." (Tr. 15.) Instead, the court "believe[d] that punishment for what [defendant] visited upon these two women \* \* \* [and] given [his] denial \* \* \* the maximum sentence in each one of these counts is appropriate, and the same will run consecutive." (Tr. 15-16.) In view of the facts and the trial court's explanation, we cannot say the trial court abused its discretion in giving defendant maximum and consecutive terms. Similarly, we cannot say they are clearly and convincingly contrary to law under *Burton*.

{¶23} Defendant's due process rights were not violated when the trial court did not include in the judgment entry its rationale for sentencing defendant to maximum and consecutive sentences. Defendant's first assignment of error is overruled.

#### **IV. Second Assignment of Error**

{¶24} In his second assignment of error, defendant argues the trial court erred in entering judgment against him, because (1) the evidence presented at trial was insufficient to sustain his conviction and (2) his conviction was against the manifest weight of the evidence. Both contentions lack merit.

### A. Sufficiency of the Evidence

{¶25} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶26} Defendant does not challenge his convictions for robbing Bishop, but questions whether sufficient evidence existed with regard to the element of force to support his conviction for robbing Maclellan. Defendant suggests no force was used in order to take Maclellan's purse; he simply snatched it off the bench on which it was sitting. While Maclellan suffered an injury when defendant was escaping, defendant argues the evidence clearly demonstrates he did not knowingly use force against her. Instead, defendant asserts, he panicked and lost control of his vehicle when Maclellan climbed partially into defendant's vehicle in an attempt to recover her purse. According to defendant, the car fishtailed on wet pavement and struck a parked vehicle, throwing Maclellan from the vehicle.

{¶27} Defendant was convicted of violating R.C. 2911.02 for robbing Maclellan. The statute, as relevant here, provides: "(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following: \* \* \* (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another." In *Colon*, supra, at ¶14, the Ohio Supreme Court held "recklessly" was the culpable mental state required to commit a robbery offense pursuant to R.C. 2911.02(A)(2).

{¶28} R.C. 2901.22(C) provides that "[a] person acts recklessly when, with heedless indifference to the consequences," the person "perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." The statute further provides that "[a] person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶29} As the state correctly points out, it was not required to prove force for defendant's conviction of robbery in violation of R.C. 2911.02. While the state was required to prove force under R.C. 2911.02(A)(3) for defendant's robbing Bishop, the Maclellan robbery charges required the state to prove, in addition to the theft, that defendant acted recklessly in inflicting or attempting to inflict serious physical harm on her.

{¶30} If the evidence is viewed in the light most favorable to the prosecution, sufficient evidence supports defendant's conviction. Although defendant may have panicked when the victim of his purse-snatching attempted to retrieve her property, he knew Maclellan was halfway outside of the car when he chose to drive away with the driver side door ajar. Because, despite the obvious risk of serious injury to Maclellan, defendant continued to drive in an effort to complete the theft, a reasonable juror could conclude defendant acted recklessly in inflicting harm on Maclellan as part of the theft offense. Sufficient evidence supports defendant's conviction.

### **B. Manifest Weight of the Evidence**

{¶31} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence

supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins*, supra, at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶32} While defendant's brief properly lays out the legal basis for a manifest weight challenge, he does not explain how his conviction is against the weight of the evidence. Instead, he merely suggests insufficient evidence exists, a contention we already considered and rejected. Lacking guidance from defendant, we nonetheless have reviewed the record and weighed the evidence and all reasonable inferences. Our review reveals no basis for defendant's manifest weight argument. As both sufficient evidence and the manifest weight of the evidence support defendant's conviction, defendant's second assignment of error is overruled.

{¶33} Having overruled defendant's two assignments of error, we affirm the judgment of the trial court.

*Judgment affirmed.*

BROWN and SADLER, JJ., concur.

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