[Cite as *State v. Bethune*, 2010-Ohio-6138.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- DESHAWN BETHUNE Defendant-Appellant	JUDGES: Hon. Julie A. Edwards, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J. Case No. 2009CA00301 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2009CR1042(B)
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 13, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY STARK COUNTY, OHIO BY: KATHLEEN O. TATARSKY Assistant Prosecuting Attorney Appellate Section 110 Central Plaza, South – Suite 510 Canton, Ohio 44702-1413	WAYNE E. GRAHAM, JR. Suite 300 Renaissance Centre 4580 Stephen Circle, N.W. Canton, Ohio 44718

Hoffman, J.

{¶1} Defendant-appellant Deshawn Bethune appeals his conviction and sentence entered by the Stark County Court of Common Pleas, on one count of aggravated murder with a firearm specification, following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On August 24, 2009, the Stark County Grand Jury indicted Appellant on one count of aggravated murder, in violation of R.C. 2903.01(A), with a firearm specification. Appellant appeared before the trial court for arraignment on August 28, 2009, and entered a plea of not guilty to the Indictment.

{¶3} The matter proceeded to jury trial on October 13, 2009. The following evidence was adduced at trial.

{¶4} During Memorial Day weekend, 2009, Laquesha Driver, Appellant's girlfriend, was sitting outside on the porch of her grandmother's house. Appellant had just left, and was driving up and down the street. Matthew Copeland and a friend were walking up the street and stopped to talk to Driver. When Appellant observed Copeland and Driver, he stopped his car and began to argue with Copeland about Copeland's speaking with Driver. Appellant continued to accuse Copeland of having a relationship with Driver.

{¶5} On or about June 23, 2009, Darrin Newman was visiting Aubrey Williams when Appellant arrived. Appellant began to complain about Copeland and his interest in Driver. Copeland was dating Farrin Newman, Darrin Newman's daughter, at the time.

On June 24, 2009, Appellant called Driver and repeatedly asked her whether Copeland was with her.

{¶6} On June 25, 2009, Andre Bethune, Appellant's uncle, was on the porch of a house on Federal Avenue, in Massillon, Ohio, when Appellant drove by in his Cadillac. Appellant stopped his car and yelled for Bethune to come over. During their conversation, Appellant told Bethune he had almost been jumped at a gas station earlier that day. Appellant, who mentioned something about his "baby mama", was angry about the incident and was "ready to get even". Bethune joined Appellant in the Cadillac.

{¶7} Appellant drove to the Johnson Street home of Farrin Newman. Appellant parked his vehicle at the end of the street, and exited, telling Bethune he would be back. Appellant returned two minutes later, and drove off. Appellant parked by a school and again exited his vehicle. A short time later, Appellant returned and stated he was leaving. Appellant then told Bethune, who was driving at the time, he had changed his mind and instructed Bethune to turn left onto Pearl Street. Appellant saw Copeland and exited his vehicle. It was approximately 5:30 pm.

{¶8} Copeland was with his friend, James Farris. Farris had driven Copeland to Newman's house in order for Copeland to drop off his laundry to Newman. Several people were outside, including a number of children playing on a trampoline. Copeland gave Newman's young son a hug and a high five, and proceeded to the side yard to speak with Newman. Newman told Copeland Appellant had been there, looking for him, and was upset. In less than a minute, Appellant exited the passenger side of his vehicle, and proceeded toward Copeland. Appellant, who had a white shirt over his hand, told

Copeland he was going to kill him. Copeland responded, "Let's take this in the backyard." Appellant pulled out a gun and fired two shots at Copeland. After the shots missed him, Copeland retorted, "F- that n-g-r, he's shooting blanks."

{¶9} Darrin Newman instructed his son to take the children into the backyard, behind a shed. Copeland remained where he was standing, believing Appellant was shooting blanks. When Appellant returned, Copeland did not move. Newman yelled to her father for help when she saw Copeland was "like paralyzed" and "scared". Darrin Newman grabbed Copeland and pulled him into the house. Appellant followed into the house, shooting. As the door flew open, Appellant shot Copeland, striking him in the head above his left ear. Copeland fell to the ground, his eyes and mouth opened. Darrin Newman checked Copeland's pulse and began CPR as Copeland was still breathing. Meanwhile, Appellant ran back to his vehicle and instructed Bethune to drive off. The two eventually went their separate ways.

{¶10} Several people called 911. Officer John Mitchell of the Massillon Police Department responded to a "shots fired" call. When he arrived at the Johnson Street address, he observed Copeland with a gunshot wound to the head, lying on the kitchen floor. EMTs transported Copeland to Aultman Hospital where he died of a massive brain injury four days later.

{¶11} Police recovered three .32 caliber Smith and Wesson bullets at the scene: one live bullet in the front yard, one spent bullet in a car parked in the driveway, and one spent bullet in a neighboring home. Police also recovered the bullet lodged in Copeland's brain. Police recovered and seized Appellant's Cadillac. Appellant's fingerprints were lifted from items in the vehicle. Eye witnesses identified Bethune as

the driver of the Cadillac. Bethune made several statements to the police, implicating himself and identifying Appellant as Copeland's killer. Police learned Appellant had fled to the Washington D.C./Virginia area to an aunt's residence. Appellant ultimately returned to the area and was arrested.

{¶12} The trial court instructed the jury on the applicable law, including the lesser included offense of murder. The trial court denied Appellant's request for an instruction on the lesser included offense of voluntary manslaughter, finding the evidence did not warrant the instruction. After hearing all the evidence and deliberations, the jury found Appellant guilty as charged. The trial court sentenced Appellant to life in prison without parole and an additional three years for the firearm specification.

{¶13} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

{¶14} "I. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT A CONVICTION, AND THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶15} "II. THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER.

{¶16} "III. THE TRIAL COURT PLAINLY ERRED IN IMPOSING MAXIMUM PRISON TERMS FOR APPELLANT'S CONVICTIONS."

I

{¶17} In the first assignment of error, Appellant argues his conviction for aggravated murder with a firearm specification was against the sufficiency and manifest

weight of the evidence. Specifically, Appellant claims the State failed to prove beyond a reasonable doubt he acted with "prior calculation and design", a necessary element of the crime.

{¶18} In *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, superseded by constitutional amendment on other grounds in *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held: "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is 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." *Id.* at paragraph two of the syllabus.

{¶19} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541 superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668, citing *State v. Martin* (1983), 20

Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶20} Appellant was convicted of aggravated murder, in violation of R.C. 2903.01(A), which reads:

{¶21} "(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy."

{¶22} Prior calculation and design requires a scheme designed to implement the calculated decision to kill. *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph 2 of the syllabus. There is no bright line test as each case depends upon the particular facts and circumstances existing therein. *State v. Taylor* (1997), 78 Ohio St.3d 15, 19-20.

{¶23} Sometime around Memorial Day, 2009, Appellant and Copeland had an argument because Copeland spoke with Appellant's girlfriend, Laquesha Driver. Two days prior to the shooting, Appellant arrived at the home of Aubrey Williams, and complained to Darrin Newman and Williams that Copeland was "messing with" his girlfriend. Appellant called Driver the night before the shooting and repeatedly asked her if she was with Copeland.

{¶24} The next day, June 25, 2009, Copeland was driving around and saw Appellant at a gas station. Copeland decided to stop to talk to Appellant about Appellant's "beef" with him. The conversation became heated, and ended with Copeland telling Appellant to meet him at Newman's house. Appellant arrived at approximately 5:00 pm. Copeland was not at the house. Appellant was asked to leave,

which he did. He returned a short time later after seeing Copeland arrive, and informed Copeland he was going to kill him.

{¶25} We find Appellant's act of bringing a gun to Newman's house coupled with the preexisting strained relationship he had with Copeland is sufficient evidence of prior calculation and design. See, *State v. Claytor* (1991), 61 Ohio St.3d 234. Based upon the foregoing and the facts as set forth supra, we find Appellant's conviction was neither against the manifest weight nor the sufficiency of the evidence.

{¶26} Appellant's first assignment of error is overruled.

II

{¶27} In his second assignment of error, Appellant contends the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter.

{¶28} An instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support *both* an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Robb* (2000), 88 Ohio St.3d 59, 74, 723 N.E.2d 1019 (emphasis added). Thus, if the jury can reasonably find the state failed to prove one element of the charged offense beyond a reasonable doubt but that the other elements of the lesser included offense were proven beyond a reasonable doubt, a charge on the lesser included offense is required. *Id.*

{¶29} Trial courts have broad discretion in determining whether the evidence adduced at trial was sufficient to warrant a jury instruction. *State v. Morris,* Guernsey App. No. 03CA29, 2004-Ohio-6988, reversed on other grounds, 109 Ohio St.3d 313, 847 N.E.2d 1174, 2006-Ohio-2109; *State v. Mitts* (1998), 81 Ohio St.3d 223, 228, 690 N.E.2d 522. "When reviewing a trial court's jury instructions, the proper standard of

review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims,* Cuyahoga App. No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. A trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction. *State v. Lessin* (l993), 67 Ohio St.3d 487, 494, 620 N.E.2d 72. An "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore,* supra.

{¶30} Upon our review of the record, we find the trial court did not abuse its discretion by not giving a jury instruction on the lesser included offense of voluntary manslaughter. The record clearly supports the jury's finding Appellant purposely and with prior calculation and design caused the death of Matthew Copeland. We find the evidence did not support an acquittal on the greater charge of aggravated murder. We further find the evidence did not demonstrate reasonably sufficient provocation by Copeland to cause Appellant to kill his victim while under sudden passion or a sudden fit of rage. Appellant bore the burden of persuading the fact finder, by a preponderance of the evidence, he acted while under the influence of sudden passion or sudden fit of rage, either of which was brought about by serious provocation occasioned by Copeland. We agree with the trial court, the evidence Appellant claims to support the giving of the lesser included offense instruction was legally insufficient to establish serious provocation to commit the murder of Copeland. See, *State v. Rhodes* (1992), 63 Ohio St.3d 613, syllabus.

{¶31} Appellant's second assignment of error is overruled.

III

{¶32} In his final assignment of error, Appellant argues the trial court erred in imposing the maximum terms of incarceration.

{¶33} In *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and discussed the affect of the *Foster* decision on felony sentencing. The *Kalish* Court explained, having severed the judicial fact-finding portions of R.C. 2929.14 in *Foster,* "trial 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." *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne,* 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. "Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2)." *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13. See also, *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶34} "Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and

convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Kalish* at paragraph 14.

{¶35} In reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, appellate courts must use a two-step approach. “First, they must 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. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard .” *Id.* at paragraph 4.

{¶36} The *Kalish* Court ultimately found the trial court's sentencing decision was not contrary to law. “The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law.” *Kalish* at paragraph 18. The Court further held the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and there was “nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable”. *Id.* at paragraph 20.

{¶37} We find Appellant's sentence is not contrary to law. The trial court expressly stated in its November 24, 2009 Found Guilty by Jury and Sentence Imposed, it considered the overriding purposes of felony sentencing set forth in R.C. 2929.11 and considered the seriousness and recidivism factors set forth in 2929.12. Furthermore, Appellant's sentences are within the permissible statutory ranges.

{¶38} Having satisfied step one, we next consider whether the trial court abused its discretion in selecting the sentence. *Kalish,* at ¶ 4, 19, 896 N.E.2d 124. 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, 450 N.E.2d 1140.

{¶39} We find the trial court did not abuse its discretion. The trial court considered the statutory factors under R.C. 2929.11 and 2929.12. The trial court also considered the factual background of the case; and Appellant's long history of crimes involving guns.

{¶40} Based upon the foregoing, Appellant's third assignment of error is overruled.

{¶41} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Hoffman, J.

Edwards, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DESHAWN BETHUNE	:	
	:	
Defendant-Appellant	:	Case No. 2009CA00301

For the reasons stated in our accompanying Opinion, the judgment of the Stark County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY