[Cite as *State v. Coleman*, 2005-Ohio-318.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio — Court of Appeals No. S-02-041

Appellee — Trial Court No. 02-CR-614

v.

Andre J. Coleman — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: January 28, 2005

* * * * *

Thomas L. Steirwalt, Sandusky County Prosecuting Attorney and Norman P. Solze, Assistant Prosecuting Attorney, for appellee.

David H. Bodiker, State Public Defender and James Foley, Assistant Public Defender, for appellant.

* * * * *

KNEPPER, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas that found appellant guilty of one count each of murder with a firearm specification, felonious assault with a firearm specification, possession of drugs, having a weapon while under disability, tampering with evidence and failure to comply with the order or signal of a police officer following trial to a jury. For the reasons that follow, this court affirms appellant's convictions but remands the matter for resentencing.

{¶ 2} In support of his appeal, appellant sets forth the following assignments of error:

{¶ 3} "I. The trial court unreasonably and unconstitutionally deprived Mr. Coleman of a self-defense instruction despite ample testimonial evidence of a violent, drunken mob, his bloodied companion, and that he himself was struck in the head as a crowd surged towards him. (Tr. 712)

{¶ 4} "II. The trial court erred by failing to instruct the jury on the lesser charge of aggravated assault despite a specific request from counsel, thereby denying Mr. Coleman the ability to seek an involuntary manslaughter charge in violation of his right to due process of law. (Tr. 701-710)

{¶ 5} "III. Mr. Coleman's right to due process was violated when improper evidence suggesting that he was a crack cocaine dealer was introduced as evidence against him at trial. Mr. Coleman's trial counsel provided ineffective assistance of counsel for failing to object to the testimony in violation of the Sixth Amendment to the United States Constitution. (Tr. 140-142)

{¶ 6} "IV. The trial court erred in violation of R.C. 2929.14(C) and due process of law when it ordered Mr. Coleman to serve maximum terms of incarceration without making the requisite statutory findings. (See Sentencing Transcript, passim)"

{¶ 7} Additionally, by leave of this court, appellant submitted the following supplemental assignment of error:

{¶ 8} "V. Mr. Coleman's rights under the Sixth and Fourteenth Amendments to the United States Constitution were violated when the trial court imposed non-minimum,

maximum, and consecutive sentences without affording Mr. Coleman the right to have a jury determine the factual findings required to support the imposition of such sentences. (See Sentencing Transcript, passim)"

{¶ 9} The undisputed facts relevant to this appeal are as follows. On July 11, 2002, appellant was indicted on one count of murder with a firearm specification; two counts of attempted murder with firearm specifications; two counts of felonious assault with firearm specifications; one count of failure to comply with the order or signal of a police officer; one count of tampering with evidence; one count of having a weapon while under disability; and one count of possession of drugs. The charges arose from a brawl involving a crowd of people that broke out shortly after 2:00 a.m. on July 6, 2002, in the parking lot outside a bar in Freemont, Ohio. As a result of the fight, one man died from a gunshot in the chest and another man was shot in the leg. After the shootings, appellant and his companions fled the scene in their car. Appellant threw his gun out the car window and failed to immediately pull over when the police pursued him. When appellant was searched incident to arrest, police recovered marijuana and cocaine from his pockets. The case was tried to a jury and on October 18, 2002, appellant was found guilty of all counts except attempted murder and one of the felonious assault charges. Appellant was sentenced on November 14, 2002, as outlined under the relevant assignments of error below.

{¶ 10} In his first assignment of error, appellant asserts that the trial court erred by refusing to instruct the jury on self-defense. Appellant argues that he merely fired several

warning shots into the air in an act of self-defense as a violent, drunken mob surged toward him in the parking lot outside the bar.

{¶ 11} Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co*. (1991), 61 Ohio St.3d 585. "*** [A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. Further, a determination as to jury instructions is a matter left to the sound discretion of the trial court. Id. "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an *** instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, at syllabus.

{¶ 12} To establish self-defense, a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger. *State v. Barnes* (2002), 94 Ohio St.3d 21; *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus.

{¶ 13} Self-defense is an affirmative defense under Ohio law. “The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R. C. 2901.05 is to inquire whether the defendant has

introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Melchior* (1978), 56 Ohio St.2d 15, paragraph one of the syllabus.

{¶ 14} After a thorough reading of the record in this case, we find that there was insufficient evidence to raise a question in the minds of reasonable men as to whether appellant acted justifiably in self-defense. Although appellant testified that he merely fired "warning shots" into the air as he stood in the parking lot that night, the testimony of several of the state's witnesses indicated otherwise. Several witnesses saw appellant remove a gun from the trunk of his car and put it in the waistband of his pants. Based on the testimony, it appears that appellant was not in fear of death or great bodily harm when he took the gun from his trunk and that he could have withdrawn from the crowd and avoided any danger or confrontation at that time. There was no testimony that either of the two victims or anyone else in the crowd had guns or other weapons, nor was there testimony that either of the victims confronted appellant or had any verbal or physical contact with him. James Jackson, who was shot in the leg, testified that right before appellant shot him he saw another person hit appellant. Ralph Barnett testified that when appellant took the gun out of his trunk, the crowd scattered. Barnett stated that appellant put the gun in his waistband and the crowd started walking toward him; he then saw appellant point the gun at the crowd and fire at Jackson and Williamson, get into his car and fire one more time as he drove away. Lee McKinstry, Jr., testified that he saw appellant get punched, pull the gun out of his waistband and shoot into the crowd twice, then turn and shoot once in the opposite direction. No one testified that appellant fired

his gun in the air as appellant claims. There simply was no testimony that would have indicated a bona fide belief by appellant that he was in imminent danger of death or great bodily harm and certainly no evidence that appellant was faced with a choice between having to confront such danger, if indeed it existed, or use deadly force. We find that the trial court did not err by refusing to instruct the jury on self-defense and, accordingly, appellant's first assignment of error is not well-taken.

{¶ 15} In his second assignment of error, appellant asserts that the trial court erred by failing to instruct the jury on aggravated assault as an offense of an inferior degree to felonious assault. Appellant argues that he presented evidence that he was provoked by a violent crowd and that "his state of mind was one of fear, passion and self-preservation."

{¶ 16} R.C. 2903.12 defines aggravated assault as follows:

{¶ 17} "(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:

{¶ 18} "(1) Cause serious physical harm to another or to another's unborn;

{¶ 19} "(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."

{¶ 20} As stated above, "*** [A] court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster* (1981), 66 Ohio St.2d 266, 271. Further, a determination as to jury instructions is a matter left to the sound discretion of the trial court. *Guster*, supra.

{¶ 21} The essential elements of felonious assault, with which appellant was charged, and aggravated assault are identical. It is the mitigating circumstance of "serious provocation occasioned by the victim" that distinguishes the two offenses and makes aggravated assault an offense of inferior degree of felonious assault. Given the proper evidence, an accused can be found guilty of aggravated assault under R.C. 2903.12 when he is charged with felonious assault under R.C. 2903.11. Appellant asserted at trial that there was sufficient evidence of serious provocation to warrant a jury instruction on aggravated assault.

{¶ 22} "Aggravated assault, R.C. 2903.12, contains elements which are identical to the elements defining felonious assault, R.C. 2903.11, except for the additional mitigating element of serious provocation. Thus, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given to the jury. (R.C. 2945.74 and Crim. R. 31[C], construed and applied.)" *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph 4 of the syllabus.

{¶ 23} Appellant herein did not present sufficient evidence of provocation to warrant a jury instruction on aggravated assault.

{¶ 24} ""Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and

circumstances that surrounded him at the time." *State v.. Mabry* (1982), 5 Ohio App.3d 13, paragraph five of the syllabus.

{¶ 25} The trial in this case was devoid of testimony that either of the victims provoked appellant to a fit of rage or sudden passion. In fact, appellant testified that he did not even know who he shot or when it happened. His testimony was that he fired shots into the air, which does not indicate that he was incited or aroused to use deadly force by either of the victims. Appellant simply did not testify that either of the victims incited him to sudden passion or a sudden fit of rage. If believed, his testimony at most indicated that he was frightened by the crowd around him.

{¶ 26} The trial court denied appellant's request for an instruction on aggravated assault, finding that appellant "* * * presented no evidence whatsoever of being in a fit of rage or sudden passion brought on by any behavior of either of the alleged victims of Felonious Assault." We agree and find that none of the events that transpired in the parking lot on the night of July 6, 2002, were reasonably sufficient, as a matter of law, to incite or arouse appellant to shoot either victim. Thus, an instruction to the jury on aggravated assault was not warranted by the evidence presented in this case and was properly refused. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 27} In his third assignment of error, appellant asserts that the trial court erred by allowing evidence indicating that he was a crack cocaine dealer, and that trial counsel was ineffective for failing to object to the testimony. Appellant argues that the testimony of state's witness, Ralpheal Reynolds, that appellant sold crack cocaine to someone in the parking lot just before the shootings was inadmissible "other acts" testimony offered only

to attack his character. Appellant argues that, while he was charged with possession of drugs for having cocaine and marijuana in his pocket when he was arrested after the shootings, the vast difference between drug possession and drug dealing makes the admission of evidence that he sold drugs that night prejudicial and irrelevant. He further argues that trial counsel should have objected to the testimony.

{¶ 28} Witness Reynolds testified that he was in the parking lot at the time of the shooting. As to the events leading up to the shooting, Reynolds stated that he was standing in the parking lot when he saw a car full of women he described as "crackheads" pull into the lot. Reynolds stated that he walked up to the car and when the women said they wanted to buy some crack cocaine he called appellant over because he knew appellant had some with him. When the prosecutor asked Reynolds how he knew appellant had the cocaine, Reynolds said it was because he had just seen appellant make another sale. Trial counsel did not object to this testimony.

{¶ 29} It is well settled that "the trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court." *State v. Issa* (2001), 93 Ohio St.3d 49, 64.

{¶ 30} Appellant was charged with possession of cocaine at the time of his arrest and a violation of R.C. 2925.11(A) and (C)(4)(a), possession of drugs, was one of the offenses for which he was on trial. Accordingly, testimony that appellant had cocaine in his possession when he was arrested after the shootings was relevant to the issues before the jury. The testimony as to appellant selling crack cocaine to the women in the parking

lot was offered as part of Reynolds' description of appellant's actions immediately prior to the shootings. Further, once Reynolds testified that appellant was in possession of drugs that night, it was not improper for the prosecutor to ask him how he knew that. There was no testimony as to any drug activity on appellant's part at any time other than in the minutes just prior to the shootings.

{¶ 31} Based on the foregoing, we find that appellant was not prejudiced by the testimony that he sold drugs before the shooting, and this argument is without merit. Further, based on our conclusion that the testimony was not prejudicial, we find that trial counsel was not ineffective for failing to object, and appellant's second argument is also without merit. Accordingly, appellant's third assignment of error is not well-taken.

{¶ 32} In his fourth assignment of error, appellant asserts that the trial court erred by imposing maximum sentences for his convictions without making the findings required by R.C. 2929.14(C) at his sentencing hearing. Appellant was sentenced as follows: for murder, 15 years to life, plus a 3-year gun specification; for felonious assault, eight years, plus a 3-year gun specification; for failure to comply with the order or signal of a police officer, eighteen months; for tampering with evidence, five years; for having a weapon under disability, 12 months; and for possession of drugs, 12 months. Each of the foregoing sentences is the maximum allowable for the offense according to law. The trial court ordered that the murder and felonious assault sentences be served consecutively and that the remaining four sentences be served concurrently with the felonious assault prison term.

{¶ 33} When imposing a felony sentence, the trial court must consider the overriding purposes of felony sentencing, which are to protect the public from future crime and to punish the offender. R.C. 2929.11(A). Accordingly, the court "shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." Id. Additionally, the law requires that a sentence imposed for a felony shall be reasonably calculated to achieve the purposes of felony sentencing, "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." R.C. 2929.11(B). Finally, a trial court shall not impose a sentence based on the race, ethnicity, gender, or religion of the offender. R.C. 2929.11(C). Further, the trial court must consider the factors found in R.C. 2929.12(B) and (C) to determine how to accomplish the purposes embraced in R.C. 2929.11. The record reflects that the trial court in this case considered the factors relevant to the principles and purposes of felony sentencing.

{¶ 34} This court has stated that the imposition of more than the minimum sentence, or the imposition of the maximum authorized sentence, requires that the sentencing court make clear on the record that it has considered all of the factors required by statute. See *State v. Weidinger* (June 30, 1999), 6th Dist. No. H-98-035. R.C. 2929.14(B) provides that if the court elects or is required to impose a prison term on the offender, "* * * the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless * * * the offender was serving a prison

term at the time of the offense or previously had served a prison term * * *." The trial court in this case complied with the relevant statute by finding on the record that appellant had previously served several prison terms for felony convictions in Ohio.

{¶ 35} As to the imposition of a maximum sentence, pursuant to R.C. 2929.14(C), the sentencing court is required to do two things: (1) make a finding that the offender committed the worst form of the offense or that the offender poses the greatest likelihood of committing future crimes; and (2) state the reasons that support its findings on the record during the sentencing hearing. See R.C. 2929.14(C); R.C. 2929.19(B)(2)(d); and *State v. Newman*, 9th Dist. No. 20981, 2003-Ohio-4754, citing *State v. Comer*, 99 Ohio St.3d 463, 2003-Ohio-4165.

{¶ 36} Upon review of the record, we find, with respect to the court's imposition of maximum sentences for each of appellant's convictions that the trial court failed to find on the record that appellant committed the worst form of each offense or that he poses the greatest likelihood of committing future crimes. See R.C. 2929.14(C); R.C. 2929.19(B)(2)(d); *Newman*, supra, and *Comer*, supra. Appellant was convicted of six different offenses, ranging from murder, an unclassified felony, to having a weapon under disability, a fifth-degree felony. In this case, the trial court merely stated, without referring specifically to any of the offenses, that "there's a very good likelihood that the Defendant could commit future crimes * * *." That language, by itself, is insufficient to meet the requirements of R.C. 2929.14(C) for the imposition of a maximum sentence.

{¶ 37} We further find that, in order to comply fully with R.C. 2929.14, the trial court should have made the required finding as to each of the six maximum sentences.

{¶ 38} As to the consecutive nature of appellant's murder and felonious assault sentences, in order to comply with R.C. 2929.14 the trial court was required to: 1) find that consecutive sentences are necessary to protect the public from future crime or to punish the offender; 2) find that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and 3) find the existence of one of the enumerated circumstances in R.C. 2929.14(E)(4)(a) through (c) . Pursuant to *Comer*, supra , the trial court must make these findings orally at the sentencing hearing and must give its reasons in support of the findings at the hearing.

{¶ 39} This court has carefully reviewed the record of proceedings in the trial court. The trial court stated that "* * * consecutive terms are necessary, since the crimes were committed while he was under sanction, the harm is so great that a single terms does not adequately reflect the seriousness of his conduct, and the Defendant's criminal history shows that consecutive terms are necessary to protect the public." However, the court failed to find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public * * *." See R.C. 2929.14(E)(4) .

{¶ 40} Because strict technical compliance with R.C. 2929.14(E)(4) is required by *Comer*, supra, for imposition of consecutive sentences, we must reluctantly reverse the sentences imposed in this case and remand to the trial court for resentencing. As this

court has stated before, while a remand under these circumstances for what most likely will be a rote recitation of the omitted words appears to serve no real purpose, especially since the missing statutory language as cited above can arguably be inferred from the trial court's statements at sentencing, unless the General Assembly acts to amend the language of R.C. 2929.14(E)(4) or otherwise clarify the sentencing guidelines, trial judges must follow the technical and strict requirements of the relevant statutes by reciting certain language at each sentencing hearing pursuant to *Comer*, supra.

{¶ 41} R.C. 2953.08(G)(1) states that if the sentencing court was required to make the findings required by R.C. 2929.13(B) or R.C. 2929.14(E)(4), relative to the imposition of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal "* * * shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings." Having found that the trial court failed to make the necessary findings pursuant to R.C. 2929.14(C) and (E)(4), we remand the matter to the trial court to make the required findings with respect to each of appellant's maximum sentences and with respect to the two consecutive sentences. Accordingly, we find appellant's fourth assignment of error well-taken.

{¶ 42} Appellant's supplemental assignment of error challenges the constitutionality of appellant's sentences on the basis of the recent decision of the United States Supreme Court in *Blakely v. Washington* (2004), ___ U.S. ___, 124 S.Ct. 2531, which overturned a defendant's sentence that was based on Washington statutory law that permits an enhanced sentence beyond the standard range if the judge makes certain

factual findings. The United States Supreme Court held that increasing the penalty for a crime based upon a fact which was not determined by the jury violates the Sixth Amendment right to trial by jury. However, in light of our finding as to appellant's fourth assignment of error, this assignment of error is moot at this time.

{¶ 43} Upon consideration whereof, we find that appellant was prejudiced and this case is remanded to the Sandusky County Court of Common Pleas for resentencing in accordance with this decision. The judgment of the trial court is affirmed in all other respects. Costs of this appeal are assessed to appellee.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Richard W. Knepper, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
CONCUR.
JUDGE