[Cite as *State v. Nooks*, 2010-Ohio-5049.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23591
v.	:	T.C. NO. 09CR578
SHAWN NOOKS, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 15th day of October, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Shawn Nooks, Jr., appeals from his conviction and sentence for one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony of the second degree; one count of felonious assault (serious physical harm), in violation of R.C. 2903.11(A)(1), a felony of the second degree; and one

count of having a weapon while under disability (prior offense of violence), in violation of R.C. 2923.13(A)(2), a felony of the third degree. Both counts of felonious assault included a three-year firearm specification, in violation of R.C. 2929.14 and 2941.145. Nooks filed a timely notice of appeal with this Court on August 19, 2009.

I

{¶ 2} The incident which forms the basis of the instant appeal occurred on November 9, 2008, at approximately 10 p.m. when the victim, Roderick Blackburn (aka "Young Dummy") walked to Nooks' residence to visit with him as the two were friends. Thereafter, Blackburn and Nooks watched television for five to ten minutes until Nooks asked Blackburn to accompany him to the AM/PM convenience store located nearby in order to purchase a Black and Mild cigar.

{¶ 3} As it was cold outside, Nooks changed into warmer clothing, and he and Blackburn left the residence and walked to the convenience store where Nooks purchased the cigar. Nooks and Balckburn left the store and began walking back towards Nooks' residence. While walking through an alley in the neighborhood, Nooks and Blackburn encountered Nooks' cousin, Darriel Boddee. Blackburn testified that he recognized Bodee from school but had never spoken with him.

{¶ 4} As they were walking through the alley, Nooks pulled a .38 caliber handgun from his waistband and attempted to shoot a garbage can, but the gun did not fire when he pulled the trigger. Blackburn testified that he asked Nooks what was wrong with the gun. Nooks stated that nothing was wrong with the gun and proceeded to pull the trigger again, at which point the gun fired and hit the garbage can. Blackburn testified that Nooks turned the

gun on him and shot him several times. Nooks first shot hit Blackburn in the neck. The second shot hit him in the right shoulder. Blackburn testified that he tried to run away, but Nooks shot him again in his left hand. Another shot grazed Blackburn's head, and he fell to the ground and pretended to be dead. While Blackburn was lying on the ground, he heard Nooks walk up to him, and the gun clicked three times in his ear. Blackburn testified that he then heard footsteps as if the shooter was running away from his location.

{¶ 5} Once he determined that Nooks and Bodee were gone, Blackburn got up and ran to the home of Arlene Cantrell, whose residence was located near the alley where the shooting occurred. Blackburn testified that he had known Cantrell since he was a little boy and that he called her "Grandma" even though he was not related to her. Upon reaching Cantrell's residence, he banged on her front door and called for her. Cantrell, who testified that she had been babysitting her grandkids when she heard multiple gunshots behind her house, opened the door to Blackburn. Blackburn, who was bleeding profusely, stumbled into the residence. Cantrell testified that she asked Blackburn who shot him, and he told her that it was Nooks. Cantrell then called 911. The police and paramedics arrived shortly thereafter.

{¶ 6} Blackburn testified that he was initially hesitant to tell the police who shot him because he feared a reprisal from Nooks. After some encouragement from Cantrell, however, Blackburn informed the police that Nooks had shot him. The paramedics then transported Blackburn to Miami Valley Hospital where he remained for approximately a week after the shooting.

{¶ 7} Nooks, who was seventeen at the time of the shooting, was subsequently

charged by complaint in the Montgomery County Juvenile Court with felonious assault, in violation of R.C. 2903.11(A)(2), a felony of the second degree. The charge was accompanied by a three-year firearm specification. On February 17, 2009, the juvenile court issued an order in which it transferred jurisdiction of the case over to the Montgomery County Court of Common Pleas, General Division, so that Nooks could be tried as an adult.

{¶ 8} On March 6, 2009, Nooks was indicted in the Montgomery County General Division for one count of felonious assault (deadly weapon), one count of felonious assault (serious physical harm), and one count of having a weapon while under disability (prior offense of violence). Both counts of felonious assault were accompanied by a three-year firearm specification.

{¶ 9} Nooks signed a jury waiver on June 26, 2009, as to the charge of having a weapon while under disability. On June 29, 2009, Nooks proceeded to a jury trial on the remaining counts in the indictment. The trial ended on June 30, 2009, and Nooks was found guilty of both counts of felonious assault and the attendant firearm specifications. Additionally, the trial court found Nooks guilty of having a weapon while under disability.

{¶ 10} On July 15, 2009, the trial court merged the felonious assault counts and sentenced Nooks to eight years imprisonment, plus a three-year term for the firearm specification. The court also sentenced Nooks to five years in prison for having weapons while under disability, but ordered the sentence to run concurrently with the felonious assault sentence for an aggregate prison term of eleven years.

{¶ 11} It is from this judgment that Nooks now appeals

II

{¶ 12} Nooks first assignment of error is as follows:

{¶ 13} "COUNSEL FOR APPELLANT WAS INEFFECTIVE IN HIS REPRESENTATION OF APPELLANT."

{¶ 14} In his first assignment, Nooks contends that he received ineffective assistance of counsel at the trial level. Specifically, Nooks argues that there "was a breakdown of the ability of [Nooks] and his attorney to communicate and to work together to prepare [Nooks'] defense in the final months before trial." Upon review, the record fails to support Nooks' claim in this regard.

{¶ 15} "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶ 16} The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, supra, at 687-688. "Because of the difficulties inherent in making the evaluation, a court must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. Thus, counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Id*.

{¶ 17} For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694.

{¶ 18} Prior to trial, Nooks requested that the court dismiss his public defender and provide him with a new attorney. On May 29, 2009, the court held a hearing in order to determine if there was any merit to Nooks' request. At the hearing, Nooks argued that, despite multiple requests to his counsel, he had not received a complete copy of his discovery packet. Nooks also complained that he had been in jail for approximately six months, and he still did know anything regarding the facts of his case from his counsel.

{¶ 19} When questioned by the court regarding Nooks' complaints, defense counsel stated the following:

{¶ 20} "The Court: Now, would you place into the record what the defense has done in terms of getting discovery and investigating this case in preparation for the upcoming trial which is set June 15 [2009]?

{¶ 21} "Defense Counsel: Your Honor, from the time the case originally got set for

bindover hearing in juvenile court, I got involved. We did obtain substantial discovery from the juvenile division prosecutors as well as me and Nikole Xarhoulacos, who was the juvenile officer from our office. That was a substantial amount as far as talking to witnesses that would provide names that were provided Mr. Nooks, witness[es'] names and information that he was provided in the discovery packet from the juvenile division prosecutors. We investigated all of that.

{¶ 22} "Miss Xarhoulacos represented Mr. Nooks, as well, in juvenile court. They did independent investigation, as well, which was incorporated into our file now. We obtained, once Mr. Nooks was indicted, back up, we did the bindover hearing. I was present, participated in that, as well.

{¶ 23} "Once he was bound over, indicted, we obtained additional discovery from the Common Pleas Division, general division prosecutors. We again followed up on any information that we had previously. Talked with Mr. Nooks, spoke with his family, spoke with witnesses, obtained some information on his behalf, pro or con.

{¶ 24} "We followed up on anything he suggested to us. He's correct in what he said. We had some issues over discovery as far as internal reasons. He was not provided a complete physical copy of the discovery. There were reasons for that but I did provide him partial discovery. And I also indicated to him that he would get – we would go over every piece of paper in the discovery together and he would be able to see it.

{¶ 25} "But, for reasons I can not disclose on the record, I didn't want him to have the paper copy in his hand while he was in custody but I did indicate we would be going over everything together to prepare for trial. And so, I repeatedly made him aware of that.

We're still investigating potential witnesses and things up to this date anticipating trial.

{¶ 26} "***

{¶ 27} "The Court: is there anything you disagree with, what Mr. Pentecost has just said, Mr. Nooks?

{¶ 28} "Nooks: Well, as far as my discovery packet that I got, it's certain parts of the discovery packet that's missing and is leaving me in a blind spot not to know what the other parts read. And the State, Rule 16 state[s] that I have some or at least photo spreads and everything as far as what the victim states and everything else.

{¶ 29} "The Court: Well, Mr. Pentecost has just said a minute ago he's going to sit down with you and go through everything.

{¶ 30} "Mr. Nooks: We supposed to do that times before.

{¶ 31} "The Court: When are you planning to do that, Mr. Pentecost?

{¶ 32} "Defense Counsel: Well, Your Honor, being quite frank, [the] last few times I visited Mr. Nooks, he was more concerned with things of that nature rather than sitting down and going through those. Always said, I want a new attorney but would not tell me any specific reasons why. I can do that as early as this week."

{¶ 33} The record does not establish that Nooks received ineffective assistance of counsel. From the time of Nooks' bindover hearing, defense counsel had been present and providing active representation. Specifically, the record reveals that defense counsel had reviewed and investigated the extensive discovery provided by the juvenile prosecutors prior to the bindover hearing and had spoken with Nooks and his family regarding the contents of the discovery packet. Nooks' claim that he did not "know anything" about his case was

undermined by the fact that Nooks was present during the bindover hearing in the juvenile court and heard all of the witness' testimony. Moreover, defense counsel stated that he made a professional and tactical decision regarding his choice to withhold some of the discovery packet provided by the General Division prosecutors to Nooks while he was in custody. Defense counsel also stated that he could meet with Nooks that very week in order to discuss the case and prepare for trial. There is nothing to indicate from the complete record before us that Nooks' counsel rendered ineffective performance and/or failed to adequately prepare for trial in any fashion.

{¶ 34} Additionally, Nooks has not established that he was prejudiced at trial in any way by defense counsel's alleged failure to provide him with a complete discovery packet. Nooks simply argues that defense counsel could have been more effective during trial if he had met with him at an earlier time in order to discuss case preparation. Other than an empty assertion, Nooks has failed to demonstrate that there is a reasonable probability that but for defense counsel's alleged inaction, the result of the trial would have been different.

{¶ 35} Nooks' first assignment of error is overruled.

III

{¶ 36} Nooks' second assignment of error is as follows:

{¶ 37} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 38} In his second assignment, Nooks argues that the verdict was against the manifest weight of the evidence.

{¶ 39} "When an appellate court analyzes a conviction under the manifest weight of

the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 40} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 41} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 42} In the instant case, we find that Nooks' convictions for felonious assault and having a weapon while under disability are not against the manifest weight of the evidence. Blackburn, the victim, provided extensive testimony

regarding the circumstances surrounding the shooting, as well as the identity of the shooter, Nooks. Arlene Cantrell testified that when Blackburn came into her house immediately after being shot, believing he was dying, he identified Nooks as the shooter. Nooks points out that Blackburn initially told police that he did not know who shot him. While he acknowledged that at first he was scared to tell the police who shot him, Blackburn did, in fact, identify Nooks as the shooter after some encouragement from Cantrell and others who were present.

{¶ 43} Nooks' defense was simply that Blackburn was either lying or was simply wrong about the identity of the shooter. Nooks also asserts that Blackburn's testimony regarding the color of the gun used to shoot him was inconsistent. The jury, however, was free to believe all, some, or none of the victim's testimony. *State v. Reese*, Montgomery App. No. 21258, 2006-Ohio-4404, citing *State v. Muhleka*, Montgomery App. No. 19827, 2004-Ohio-1822. Nooks also argues that his convictions were against the manifest weight of the evidence in light of the testimony of Darriel Bodee and Alex Berry. Bodee initially told police that he was with Nooks when he shot Blackburn. At trial, however, Bodee, a relative of Nooks, recanted and testified that Blackburn bribed him to testify against Nooks. Berry was the only defense witness called at trial. Berry testified that Blackburn told him that he did not know who shot him. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve, and the jury was free to reject the trial testimony of both Bodee and Berry. The jury did not lose its way simply because it chose to believe the State's witnesses, including Blackburn, who identified Nooks as the individual who shot

him. Having reviewed the entire record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 44} Nooks second assignment of error is overruled.

IV

{¶ 45} Nooks' third and final assignment of error is as follows:

{¶ 46} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO THE MAXIMUM POSSIBLE PENALTY FOR THE OFFENSE FOR WHICH HE WAS CONVICTED."

{¶ 47} In his final assignment, Nooks contends that the trial court erred when it sentenced him to the maximum possible sentence for the felonious assault. While he concedes that the facts and circumstances of the instant case are serious and warrant a greater than minimum prison term, Nooks argues that his prior arrest record should not be held against him. Moreover, Nooks asserts that the instant offenses "occurred when [Nooks] was barely into adulthood and had not yet acquired the benefits of adult judgment; especially as his upbringing was not of a sort that prepared him for the responsibilities and behaviors of adult life."

{¶ 48} Initially, we note that pursuant to the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, the trial court was not required to make any findings on the record in order to support the imposition of Nooks' sentence. Post *Foster*, trial courts have full discretion to impose any sentence within the statutory range and are no longer required to make findings or give their reasons for imposing more than the minimum sentences.

{¶ 49} After a thorough review of the record including the presentence investigation report (PSI), we find that the trial court had before it sufficient evidence to justify the sentence imposed of eleven years. The evidence adduced at trial established that, without provocation, Nooks shot Blackburn four times. After Blackburn fell to the ground and pretended to be dead, Nooks stood over him and pulled the trigger three more times. Fortunately, the gun did not discharge.

{¶ 50} Further, the trial court noted that the PSI established that Nooks has an extensive juvenile record including arrests for criminal trespass, attempted assault, unauthorized use of a motor vehicle, burglary, attempted burglary, disorderly conduct, and felonious assault. Coupled with the violent facts in the instant case, Nooks' history of delinquency reveals a pattern of escalating violence and a complete disregard for human life. Thus, the trial court did not abuse its discretion when it sentenced Nooks to the maximum sentence for the felonious assault of Blackburn.

{¶ 51} Nooks' third and final assignment of error is overruled.

V

{¶ 52} All of Nooks' assignments of error having been overruled, the judgment of trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

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