[Cite as *State v. Seals*, 2010-Ohio-2843.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 4
	:	T.C. NO. 08 CR 828
JONATHAN D. SEALS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 18th day of June, 2010.

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FROELICH, J.

{¶ 1} Jonathan Seals was convicted after a jury trial in the Clark County Court of Common Pleas of aggravated murder (prior calculation and design), in violation of R.C. 2903.01(A); murder, in violation of R.C. 2903.02(A); felony murder as a proximate result of felonious assault, in violation of R.C. 2903.11(A)(2); tampering with evidence; and felonious

assault; each of the counts had a firearm specification. The court sentenced Seals to an aggregate term of 33 years to life in prison and indicated that he was subject to five years of mandatory post-release control.

{¶ 2} Seals appeals from his conviction and sentence. For the following reasons, the trial court's judgment of conviction will be affirmed. Seals's sentence will be vacated, and the matter will be remanded for a new sentencing hearing so that the trial court may inform Seals of the requisite post-release control.

I

{¶ 3} At approximately 6:30 p.m. on September 18, 2008, Jonathan Seals shot and killed Leonard Barnes, the boyfriend of Seals's mother, Joanne Seals, while the three of them and others were gathered at a vacant lot next to 231 South Lowry Avenue in Springfield, Ohio. At trial, Seals acknowledged that he had shot Barnes, but he claimed that he had not planned to kill Barnes, that he was provoked by Barnes, and that he had acted in a sudden passion or fit of rage.

{¶ 4} The State's evidence at trial established the following facts.

{¶ 5} In the spring of 2008, Joanne Seals began to date Leonard Barnes. Shortly after the relationship began, Barnes hit Joanne[1] for the first time. Barnes abused Joanne a second time on Mother's Day. Joanne did not tell Seals about either of these incidents, and she did not call the police.

{¶ 6} Barnes assaulted Joanne again on August 30, 2008, after the two had been

[1] We will refer to Joanne Seals by her first name in order to avoid confusion with the defendant, Jonathan Seals.

drinking by the railroad tracks. Joanne stated that Barnes punched her with his fist, causing her to fall to the ground and be "paralyzed" for two or three minutes. Joanne saw and flagged down a police officer who, after briefly searching for Barnes, called an ambulance. At the hospital, Joanne discovered that $90 was missing from her pocket. Joanne suffered a bruise on her forehead, tingling in her fingers, and neck pain. Initially, she told her friends and family, including Seals, that she had been in a car accident.

{¶ 7} About a week before the shooting, Seals was in his mother's Cole Manor apartment with Vincent Borden, who told Seals that Barnes had assaulted Joanne at the railroad tracks. Joanne then told her son about the incident. Seals began to pace, which he does when he gets upset. Joanne told Seals, "whatever [you're] thinking, it's not worth it." Seals appeared to calm down, and they drank beer together. Later that night, Seals, who had recently obtained an apartment in the same building, went upstairs to his residence, leaving his cell phone at his mother's apartment. When Seals later came back to retrieve it, the cell phone was missing. Joanne and Seals believed that Borden had taken the cell phone during the night. Joanne and Seals tried to find Borden, but were unsuccessful. Gloria Brantley testified that Joanne and Seals had come to her home on the night before the shooting, looking for Borden.

{¶ 8} On the morning of the shooting, Joanne and Seals spoke with Dawn Massie in the common area of their apartment building. Joanne borrowed two bus tickets from Massie so she and Jonathan could go to the welfare office. During their conversation, Massie heard Seals say that when he finds Barnes, "he was gonna kill him." Massie stated that Seals was upset that Barnes had beaten his (Seals's) mother. Joanne told Seals "to whoop his ass. He's not worth killing him," and Seals seemed to calm down after that.

{¶ 9} Sandra Truman, another Cole Manor resident, also saw Joanne and Seals in the lobby and heard them talking with Massie about money being taken. Truman heard Seals say that he wanted his $90 and cell phone and that he (Seals) was going "to kill him." Truman did not hear Seals identify who he wanted to kill, and she stated that "we didn't really think he was gonna do it so we just kept playing cards." However, that night everyone was talking about how Seals had shot someone.

{¶ 10} Joanne and Seals went to the welfare office and, afterward, to Joanne's attorney's office. When they had finished these errands, Joanne and Seals decided to drink beer on the railroad tracks, and they purchased a 24-ounce beer from Mr. B's Drive-Thru. They came across a friend, Santos Martel, and drank the beer on the tracks with him. Soon thereafter, Barnes approached, and the four socialized together.

{¶ 11} After finishing the beer, Joanne, Seals, and Barnes went to Pizza 'N Stuff and purchased three 40-ounce beers. They went back to the tracks, sat down, and drank. After they got bored, they decided to go to Clark Street, where they stopped at the home of Cherie Rickman, who was having a barbecue. Rickman had met Joanne and Seals a couple of times; she did not know Barnes. Barnes, however, knew James Thomas ("Dirty") Hughes, who was playing music at the social gathering. Barnes, Seals, and Joanne stayed for an hour or more. Rickman testified that it "seemed that Joanne and the gentleman, Leonard, were into it and they had had some words," and Hughes stated that "everybody was feeling uncomfortable 'cause they seen that *** there was a little something going on." Barnes asked Hughes for a ride. Hughes thought he would only drive Barnes; however, Seals stated, "We came together; we'll leave together." Hughes drove Barnes, Seals, and Joanne to a vacant lot next to 231 South Lowry

Avenue.[2] All four got out of the vehicle.

{¶ 12} The lot next to 231 South Lowry Avenue is a location where a number of people – several of whom were residents of 231 South Lowry – regularly went to drink and socialize. When Hughes arrived, David Bass, Roger ("Rabbit") Wells, and Don Hill were outside sitting around a picnic table at the vacant lot. Hughes got out of his vehicle and began to talk to Wells. Several witnesses saw Barnes, Seals, and Joanne walk over to the picnic table; Barnes sat down near the table. Ralph Shaffer drove up to the lot in his van and began talking with Rick ("Joker") Pollard.

{¶ 13} Bass testified that Seals asked Barnes, "Where's my money?" Wells similarly testified that Barnes had "a few choice words" with Seals about "finances" and that Seals had said, "motherfucker," "where's my goddamn money?" and "I'm gonna fuck you up." Bass did not hear Barnes respond, but Wells heard Barnes say that he did not have any money. Shaffer testified that he saw Joanne and Seals argue with Barnes.

{¶ 14} After this verbal exchange, Seals shot at Barnes three times, hitting him twice in the chest as Barnes was seated and beginning to rise. Barnes fell to the ground. Seals then shot Barnes four more times in the back at "point blank" range. After Seals finished shooting, Shaffer heard Seals say, "Now fuck with me, nigger."

{¶ 15} Seals turned to those in the lot and waved his gun at them. Shaffer testified that Seals approached him and asked if he was going to say anything. Chris Klos, who saw a portion of the shooting from the back of his father's house on Jefferson Street, stated that he saw Seals

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[2] The lot was formerly known as 227 South Lowry Avenue. A house that had stood on the property was razed a few years before the shooting.

point his gun to another man's head and say, "You can get it, too, mother fucker." Similarly, Bass testified that Seals pointed his gun at him and said, "Do you want some too or are you gonna tell?" Wells also testified that Seals pointed his gun at others and said, "Do you want some?"

{¶ 16} Seals put the gun in his pants, and he and Joanne walked northbound on South Lowry Avenue to the railroad tracks and then headed eastbound along the railroad tracks. Davide Wells, Klos's cousin who also saw a portion of the shooting, followed Seals and Joanne to the railroad tracks and called 911. When Seals and Joanne were halfway between the shooting scene and Mr. B's Drive-Thru, Seals gave his gun to his mother, and the two separated. Joanne hid the gun in the grass by Mr. B's.

{¶ 17} Numerous police officers responded to the shooting scene. Paramedics transported Barnes to Springfield Regional Medical Center; Barnes died from the multiple gunshot wounds. Several witnesses provided descriptions of the suspects: a woman with a facial skin pigmentation disorder and a man. Springfield Police Officer Matt Haytas believed from the description that the woman was Joanne Seals, and he knew that she resided at Cole Manor; he forwarded that information to other officers. Officer Haytas apprehended Seals walking eastbound along High Street near South Clairmont. Officer Mike Fredendall located Joanne Seals as she walked eastbound on Mound Street near Ludlow.

{¶ 18} During the police investigation of the shooting, seven CCI 9-millimeter bullet casings and two bullets were located by the picnic table at the vacant lot. A white shirt with Seals's DNA and gunshot residue was located on the railroad tracks approximately 80 to 100 yards from the crime scene. The following day, Seals's semi-automatic Hi-Point gun was

located near Mr. B.'s Drive-Thru. Upon searching Seals's Cole Manor apartment, a gun holster and three boxes of ammunition, including CCI Blazer 9-millimeter bullets, were discovered in a bedroom closet. A forensic criminalist from the Springfield Crime Laboratory testified that all of the cartridges found at the crime scene were fired from the gun found by the police. When the weapon was located, there was a bullet still in the chamber, indicating that the gun had been fully loaded at the time of the shooting.

{¶ 19} Seals testified on his own behalf. He admitted that he owned the Hi-Point gun, the ammunition, and the holster, and that he had shot Barnes, although he only recalled shooting him twice. Seals stated that he had moved to Springfield from Lima on two occasions, the most recent being two days before the shooting. Although Seals initially testified that he "never carried [a gun] during the day," he stated that he had carried a concealed weapon all day on the day of the shooting because of an "incident" that had happened in Lima.

{¶ 20} Seals stated that, on September 18, 2008, he, Barnes, and Joanne had been laughing, talking, and conversing while drinking beer at the railroad tracks. The three had gone to Clark Street and stayed for approximately one and one-half hours. When they were all ready to go, Hughes drove them to the vacant lot on South Lowry Avenue. Once there, Seals asked Barnes if they could walk and have a conversation. Barnes responded that "whatever you need to talk about, you can talk about it right here in front of these people." Seals asked, "What's this I hear about you beating on my mom?" Barnes replied that it was none of Seals's business. When Seals responded that he had a right to know why Barnes was hitting his mother, Barnes answered "cold-heartedly" that was "none of [Seals's] business" and "I'm gonna keep beating that dumb bitch." Seals stated that Barnes's response "pissed [him] off" and "after that, just

happened so fast, I pulled the pistol out and shot him twice."

{¶ 21} Seals claimed that he had threatened to beat up Vincent Borden, not kill Barnes. Seals testified that he had not made plans to hurt Barnes, and he denied having said that he was going to kill Barnes or calling Barnes the "N-word." Seals did not recall sticking a gun in other people's faces. He testified that he did not know that a round of ammunition was already in the chamber of his gun. Seals stated that he was angry when he heard that Barnes had struck his mother, but he had let it go. He admitted that he lied to the police when he was stopped and told the officers that he had been home playing video games during the day.

{¶ 22} Upon considering the evidence, the jury found Seals guilty of aggravated murder, murder, felony murder, tampering with evidence, and felonious assault, each with a firearm specification. At the sentencing hearing, the trial court merged the aggravated murder, murder, felony murder, and felonious assault counts and sentenced Seals for aggravated murder. The court imposed life imprisonment with parole eligibility after 30 years for aggravated murder and five years for tampering with evidence, to be served concurrently. The trial court sentenced Seals to three years on the firearm specifications, to be served consecutive and prior to the other sentences. The court further ordered Seals to pay restitution in the amount of $1,800 and court costs. The court informed Seals that post-release control did not apply to Seals's sentence.

{¶ 23} The judgment entry reflected the court's orally-imposed prison sentences. However, the judgment entry stated that Seals was informed that five years of post-release control was mandatory and that he "is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board ***." The judgment entry did not mention restitution.

{¶ 24} Seals appeals from his conviction and sentence, raising four assignments of error. We will address his assignments of error in a manner that facilitates our analysis.

II

{¶ 25} Seals's second assignment of error states:

{¶ 26} "THE CONVICTION FOR AGGRAVATED MURDER IS NOT BASED ON SUFFICIENT EVIDENCE."

{¶ 27} In his second assignment of error, Seals argues that the State failed to produce sufficient evidence that he acted with "prior calculation and design" to support his conviction for aggravated murder.

{¶ 28} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." Id.

{¶ 29} R.C. 2903.01, the aggravated murder statute, provides that "[n]o person shall purposely, and with prior calculation and design, cause the death of another[.]" R.C. 2903.01(A).

{¶ 30} "There is no bright-line test to determine whether prior calculation and design are present. Rather, each case must be decided on a case-by-case basis." *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶61. "However, where the evidence presented at trial 'reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified.' " *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶154, quoting *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph three of the syllabus.

{¶ 31} The Supreme Court of Ohio has identified certain considerations that are pertinent to determining whether prior calculation and design exist. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶56. They include: (1) whether the defendant and the victim knew each other and whether the relationship was strained; (2) whether the defendant gave thought or preparation to choosing the murder weapon or the murder site; and (3) whether the murder was drawn out or "an almost instantaneous eruption of events." Id., quoting *State v. Taylor* (1997), 78 Ohio St.3d 15, 19.

{¶ 32} Upon review of the State's evidence, we find sufficient evidence of "prior calculation and design" to support sending the aggravated murder charge to the jury. Approximately one week before the shooting, Seals learned that Barnes had physically abused his mother and taken $90 from her. Seals was visibly upset by the news, and his mother told him "whatever he was thinking, it's not worth it."

{¶ 33} On the morning of the shooting, two witnesses – Massie and Truman – heard Seals say that he was going to kill someone. Specifically, Massie testified that, when Joanne

and Seals came to get a bus pass from her, Seals was angry that Barnes had beaten his mother, and Seals expressed that he was going to kill Barnes when he found him. Truman, who heard this conversation, testified that Seals wanted his $90 and cell phone back and was going to kill someone. Seals carried a gun with him that day, and the gun had a bullet in the chamber plus a full magazine with seven cartridges.

{¶ 34} Several witnesses at the vacant lot on South Lowry Avenue stated that Seals confronted Barnes about money. Seals called Barnes "motherfucker," asked "where's my goddamn money?" and said, "I'm gonna fuck you up." Seals pulled out his gun and shot at Barnes three times, hitting him twice; after Barnes fell, Seals shot him four times in the back at close range. After Seals finished shooting Barnes, Shaffer heard Seals say, "Now fuck with me, nigger." Numerous witnesses to the shooting indicated that Seals had threatened other people at the scene with his gun. After Seals left the scene, he disposed of evidence against him by removing his shirt with gunshot residue and giving his gun to his mother. Seals did not have gunshot residue on this hands, which, as the prosecutor argued, suggested that he also wiped or washed his hands after the shooting.

{¶ 35} Based on the State's evidence, a jury could reasonably infer that Seals's intent to kill Barnes was the product of prior calculation and design. Seals's conviction for aggravated murder was based on sufficient evidence.

{¶ 36} The second assignment of error is overruled.

III

{¶ 37} Seals's third assignment of error states:

{¶ 38} "DEFENDANT'S CONVICTIONS ARE AGAINST THE MANIFEST

WEIGHT OF THE EVIDENCE."

{¶ 39} In his third assignment of error, Seals claims that his convictions for aggravated murder, murder, felony murder, and felonious assault are against the manifest weight of the evidence, because the facts presented at trial supported the conclusion that Seals had shot Barnes while under the influence of sudden passion or a sudden fit of rage. Seals asserts that the jury should have convicted him of voluntary manslaughter and aggravated assault.

{¶ 40} In contrast to the sufficiency of the evidence standard, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *Wilson* at ¶12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 41} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288. However, we may determine which of several competing inferences suggested by the evidence should be preferred. Id.

{¶ 42} The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶14. A judgment of

conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 43} Voluntary manslaughter is an inferior degree of murder. *State v. Shane* (1992), 63 Ohio St.3d 630, 632. The elements of voluntary manslaughter are set forth in R.C. 2903.03(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 ***."

{¶ 44} "Aggravated Assault is an inferior degree of Felonious Assault, since its elements are identical to Felonious Assault, except for the mitigating element of serious provocation." *State v. Hancher*, Montgomery App. No. 23515, 2010-Ohio-2507, ¶54, citing *State v. Deem* (1988), 40 Ohio St.3d 205, 210-11. The aggravated assault statute reads, in relevant part: "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: (1) Cause serious physical harm to another ***." R.C. 2903.12(A).

{¶ 45} For both aggravated assault and voluntary manslaughter, "reasonably sufficient" means that the provocation was "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Shane*, 63 Ohio St.3d at 633; *State v. Miller*, Montgomery App. No. 22433, 2009-Ohio-4607, ¶26, citing *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶81. In general, mere words do not justify the use of deadly force, and "vile or abusive language or verbal threats, no matter how provocative, do not justify an assault or the use of a

deadly weapon." *State v. Napier* (1995), 105 Ohio App.3d 713, 723. Classic examples of serious provocation are assault and battery, mutual combat, illegal arrest, and discovering a spouse in the act of adultery. *Shane*, 63 Ohio St.3d at 635.

{¶ 46} In asserting that he should have been convicted of voluntary manslaughter and aggravated assault, Seals emphasizes that he did not seek out Barnes on September 18, 2008, and, as such, his comment that morning that he would kill Barnes did not reflect that he (Seals) had formulated a plan to kill. He notes that Barnes approached him and his mother as they were drinking beer, and the three of them spent several hours together drinking and socializing without incident. Seals asserts that he did not shoot Barnes until Barnes "made the cold-hearted comment that he was going to 'keep beating the dumb bitch' and there is no indication [Seals] would have shot [Barnes] if [Barnes] had not made this comment." Seals states that he was provoked not only by Barnes's words, but also by Barnes's prior abuse of his mother.

{¶ 47} Seals further asserts that his shooting Barnes in the back, his comment "[n]ow fuck with me, nigger," his threatening of others after the shooting, and his actions to rid himself of incriminating evidence were not indicative that he acted in a calculating manner. Seals asserts that he did not remember doing any of these acts and that he "was not in control of himself for several minutes."

{¶ 48} Viewing the evidence as a whole, we cannot conclude that the jury lost its way in convicting Seals of aggravated murder, murder, felony murder, and felonious assault, rather than voluntary manslaughter and aggravated assault. Although Joanne and Seals drank and socialized with Barnes at the railroad tracks and at Rickman's home prior to the shooting and Seals testified that he shot Barnes only after Barnes indicated that he would continue to abuse

Seals's mother, the State presented a compelling case that Seals acted with prior calculation and design, and the jury apparently believed that evidence.

{¶ 49} Specifically, the jury could have reasonably believed that Seals's expressed threat against Barnes, which was heard by Massie and Truman, was genuine and reflected a plan to kill Barnes. Seals testified on direct examination that he "never carried [a gun] during the day," yet stated upon cross-examination that he carried a gun during the day due to an "incident" in Lima; the jury could have concluded, instead, that Seals carried a gun on September 18, 2008, because he planned to kill Barnes. Bass and Wells testified that Seals had confronted Barnes about money, and they made no mention of any conversation between Seals and Barnes regarding Barnes's alleged abuse of Joanne; the jury could have reasonably concluded that Seals had shot Barnes because Barnes did not have his or Joanne's money. Even if the jury had believed Seals's rendition of his conversation with Barnes by the picnic table, the jury could have reasonably concluded that Seals was merely providing Barnes an opportunity to explain his abusive behavior toward Seals's mother and, when Barnes was unapologetic, Seals carried out his plan to kill Barnes. Although the jury could have believed that Seals flew into a rage as a result of Barnes's response to Seals's questions concerning Barnes's abuse of Joanne, the jury's apparent decision to credit the State's version of events is not against the manifest weight of the evidence.

{¶ 50} The third assignment of error is overruled.

IV

{¶ 51} Seals's fourth assignment of error states:

{¶ 52} "THE TRIAL JUDGE ABUSED HIS DISCRETION IN SENTENCING

JONATHAN SEALS."

{¶ 53} In his fourth assignment of error, Seals asserts that the trial court abused its discretion in sentencing Seals to life imprisonment with parole eligibility after 30 years instead of life imprisonment with parole eligibility after 20 years. Seals emphasizes that he did not seek out Barnes to kill him, that he had reacted to Barnes's statement that he (Barnes) was "gonna keep beating the dumb bitch," and that Seals was a "young man protecting his mother."

{¶ 54} We review a felony sentence using a two-step procedure. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶4. "The first step is to 'examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.'" *State v. Stevens*, 179 Ohio App.3d 97, 2008-Ohio-5775, ¶4, quoting *Kalish* at ¶4. "If this step is satisfied, the second step requires that the trial court's decision be 'reviewed under an abuse-of-discretion standard.'" Id.

{¶ 55} The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.11(A). Unless otherwise required by R.C. 2929.13 and R.C. 2929.14, the trial court has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in R.C. 2929.11. R.C. 2929.12(A). The trial court must also consider the seriousness of the offender's conduct, its impact upon the victim, and the sentences imposed for similar crimes committed by similar offenders. R.C. 2929.11(B). It may consider any other factors that are relevant to achieving the purposes and principles of sentencing. R.C. 2929.12. See, also, *State v. Arnold*, Clark App. No. 2008 CA 25, 2009-Ohio-3510, ¶8.

{¶ 56} At the sentencing hearing, the State argued that the conviction for aggravated

murder warranted a sentence of life in prison with the possibility of parole after 25 years. The State further stated: "Obviously, the State of Ohio would argue that life without the possibility of parole till 30 and life without the possibility of parole would also be fitting in this case." With respect to the tampering with evidence charge, that State asserted that there "should be a maximum consecutive sentence for an additional 5 years on the Defendant's sentence." The prosecutor noted that the presentence investigation revealed that Seals had one prior offense in 2000 for possession of deadly weapons on school grounds; Seals had denied that he had that conviction. The State acknowledged that there were some mitigating factors in the shooting of Barnes, such as the abusive relationship between Barnes and Joanne.

{¶ 57} Barnes's sister and niece addressed the trial court. Both requested that Seals receive the maximum penalty possible for the homicide.

{¶ 58} Defense counsel requested a "lighter sentence" on the aggravated murder charge, arguing that "despite the fact [Seals] had threatened to kill Mr. Barnes, I don't think he really initiated that thought completely until something was said at 231 South Lowry that afternoon." Defense counsel also requested a minimum or concurrent sentencing on the tampering with evidence charge.

{¶ 59} Seals addressed the court and expressed remorse for his actions.

{¶ 60} The court made the following comments before imposing sentence:

{¶ 61} "There's not much that can be said about such a needless act. There was testimony about mitigating factors, about a violent relationship, about assault, about theft. The jury found that there was a plan, a scheme to kill the victim. There was a little more time in which the Defendant was willing to back away from that plan or scheme. There certainly

appeared to be evidence that there was much better opportunity to take the life of Mr. Barnes before they got to the north – the Lowry Street address with all the witnesses. It's possible that Mr. Barnes said something that made Mr. Seals decide to carry out the plan right then, right there instead of backing away from it.

{¶ 62} "The country seems to be heading back to a time when people thought it was okay to carry a gun and handle all their problems by shooting somebody else.

{¶ 63} "The Defendant has been found guilty of aggravated murder, murder, murder caused by felony offense, and felonious assault, all of which are the same act, all of which involved the shooting of Mr. Barnes, thus causing his death. All of those charges merge, leaving the State to sentence the Defendant on aggravated murder and tampering with evidence.

{¶ 64} "Taking the mitigating factors into consideration here under those circumstances, I also take into consideration the fact that it was found to have – by the jury to have been premeditated and the Defendant was – and the victim was shot six times, four of which in the back while he lay on the ground."

{¶ 65} The trial court sentenced Seals to life in prison with the possibility of parole after 30 years. The court imposed a five-year sentence for tampering with evidence, to be served concurrently with the 30-year sentence. The court also imposed three years for the firearm specification, to be served consecutive to the other sentences, for a total of 33 years to life. The Court ordered $1,800 in restitution: $200 to Tina Travis and $750 to Tim Barnes for their contribution to funeral expenses, and the balance to the State of Ohio.[3]

[3] Although the trial court orally imposed restitution, restitution was not mentioned in the trial court's judgment entry. "It is well established that the court speaks only through its journal entries, not by its oral pronouncements." *State v. DeLong*, Montgomery App. No.

{¶ 66} Upon consideration of the facts of this case, the sentence, and the trial court's rationale, we find that Seals's sentence was neither contrary to law nor an abuse of discretion.

{¶ 67} The fourth assignment of error is overruled.

V

{¶ 68} Seals's first assignment of error states:

{¶ 69} "THE TRIAL COURT ERRED BY SENTENCING JONATHAN SEALS TO FIVE YEARS OF POST-RELEASE CONTROL."

{¶ 70} In his first assignment of error, Seals claims that the trial court erred in stating in its judgment entry that Seals faced a mandatory five-year term of post-release control. He states that the only classified felony of which he was convicted was tampering with evidence, a third-degree felony, which is subject to an optional three-year term of post-release control. (The murder counts all merged into the aggravated murder count, which is an unclassified felony to which post-release control does not apply. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, ¶36.)

{¶ 71} The State concedes that the trial court could not sentence Seals to five years of post-release control. It notes, however, that upon Seals's release from prison, he would be required to be on parole for at least five years. If a person's term of parole is longer than post-release control, the person must be supervised on parole. R.C. 2967.28(F)(4)(a). The State, thus, asserts that we should remand this matter back to the trial court with instructions to prepare an amended entry without notification of post-release control.

20656, 2005-Ohio-1905, ¶18, citing *Schenley v. Karth* (1953), 160 Ohio St. 109. Because the trial court's judgment entry did not detail the restitution to be paid, restitution was not, in fact, imposed. See *State v. Murillo*, Montgomery App. No. 21919, 2008-Ohio-201.

{¶ 72} "A trial court is required to notify a defendant at the time of the sentencing hearing of the potential of post release control, and must incorporate that notice into its journal entry. *State v. Jordan,* 104 Ohio St.3d 21, 817 N.E.2d 864, 2004-Ohio-6085. Where a sentence fails to contain a statutorily mandated term, such as post release control, the sentence is void. Id. The remedy is to resentence [the defendant] and notify him at the hearing of his post-release control requirements. *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197; *State v. Davis,* Montgomery App. No. 22403, 2008-Ohio-6722; R.C. 2929.191." *State v. Golson,* Montgomery App. No. 22927, 2010-Ohio-560, ¶10.

{¶ 73} Post-release control is governed by R.C. 2967.28. Under that statute, if the offender committed a third-degree felony that is not a felony sex offense and the offender caused or threatened physical harm to a person, the offender would be subject to a mandatory three-year term of post-release control. R.C. 2967.28(B). For other third-degree felonies that are not sex offenses, such as Seals's conviction for tampering with evidence, the three-year period of post-release control would be optional at the discretion of the parole board. R.C. 2967.28(C).

{¶ 74} When an offender's sentence includes both a definite sentence and a life or an indefinite sentence, the statute provides, in relevant part:

{¶ 75} "(4) Any period of post-release control shall commence upon an offender's actual release from prison. If an offender is serving an indefinite prison term or a life sentence in addition to a stated prison term, the offender shall serve the period of post-release control in the following manner:

{¶ 76} "(a) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under a life sentence or an indefinite sentence, and

if the period of post-release control ends prior to the period of parole, the offender shall be supervised on parole. The offender shall receive credit for post-release control supervision during the period of parole. ***

{¶ 77} "(b) If a period of post-release control is imposed upon the offender and if the offender also is subject to a period of parole under an indefinite sentence, and if the period of parole ends prior to the period of post-release control, the offender shall be supervised on post-release control. The requirements of parole supervision shall be satisfied during the post-release control period." R.C. 2967.28(F)(4)(a)-(b).

{¶ 78} R.C. 2967.28(F) does not say that post-release control is inapplicable to a definite sentence when an indefinite or life sentence is also imposed. Rather, R.C. 2967.28(F) discusses how post-release control is served when an offender is also subject to parole under an indefinite or life sentence. *State ex rel. Carnail v. McCormick*, – Ohio St.3d –, Slip Opinion No. 2010-Ohio-2671, ¶20. Accordingly, when a life or indefinite sentence is imposed, the trial court must still inform a defendant of the applicable post-release control regarding the definite sentence. See id.; *State v. Rogers*, Fayette App. No. CA2004-06-014, 2005-Ohio-6693, ¶35-37 (finding trial court's failure to inform defendant, who was convicted of aggravated murder and tampering with evidence, of post-release control required the sentence be vacated and the case remanded for resentencing). See, also, *State v. Amison*, Cuyahoga App. No. 86279, 2006-Ohio-560, ¶21 (Cooney, J., dissenting).

{¶ 79} Although Seals would receive credit for post-release control while serving a longer period of parole, the trial court was nevertheless required to inform Seals that he could be placed on post-release control for tampering with evidence, the third-degree felony. Because

Seals was subject to an optional three-year term post-release control for tampering with evidence, the trial court erred in failing to inform him of that post-release control requirement and in erroneously including in the judgment entry that he was subject to a mandatory five-year term of post-release control. Seals's sentence must be vacated, and the matter must be remanded to the trial court so that the trial court may inform Seals of the requisite post-release control. *Golson*, supra.

{¶ 80} The first assignment of error is sustained.

VI

{¶ 81} Seals's convictions for aggravated murder and tampering with evidence will be affirmed. Seals's sentence is vacated, and the matter is remanded for a new sentencing hearing so that the trial court may inform Seals of the requisite post-release control.

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BROGAN, J. and FAIN, J., concur.

Copies mailed to:

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