[Cite as *State v. Bailey*, 2013-Ohio-3596.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-699
v.	:	(C.P.C. No. 11CR-1350)
Robert W. Bailey,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 20, 2013

Ron O'Brien, Prosecuting Attorney, and *Michael P. Walton*, for appellee.

Brehm & Associates, and *Eric W. Brehm*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

O'GRADY, J.

{¶ 1} Defendant-appellant, Robert W. Bailey, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of voluntary manslaughter, tampering with evidence, and having a weapon while under disability. For the following reasons, we affirm appellant's convictions but remand this matter for resentencing.

I. FACTUAL BACKGROUND

{¶ 2} On March 2, 2011, Robert Dillon was riding his bicycle down the sidewalk on the east side of Hague Avenue in Franklin County, Ohio. Appellant and his daughter, Farron Bailey, lived together on the west side of Hague Avenue. Their dogs got loose and ran over towards Dillon, which prompted a heated argument between Farron and Dillon.

{¶ 3} Witnesses testified that Farron crossed the street to confront Dillon during this initial exchange. She then departed back across the street to her house. At some point during Farron and Dillon's exchange, appellant also emerged from the house, crossed the street, and confronted Dillon. Appellant and Dillon argued, and then appellant too returned to his house.

{¶ 4} Farron was the first to re-emerge, this time carrying a baseball bat. Appellant followed behind her holding a handgun in plain view. Several neighbors saw the gun, and one eyewitness testified that he heard the distinct "clack, clack" sound of appellant racking his pistol to chamber a round on his way towards Dillon. (Tr. Vol. I, 126.) Appellant and Farron crossed the street again, and the argument between them and Dillon escalated violently.

{¶ 5} Farron struck Dillon repeatedly with her baseball bat, Dillon swung a chain-style bike lock at the Baileys, and appellant and Dillon exchanged blows with their fists. The fight between appellant and Dillon went to the ground, and while they were wrestling, appellant's gun discharged. The bullet struck Dillon in the abdomen and exited his back.

{¶ 6} There was conflicting testimony at trial regarding the position of appellant and Dillon when the shot was fired. However, one eyewitness testified that appellant was on top of Dillon, pinning him with his knee, when she saw appellant move his gun from behind his back towards Dillon. Then, she heard the gun fire.

{¶ 7} After Dillon was shot, appellant and Farron retreated with their weapons back to their home, each crossing the street a final time. Appellant hid his gun underneath an upstairs mattress and the bat was placed in a first floor closet, where both were later discovered by police.

{¶ 8} After the shooting, Dillon stood up and began to walk with his bicycle, but collapsed to the ground shortly thereafter. Neighbors called 9-1-1 and attempted to administer aid to Dillon, but he died as a result of the gunshot wound.

{¶ 9} While neighbors were assisting Dillon and waiting for police to arrive, appellant and Farron came back out of their house and asked what happened. One neighbor responded, "you know what * * * happened. Get back across the street where you belong because you guys did this and you're not coming over here." (Tr. Vol. II, 235-

36.) Appellant and Farron complied, and they were arrested outside of their house as soon as police arrived.

{¶ 10} Several eyewitnesses testified at trial that appellant and Farron were the aggressors. They crossed the street several times during the ordeal, while Dillon never left his side of the street. They brought weapons to the fight and used them. Dillon did have a handgun concealed in his pants, but he did not brandish it during the fight. Paramedics found it fully loaded and in its holster after the shooting.

{¶ 11} Appellant and Farron both testified at trial that they saw the gun and that Dillon motioned towards his pants as if he had a gun during the incident. However, they did not tell police that they saw the gun during the investigation, and during cross-examination, both appellant and Farron admitted that they were claiming they saw the gun for the first time at trial.

{¶ 12} Appellant further claimed at trial that his gun went off accidentally during the struggle with Dillon. Plaintiff-appellee, the State of Ohio, countered with expert testimony establishing that appellant's gun required a little more than nine pounds of pressure applied to the proper surface of the trigger to fire a round.

{¶ 13} The state also put forth evidence regarding gunshot residue. Both appellant and Farron's hands tested positive for gunshot residue. However, Dillon's hands were not tested by police. The state's forensic scientist explained the significance, testifying that finding "gunshot residue particles does not mean that somebody fired a firearm." (Tr. Vol. III, 543.) It means that an individual either fired a gun, was in the vicinity of where a gun was fired, or arrived in the area where a gun was fired afterwards and picked up the residue secondhand.

II. PROCEDURAL HISTORY

{¶ 14} On March 10, 2011, appellant was indicted on two counts of murder, in violation of R.C. 2903.02, each with a firearm specification pursuant to R.C. 2941.145, one count of felonious assault, in violation of R.C. 2903.11, also with a firearm specification pursuant to R.C. 2941.145, one count of tampering with evidence, in violation of R.C. 2921.12, and one count of having a weapon while under disability, in violation of R.C. 2923.13. In June 2012, the having a weapon while under disability charge was tried to the bench. All of the other charges were tried to a jury. At the conclusion, appellant was

found guilty of the lesser-included offense of voluntary manslaughter, in violation of R.C. 2903.03, an accompanying firearm specification, tampering with evidence, and having a weapon while under disability.

{¶ 15} On July 16, 2012, the trial court held a sentencing hearing, and sentenced appellant to 10 years in prison for voluntary manslaughter, 3 years for the firearm specification, 1 year for tampering with evidence, and 3 years for having a weapon while under disability, all to be served consecutively for a total of 17 years.

{¶ 16} In doing so, the trial court stated, *inter alia*:

> [T]he reason that I imposed the maximum sentence on the voluntary manslaughter was because you had ample time and ample opportunity to make different decisions than you untimately did. I mean, someone with a prior conviction and knowing that having any type of weapon is a violation of law * * *, [This] is the reason why * * * I imposed the maximum sentence as well on the having weapon while under disability charge.

(Tr. Vol. V, 901-02.) Further, the trial court stated:

> [A]fter listening to the evidence, based upon all the information that I've had an opportunity to review in this matter, I do believe that consecutive sentences are appropriate in this case because the harm was so great or unusual that a single term does not adequately reflect the seriousness of the conduct.
>
> A person died, okay, because of the decisions you made, of the actions that you took. And having been a convicted felon, you should have known that you were not to have a weapon. And having grabbed that weapon and used that weapon, I believe, supports and then hiding that weapon, supports consecutive sentences in this case.

(Tr. Vol. IV, 903.)

{¶ 17} The judgment entry conveying the sentence was filed with the clerk of courts on July 23, 2012, stating, in pertinent part:

> The court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C.

> 2929.13 and R.C. 2929.14. The Court further finds that a prison term **is** mandatory pursuant to R.C. 2929.13(F).
>
> The Court hereby imposes the following sentence: **Ten (10) years as to Count One, with additional Three (3) years Firearm, One (1) year for Count Four and Three (3) years as to Count Five to be served** at the **OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. Said sentence shall be served consecutive with Count One to Count Four to Count Five for a total of Seventeen (17) years.**

(Emphasis sic.)

III. ASSIGNMENTS OF ERROR

{¶ 18} Appellant appeals and presents this court with two assignments of error for review:

> 1. THE TRIAL COURT DID ERR BY IMPOSING CONSECUTIVE PRISON SENTENCES.
>
> 2. THE TRIAL COURT DID ERR WHEN IT ENTERED JUDGMENT AGAINST THE DEFENDANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

IV. DISCUSSION

{¶ 19} For ease of discussion, we elect to address appellant's second assignment of error first. Initially, we note that appellant only attacks his voluntary manslaughter conviction. Therefore, we will restrict our review to the evidence supporting that offense.

{¶ 20} Under his second assignment of error, appellant contends that the evidence presented at trial was insufficient to sustain a conviction for voluntary manslaughter, and that his conviction is against the manifest weight of the evidence.

{¶ 21} "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶ 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime

proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102 (1997).

{¶ 22} "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶ 38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386-87. "When 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." *Thompkins* at 387, citing *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). " 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). This discretionary authority " 'should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Id*. at 387, quoting *Martin* at 75.

{¶ 23} Furthermore, a defendant is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was offered at trial. *In re C.S.*, 10th Dist. No. 11AP-667, 2012-Ohio-2988, ¶ 27. The trier of fact is free to believe or disbelieve any or all of the testimony presented. *Id*. The trier of fact is in the best position to take into account the inconsistencies in the evidence, as well as the demeanor and manner of the witnesses, and to determine which witnesses are more credible. *Id*. Consequently, although an appellate court must sit as a "thirteenth juror" when considering a manifest-weight argument, it must also give great deference to the trier of fact's determination on the credibility of the witnesses. *Id*.

{¶ 24} Appellant specifically asserts that the state failed to prove he acted "knowingly" when he caused the death of Dillon, an essential element of voluntary manslaughter. (Appellant's brief, at 17.) We disagree.

{¶ 25} "Voluntary manslaughter" is defined in R.C. 2903.03 as follows:

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another * * *.

{¶ 26} "Knowingly" is defined in R.C. 2901.22 as follows:

> (B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

{¶ 27} Appellant states that he and Farron both testified that he was face down on the ground, struggling with Dillon, when the gun went off. Appellant contends that the results of the gunshot residue tests on his hands support that he was laying prone when the gun fired. Appellant also mentions that Dillon's hands were not tested for gunshot residue, although he does not attach significance to that fact. Appellant further claims that "none of the State's witnesses * * * testified to the position of the firearm when it discharged." (Appellant's brief, at 18.) Finally, appellant points out that he testified "he did not intend on shooting Dillon." (Appellant's brief, at 18.)

{¶ 28} Appellant's arguments are not persuasive. The evidence presented at trial could lead a rational juror to conclude that appellant was aware of the probable result of his actions. Moreover, the jury was free to assign credibility to witnesses, and believe the testimony of others over the testimony of appellant and Farron.

{¶ 29} For instance, the jury was free to believe the eyewitness that testified appellant was on top of Dillon, pinning him with his knee, when the gun fired. Additionally, several witnesses painted appellant and Farron as the aggressors. They crossed the street back-and-forth twice during the ordeal, while Dillon never left his side of the street. Appellant openly brandished a handgun, and one witness heard him chamber a round on his way towards Dillon. Then, after the shooting, appellant stashed his gun under an upstairs mattress.

{¶ 30} Although appellant and Farron both testified at trial that they saw the gun concealed in Dillon's pants, neither told police that they saw the gun during the investigation. Therefore, the jury was free to discount that testimony.

{¶ 31} Appellant's testimony that his gun went off accidentally and that he did not intend to shoot Dillon was controverted by the state's firearms expert, who testified that appellant's gun required a little more than nine pounds of pressure applied to the proper surface of the trigger to fire a round.

{¶ 32} Likewise, appellant's assertions concerning the implications of the gunshot residue tests are not supported by the record. The state's forensic scientist testified that the presence of gunshot residue does not indicate whether a person fired a gun. A person could have alternatively been in the vicinity of where a gun was fired, or arrived in the area afterwards and picked up the residue secondhand. The state further established that finding gunshot residue on appellant's left hand, but not his right hand, is not indicative of any particular body position. Therefore, appellant's contention that the results of the gunshot residue tests support he was laying prone when the gun fired is unsubstantiated.

{¶ 33} Accordingly, we find that the state produced sufficient evidence to support the jury's verdict finding appellant guilty of voluntary manslaughter. Considering the evidence, we cannot say that the jury clearly lost its way resulting in a manifest miscarriage of justice. Therefore, we overrule appellant's second assignment of error, and affirm his conviction.

{¶ 34} Under his first assignment of error, appellant asserts the trial court erred by imposing consecutive sentences without making all of the findings required by R.C. 2929.14(C)(4). We agree.

{¶ 35} Preliminarily, we note that appellant failed to object to the imposition of consecutive sentences at the sentencing hearing and, therefore, has forfeited all but plain error. *See* Crim.R. 52(B); *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 84. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." For an error to be "plain" within the meaning of Crim.R. 52(B), it " 'must be an "obvious" defect in the trial proceedings.' " *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 16, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002).

{¶ 36} R.C. 2929.14(C)(4), enacted as part of 2011 Am.Sub.H.B. No. 86 ("H.B. No. 86"), provides:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 37} In *State v. Wilson*, 10th Dist. No. 12AP-551, 2013-Ohio-1520, we held that H.B. No. 86 applies to defendants that were sentenced on or after its effective date, September 30, 2011, by operation of R.C. 1.58(B). *Id*. at ¶ 17; *State v. Roush*, 10th Dist. No. 12AP-201, 2013-Ohio-3162, ¶ 79.

{¶ 38} R.C. 1.58(B) states:

> If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

{¶ 39} Appellant was sentenced on July 23, 2012. Thus, his sentence was "not already imposed" when H.B. No. 86 took effect on September 30, 2011. Additionally, the

lowest potential sentence for two of appellant's third degree felonies, tampering with evidence and having a weapon while under disability, was reduced from one year to nine months by H.B. No. 86's revisions to R.C. 2929.14(A)(3). Therefore, by operation of R.C. 1.58(B), appellant should have been sentenced in accordance with H.B. No. 86's revisions to R.C. 2929.14, including 2929.14(C)(4).

{¶ 40} The state argues to the contrary, directing our attention to *State v. Edwards*, 6th Dist. No. WD-11-078, 2013-Ohio-519.

{¶ 41} In *Edwards*, the defendant was convicted of two counts of gross sexual imposition in violation of R.C. 2907.05. *Id.* at ¶ 2-5. H.B. No. 86's amendments to R.C. 2929.14(A) did not reduce the potential penalty for a violation of R.C. 2907.05. *Id*. at ¶ 21. Therefore, the Sixth District Court of Appeals concluded, "since the amendments did not reduce the penalty, forfeiture, or punishment for gross sexual imposition, * * * R.C. 1.58(B) is inapplicable." *Id*. at ¶ 24.

{¶ 42} Unlike in *Edwards*, the potential penalty for two of appellant's offenses was reduced by H.B. No. 86's amendments to R.C. 2929.14(A). Therefore, through R.C. 1.58(B), H.B. No. 86 applies.

{¶ 43} Accordingly, pursuant to R.C. 2929.14(C)(4), the trial court was required to make at least three distinct findings when sentencing appellant: (1) that consecutive sentences are necessary to protect the public from future crime or to punish the offender; (2) that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public; and (3) that one of the subsections (a), (b), or (c) applies. Although the trial court was not required to give reasons explaining these findings, nor was the court required to recite any " 'magic' " or " 'talismanic' " words when imposing consecutive sentences, the record must reflect that the court made the findings required by the statute. *State v. Hubbard*, 10th Dist. No. 11AP-945, 2013-Ohio-2735, ¶ 86, quoting *State v. Farnsworth*, 7th Dist. No. 12 CO 10, 2013-Ohio-1275, ¶ 8.

{¶ 44} The state contends the trial court specified enough on the record to comply with R.C. 2929.14(C)(4). We cannot agree.

{¶ 45} Our review of the record does not reveal findings by the trial court that consecutive sentences are necessary to protect the public from future crime or to punish

appellant, or that consecutive sentences are not disproportionate to the seriousness of appellant's conduct and to the danger he poses to the public.

{¶ 46} Failure to fully comply with R.C. 2929.14(C)(4) is plain error as a matter of law. *State v. Bender*, 10th Dist. No. 12AP-934, 2013-Ohio-2777, ¶ 7, citing *Wilson*, 2013-Ohio-1520; *State v. Slane*, 10th Dist. No. 12AP-316, 2013-Ohio-2107, ¶ 8. Therefore, finding plain error, we sustain appellant's first assignment of error.

IV. CONCLUSION

{¶ 47} For the foregoing reasons, appellant's second assignment of error is overruled. Appellant's first assignment of error is sustained, and we hereby reverse the judgment of the Franklin County Court of Common Pleas and remand this matter to that court for resentencing in accordance with law and consistent with this decision.

Judgment reversed
and cause remanded.

BROWN and DORRIAN, JJ., concur.