

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
JOSHUA NORFLEET	:	Case No. 2016CA0009
	:	
Defendant - Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING:	Appeal from the Coshocton County Court of Common Pleas, Case No. 2016-CR-0016
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT:	December 15, 2016
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APPEARANCES:

For Plaintiff-Appellee

JASON W. GIVEN
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For Defendant-Appellant

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Baldwin, J.

{¶1} Defendant-appellant Joshua Norfleet appeals his conviction and sentence from the Coshocton County Court of Common Pleas on one count each of aggravated burglary, carrying a concealed weapon, having weapons while under disability, and tampering with evidence and two counts of kidnapping. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 29, 2016, the Coshocton County Grand Jury indicted appellant on one count of aggravated burglary in violation of R.C. 2911.12(A)(2), a felony of the first degree, four counts of kidnapping in violation of R.C. 2905.01(A)(3), felonies of the first degree, and one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2), a felony of the fourth degree. Appellant also was indicted on one count of having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree, one count of tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree, and one count of improperly discharging a firearm at or into a habitation in violation of R.C. 2923.161(A)(1), a felony of the second degree. The aggravated burglary count contained a firearm specification. At his arraignment on March 9, 2016, appellant entered a plea of not guilty to the charges contained in the indictment.

{¶3} Thereafter, a jury trial commenced on April 12, 2016. At the trial, Brittany Harris testified that on February 3, 2016, she was staying with Linda Murray at Murray's house. Harris testified that she had been staying at the house for about a month and that although she had used drugs while at Murray's house, she was not using or under the

influence of drugs on February 3, 2016. Harris further testified that Samantha Crenshaw and Carrie Sickles were at Murray's house on such date.

{¶4} Harris testified that she was in her bedroom, Murray and Sickles were in Murray's bedroom and Crenshaw was sleeping in front of the living room door on an air mattress. According to Harris, she was woken up by someone beating on the door. After no one closer to the door answered it, Harris got up and asked who was there. After a person responded "Josh", Harris, thinking that it was Josh Edie who lived in the house, unlocked and opened the door about three inches. Transcript at 176. Outside, Harris saw three African-American men. One of the men was appellant and the other two were his brothers. Harris testified that she asked the men who they were there for and that they did not respond. When she went to close the door, the three men pushed their way into the house. Harris noticed that the first one in, who was appellant, had a gun in his pants.

{¶5} When asked what happened after the men pushed the door open, Harris testified that appellant "put the gun to my chest and told me to sit the fuck down on the couch." Transcript at 178. Harris testified that appellant and his brothers had lived across the street from her growing up and that appellant was wearing a white t-shirt and white bandanna. According to Harris, the men began asking "Where's he at? Where's that nigga at? We know he is in here somewhere." Transcript at 179. She testified that she did not know who they were talking about and that appellant's brother, Willie, was yelling at Samantha Crenshaw. At the time, Willie had a dark object in his waistband.

{¶6} Harris testified that Linda Murray came out of her room and told the men to leave. Appellant continued searching while brandishing a gun and went into Murray's bedroom. Harris testified that after appellant exited the bedroom, he went over to

Samantha Crenshaw, knelt down and put the gun down by her head while Crenshaw was on the air mattress under a blanket. Crenshaw, according to Harris, tried to cover her face with the blanket and rolled towards the wall so that she was not facing appellant. After appellant shot the gun near Crenshaw's head, the men ran out of the house.

{¶7} On cross-examination, Harris admitted that she knew that drugs were being sold out of Murray's house and that people were coming to the house to buy drugs. She testified that crack and cocaine were being sold and that she had used both of the substances before while living at the house. Harris testified that she used drugs two or three times a week and that the other women living in the house also used drugs.

{¶8} The next witness to testify was Linda Murray. Murry testified that she had used crack cocaine for a long time but was not using drugs or under the influence of drugs on February 3, 2016. When asked, she testified that she did not sell drugs out of her house and that she had known appellant and his brothers for approximately 20 years. Murray testified that she did not hear knocking on the door but then heard a commotion in her front room. She testified that she told the men to "get the F out of my house" but that they did not leave. Transcript at 212. According to Murray, appellant "kept saying 'Where's her at? Where's he at.'" Transcript at 212-213. When she asked appellant who he was talking about, appellant indicated "Josh." She then told appellant that Josh was not there. Murray testified that she did not know who appellant was talking about, but that a man named Josh Edie comes to her house. She testified that appellant was wearing a white t-shirt, white bandanna and a jacket.

{¶9} Murray also testified that all three men had guns and that while appellant's gun was in his hand, she was unsure where the other two had their guns. When asked

what happened after appellant left her bedroom, she testified that she heard a shot. Murray, when asked why she did not call 911 when appellant first came into her bedroom, testified that she was scared. Murray testified that she did not want to go into the front room because she did not know if Samantha Crenshaw was dead or not. She testified that she heard the three men making comments directed towards Crenshaw about her robbing them. After the men left and Murray came out of her bedroom, she found a hole in the air mattress and the floor and a bullet casing. Murray called 911. She testified that she did not feel free to leave her house when the three men came in with guns and thought that if she did not cooperate, they might shoot everyone.

{¶10} On cross-examination, Murray testified that she used crack cocaine two or three times a month, but was not still using crack cocaine. While she admitted that drugs were sold out of her house, she testified that Josh Edie sold the drugs, not her. When asked why Samantha Crenshaw was sleeping the whole day on February 3, 2016, Murray testified that Crenshaw was “coming off of heroin.” Transcript at 232. She stated that she did not hear appellant knocking on the door and did not know if he knocked or whether Harris let him in. Murray agreed that she had a criminal record for trafficking in drugs.

{¶11} At trial, Samantha Crenshaw testified that she had a history of drug use and had used meth and weed. She testified that she was using drugs when staying with Murray and had been using drugs since she was 16 years old. Crenshaw denied using drugs or being under the influence of drugs on February 3, 2016. When asked why she slept all day on February 3, 2016, Crenshaw testified that it was normal for her to do so when she did not have drugs. When asked about the first thing that she remembered, Crenshaw testified that she woke up to the three men coming in and asking where “he”

was at. According to Crenshaw, appellant knelt down in front other, pulled out his gun, said “this is gangsta”, and shot the gun while she was on the air mattress along the wall by the front door. Transcript at 252. She testified appellant ripped off the blanket that was over her head before the gun went off.

{¶12} Crenshaw further testified that Harris was sitting on the couch when the men first came into the house and that they told Harris to sit down. The men kept asking where “he” was at. Crenshaw testified that she was not injured, that she did not hear anyone invite the men into the house, and that she had never seen them at Murray’s house prior to the date in question.

{¶13} On cross-examination, Crenshaw testified that she used drugs four days of the week and that she did not hear anyone knock on the door. She further testified that she did not see Harris open the door. While no one told her that she could not leave the house, Crenshaw, when asked if she was restrained in any way, testified that the three men had guns.

{¶14} After Crenshaw testified, appellee moved for a nolle prosequi concerning counts 9 (improperly discharging a firearm at or into a habitation) which was granted.

{¶15} Carrie Goff (aka Sickles) next testified that Murray was her aunt and that she was staying at Murray’s on the night of February 3, 2016. She admitted using cocaine and crack, but denied either using drugs or being under the influence of drugs on February 2, 2016 and February 3, 2016. Goff, on cross-examination, testified that she did not hear anyone else knock on the door that night other than Missy Wright, who had stopped in that evening.

{¶16} Detective Garrison Bryant, during the ensuing investigation, reviewed a video of Murray's house taken by a neighbor across the street. The Detective had received information that appellant was wearing a white bandanna and white T-shirt. The video showed a man wearing a white bandanna and a white shirt under a jacket. The Detective found a .40 caliber shell casing in the living area of Murray's residence and a bullet hole in the pillow that was on top of the air mattress that Samantha Crenshaw was positioned on during the incident. The pillow contained gunshot residue. The air mattress also contained a bullet hole. In the basement area of the house, under the area where Crenshaw was sleeping, Detective Bryant located a bullet hole in the ceiling and located a copper jacket of a bullet.

{¶17} After appellant was apprehended, a bullet was found in the vehicle that the three men had been driving that matched the kind and caliber of the shell casing found in Murray's residence. However, the weapon that was discharged at Murray's house was never located. The clothing that appellant was wearing at the time of his apprehension matched the descriptions that were given by the eyewitnesses. Gunshot residue was located on the left cuff of appellant's coat.

{¶18} At trial, appellant testified in his own defense. Appellant admitted that he had a criminal record and had been convicted of carrying a concealed weapon and involuntary manslaughter. He had been in prison for ten years. When asked why he went with his two brothers to Murray's house, appellant testified that his oldest brother needed to stop there for an unknown reason. Appellant testified that he knew Murray and had been to her house before and that someone opened the door after he knocked. Appellant denied forcing his way into the house or having a gun on him that night.

{¶19} At the conclusion of the evidence and the end of deliberations, the jury, on April 13, 2016, found appellant guilty of aggravated burglary with a firearm specification, of kidnapping both Brittany Harris and Samantha Crenshaw, of carrying a concealed weapon, of having weapons while under disability and of tampering with evidence. The jury found appellant not guilty of the other two of the counts of kidnapping.

{¶20} Pursuant to a Judgment Entry filed on April 15, 2016, the trial court sentenced appellant to ten years in prison for aggravated burglary with and additional three years for the firearm specification, to ten years on each of the two counts of burglary and to seventeen months for carrying a concealed weapon. The trial court also sentenced appellant to thirty months each for tampering with evidence and having weapons while under disability. The trial court ordered that appellant's sentences for aggravated burglary with the firearm specification, the two counts of kidnapping, and tampering with evidence be served consecutively while the other sentences run concurrently. Thus, appellant was sentenced to an aggregate prison sentence of over 35 years.

{¶21} Appellant now raises the following assignments of error on appeal:

{¶22} I. APPELLANT'S CONVICTION FOR BURGLARY, KIDNAPPING, HAVING A WEAPON UNDER DISABILITY, CARRYING A CONCEALED WEAPON, AND TAMPERING WITH EVIDENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶23} II. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE SENTENCES AS THE COURT FAILED TO ENGAGE IN THE REQUISITE THREE PART ANALYSIS REQUIRED TO SENTENCE A DEFENDANT TO

CONSECUTIVE SENTENCES BY FAILING TO FIND ANY OF THE THREE FACTORS LISTED IN ORC 2929.14(C)(4)(a)-(c) APPLIED.

I

{¶24} Appellant, in his first assignment of error, argues that his convictions for aggravated burglary, kidnapping, carrying a concealed weapon, having a weapon while under disability, and tampering with evidence are against the manifest weight of the evidence.

{¶25} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the “thirteenth juror,” and after “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 overturned and a new trial ordered.” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997–Ohio–52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.* We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 237 N.E.2d 212 (1967). The trier of fact “has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page.” *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997–Ohio–260, 674 N.E.2d 1159.

{¶26} ‘While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against

the manifest weight or sufficiency of the evidence.’ *State v. Naugle*, 5th District Stark No.2008–CA–00190, 2009–Ohio–3268 citing *State v. Craig*, 10th Dist. No. 99AP–739, 2000 WL 297252 (Mar. 23, 2000), *3, quoting *State v. Nivens*, 10th Dist. No. 95APA09–1236, 1996 WL 284714 (May 28, 1996), 3 .

{¶27} Appellant was convicted of aggravated burglary in violation of R.C, 2911.11(A)(2). Such section states as follows:

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:...

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶28} Appellant specifically argues that his conviction for aggravated burglary is against the manifest weight of the evidence because an individual who was going to break into a residence would not knock on the front door, because no one other than Brittany Harris, who was furthest from the front door, heard the knocking on the front door, because he did not enter the residence to commit a criminal offense, and because the four witnesses, all drug users, were not credible.

{¶29} As is stated above, Brittany Harris testified that appellant forced his way into the house and that he had a gun on his person at the time. Testimony was adduced that, while in the house, appellant restrained and terrorized both Harris and Samantha

Crenshaw and fired a gun at Crenshaw's head. While appellant argues that the women who testified were drug users who were not credible, the juror, as trier of fact, was in the best position to assess their credibility.

{¶30} Appellant also argues that his conviction for kidnapping Brittany Harris and Samantha Crenshaw was against the manifest weight of the evidence. Appellant was convicted of kidnapping in violation of R.C. 2905.01(A)(3):

{¶31} “(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

{¶32} “(3) To terrorize, or to inflict serious physical harm on the victim or another[.]”

{¶33} R.C. 2905.01(A)(3):

{¶34} Appellant initially contends that Harris could not claim to have been kidnapped when she was free to leave since the front door was open, but did not do so. However, Harris testified that she was concerned that the other three women would have been shot if she left to get help, that appellant, who had a gun, told her to sit down on the couch, and that she was worried that she would be shot if she did not listen. Thus, there was testimony that appellant, by force or threat, restrained Harris' liberty with purpose to terrorize her. Appellant also argues that Samantha Crenshaw could not have been kidnapped since she was asleep throughout the experience and testified that she did not see anyone restrained. However, Crenshaw testified that appellant knelt beside her and put a gun to her head. While she was never told that she could not leave, she testified, when asked if she was restrained in any fashion, that all of the men had guns. We find

that appellant's convictions for kidnapping were not against the manifest weight of the evidence. There was evidence, if believed, that appellant restrained the liberty of both women to terrorize them.

{¶35} Appellant next argues that his convictions for carrying a concealed weapon, having a weapon while under disability, and tampering with evidence are against the manifest weight of the evidence.

{¶36} Appellant was convicted of carrying a concealed weapon in violation of R.C. 2923.12(A)(2). Such section states as follows: "(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:...(2) A handgun other than a dangerous ordnance;.." He also was convicted of having weapons while under disability in violation of R.C. 2923.13(A)(2). Such section states as follows:

(A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:...

(2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.

{¶37} Finally, appellant was convicted to tampering with evidence in violation of R.C. 2921.12(A)(1). Such section states as follows: "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following: (1) Alter, destroy, conceal, or remove any record, document,

or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;..”

{¶38} Appellant, in support of his argument, notes that he was arrested approximately 20 minutes after he left Murray’s house, but no gun was ever found on him. He further argues that the gunshot residue test could not conclusively show that he had discharged a firearm and that Detective Bryant could not conclusively say that the hole in the floor was made when the residents of Murray’s house said it was made or the type of gun used to make the hole. He also maintains that the testimony of Brittany Harris, who testified that appellant discharged the firearm, was not credible.

{¶39} However, there was testimony from the witnesses that appellant had a gun on his person when he entered the house. Samantha Crenshaw testified that appellant held a gun to her head and fired a shot. There was evidence that bullet holes were found in the air mattress, pillow and floor. In the basement area of the house, under the area where Crenshaw was sleeping, Detective Bryant located a bullet hole in the ceiling and located a copper jacket of a bullet. Testing revealed gunshot residue on the jacket that appellant was wearing. Moreover, the bullet found in the vehicle in which appellant was apprehended was the same make and caliber as the shell casing found at the residence. Appellant had approximately 20 to 30 minutes after the 911 call was placed within which to dispose of the weapon.

{¶40} With respect to having a weapon while under disability, we note that a copy of the sentencing entry in Coshocton County Court of Common Pleas Case No. 05-CR-094 was admitted as an exhibit, showing that appellant had been convicted of involuntary manslaughter with a firearm specification, making him weapons disabled.

{¶41} In short, with respect to appellant's first assignment of error, we find that we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. While there may be been minor inconsistencies between the stories of the four women who testified, the jury, as trier of fact, was in the best position to assess their credibility. The jury clearly found their testimony, in conjunction with the video surveillance and other testimony, credible.

{¶42} Appellant's first assignment of error is, therefore, overruled.

II

{¶43} Appellant, in his second assignment of error, maintains that the trial court erred in sentencing him to consecutive sentences. Appellant specifically asserts that the trial court failed to engage in the requisite three-part analysis for sentencing one to consecutive sentences by failing to find that any of the three factors listed in R.C. 2929.14(C)(4)(a)-(c) applied.

{¶44} The two-step approach set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008–Ohio–4912, 896 N.E.2d 124 no longer applies to appellate review of felony sentences. We now review felony sentences using the standard of review set forth in R.C. 2953.08. *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22; *State v. Howell*, 5th Dist. Stark No. 2015CA00004, 2015–Ohio–4049, ¶ 31. R.C. 2953.08(G)(2) provides we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2929. 20(I), or the sentence is otherwise contrary to law. See, also, *State v.*

Bonnell, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.2d 659, ¶ 28. Clear and convincing evidence is that evidence “which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118(1954), paragraph three of the syllabus. “Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *Id.* at 477, 120 N.E.2d 118.

{¶45} Appellant, in his brief, specifically asserts that the consecutive sentences were contrary to law because the trial court failed to find that any of the three factors set forth in R.C. 2929.14(C)(4) applied.

{¶46} R.C. 2929.14 (C) states as follows:

(4) 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. (Emphasis added).

{¶47} Contrary to appellant's argument, the trial court, in the case sub judice, found that two of the factors set forth in R.C. 2929.14(C)(4)(a)-(c) applied. The trial court specifically found that consecutive sentences were necessary because "the offenses were committed while the offender was on post release control for the offense of involuntary manslaughter with a firearm specification." Transcript at 477. The trial court further found that consecutive sentences were necessary to protect the public from future crime by appellant due to his significant juvenile and adult history of criminal conduct.

{¶48} Based on the foregoing, appellant's second assignment of error is overruled.

{¶49} Accordingly, the judgment of the Coshocton County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Wise, J. concur.