[Cite as *State v. James*, 2014-Ohio-2689.]

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

State of Ohio — Court of Appeals No. L-12-1284

Appellee — Trial Court No. CR0201201495

v.

Kevin James — **DECISION AND JUDGMENT**

Appellant — Decided: June 20, 2014

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, Evy M. Jarrett and Louis E. Kountouris, Assistant Prosecuting Attorneys, for appellee.

Patricia Horner, for appellant.

* * * * *

JENSEN, J.

Statement of the Case

{¶ 1} The facts relevant to the appeal are as follows: Around 8:30 p.m. on March 16, 2012, defendant-appellant, Kevin James, was a passenger in the backseat of a

Ford Explorer "SUV" driven by Ms. Tamikka Allen. Ms. Allen stopped at the Gas & Go convenience store on the corner of Bancroft and Cherry Streets in downtown Toledo, Ohio. Appellant remained in the backseat.

{¶ 2} A group of young people were gathered in the parking lot. Among them were Ms. Allen's cousin, Montell "Tello" Allen, and the victim, Montrese Moore. Tello and Montrese Moore shook hands, and Mr. Moore said, "you all not from around here. You all got to get from over here." Mr. Moore then repeated his comment. From the backseat of the car, appellant responded, "you know what it is?" Mr. Moore asked, "what?" and appellant answered, "You know what it is, this Noiya Boy." Ms. Allen explained at trial that "Noiya Boy" is a gang. To that, Mr. Moore said, "No, this can't, Manor Boy." Ms. Allen testified that the conversation was gang-related and continued between the two of them.

{¶ 3} About this time, Robee Ware arrived at the carryout by bicycle. Mr. Ware was a longtime friend of Montrese Moore's. Ware noticed Moore standing "pretty close" to the vehicle, talking to appellant. Ware grabbed his friend and "started walking away." At that point, Ware saw the appellant "pull out a gun" from the backseat of the car. Ware testified, "And when we was walking away, I turned around to look and he shot me." Ware fell to the pavement. Appellant then shot Mr. Moore, who was also attempting to flee from appellant's pointed gun. Despite being shot, Mr. Moore ran away.

{¶ 4} Also injured was Creonna Ballard, whose foot was grazed by a bullet. Ms. Ballard also saw appellant in the backseat of the SUV pointing a gun, but she did not see

him shoot. She testified that Tello was standing behind the SUV and also brandished a gun.

{¶ 5} Off duty Toledo Police Officer John Mugler was working as a security officer that evening. Officer Mugler estimated that he was about 100 yards from the carryout when he heard four gunshots fired all "at one." Within 30 seconds, he arrived on the scene and found Robee Ware lying on the ground.

{¶ 6} An ambulance was also in the vicinity. Ambulance driver, Cherie Gommel, and her colleague were driving past the carryout when they heard four gunshots and saw a crowd quickly disperse. The driver saw Mr. Moore stumble across Bancroft Street before he collapsed in a field. She and her colleague tended to Moore and transported him to the nearby hospital. He died shortly thereafter from a gunshot wound to the heart.

{¶ 7} After the shootings, Ms. Allen panicked and pulled away from the gas station. Moments later, she stopped the car and told everyone to "get out." Two hours later, she reported the incident to homicide investigator, Detective Robert Schroeder, at the police station. She told him that she witnessed the shootings from the front seat of her car and that the shooter's name was "DK," which was later identified as appellant's nickname. Ms. Allen also identified appellant from a photo array two days after the shooting.

{¶ 8} Detective Schroeder visited Mr. Ware in the hospital four days after the shootings, once Ware's breathing tube was removed. When Schroeder asked who shot him, Ware responded that "Bo" had done it. On the witness stand, Ware said that he has

no memory of making such a remark. Detective Schroeder also showed Ware a picture of appellant, whom Ware identified as the shooter. Ware told the detective that he recognized appellant as a previous neighbor. Ware remained in the hospital for three weeks and underwent three abdominal surgeries. The bullet remains lodged in his abdomen.

{¶ 9} The Lucas County Grand Jury indicted appellant on March 30, 2012. He was arrested and taken into custody on April 2, 2012.

{¶ 10} A number of law enforcement officials testified at trial. Special Investigations Unit Detective Jason Lenhardt testified that the proximity of the four shell casings found at the crime scene suggested that the shooter fired the weapon from a stationary position. Lenhardt also testified that a latent fingerprint taken from the SUV's right window and driver's side matched appellant's prints.

{¶ 11} Todd Wharton works as a forensic scientist for the Bureau of Criminal Identification and Investigation. Mr. Wharton testified that the four cartridge cases were .25 automatic caliber and that all four came from the same weapon. Wharton also compared the bullet removed from the decedent's body with the bullet removed from Ms. Ballard's shoe. The bullets were consistent with the size and weight as being fired from a .25 automatic caliber. Wharton testified to a reasonable degree of scientific certainty that the bullets were fired from the same gun as were the shell casings. The weapon was never recovered.

{¶ 12} Detective Schroeder reviewed and preserved the surveillance video maintained by the carryout. The video was shown to the jury. It shows a hand come up from the backseat of the SUV vehicle followed by a gunshot flame from the pistol.

{¶ 13} On August 30, 2012, a jury found appellant guilty of murder in violation of R.C. 2903.02(B) and 2929.02, an unspecified felony, with firearm specifications pursuant to R.C. 2941.145 and two counts of felonious assault in violation of R.C. 2903.11(A)(2), both felonies in the second degree, with firearm specifications pursuant to R.C. 2941.145. The trial court sentenced appellant to a prison term of 15 years to life for the murder conviction (Count I) and to terms of 7 and 5 years, respectively, for the felonious assault convictions (Counts III and IV). The court ordered that the sentences be served consecutively. An additional mandatory 3-year term for each of the firearm specifications was imposed as to Counts I, III, and IV, to be served consecutively to one another, and to the terms of the underlying convictions.

{¶ 14} Defendant's trial counsel filed a notice of appeal on October 1, 2012. Defendant was then appointed appellate counsel who filed an amended notice of appeal on October 29, 2012. Appellant sets forth three assignments of error:

> I. Appellant's Conviction was not supported by sufficient evidence thereby violating his Due Process Constituional Rights as set forth in the 5th and 15th Amendments to the United States Constituion and Sections 10 and 16 of the Ohio State Constituion. [SIC]

II. Appellant's Conviction was against the manifest weight of the evidence violating Due Process Consitutional Rights as set forth in the 5th and 15th Amendments to the United States Constituion and Sections 10 and 16 of the Ohio State Constituion. [SIC]

III. Defendant-Appellant's Sentence was an Abuse of Discretion and Due Process Constituional Rights in the 5th and 15th Amendments to the United States Constituion and Sections 10 and 16 of the Ohio State Constituion. [SIC]

Sufficiency and Manifest Weight of the Evidence

{¶ 15} Appellant's first and second assignments of error will be considered together. The term "sufficiency" of the evidence presents a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The relevant inquiry in such cases 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." *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, *following Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 16} Appellant was convicted of felony murder and felonious assault. The felony murder statute provides that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of

violence that is a felony of the first or second degree * * *." R.C. 2903.02(B). The felonious assault statute provides that, "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon * * *." R.C. 2903.11(A)(2).

{¶ 17} Here, the prosecution presented direct and circumstantial evidence supporting the prosecution's case that appellant committed the crimes of which he was accused. Direct evidence is evidence based on personal observation. *State v. Rister*, 6th Dist. Lucas No. L-09-1191, 2012-Ohio-516, ¶ 12. Here, the state presented two eyewitnesses, Tamikka Allen and Robee Ware, who saw appellant shoot his weapon from the backseat of the SUV, striking three people. Circumstantial evidence was also presented. "Circumstantial evidence is the proof of certain facts and circumstances in a given case, from which the trier of fact may infer other connected facts that usually and reasonably follow according to the common experience of mankind." (Citation omitted.) *State v. Nobles*, 6th Dist. Lucas No. L-10-1172, 2011-Ohio-5041, ¶ 19. Here, the prosecution presented forensic evidence suggesting that only one weapon was fired. Video surveillance indicated that the shooter fired the weapon from inside the backseat of the SUV and also helped eliminate other potential suspects. Fingerprint evidence also tied appellant to the backseat of the vehicle.

{¶ 18} The prosecution presented evidence which, if believed, would establish beyond a reasonable doubt that appellant caused physical harm to Moore, Ware, and Ballard by means of a deadly weapon and that his actions proximately caused the death

of Moore. Therefore, we find there was sufficient evidence to support the conviction. Appellant's first assignment of error is not well-taken.

{¶ 19} Notwithstanding a determination that a trial court's judgment is supported by sufficient evidence, an appellate court may conclude that the judgment is against the manifest weight of the evidence. The Ohio Supreme Court has summarized the standard for reversal of a criminal conviction on the ground that it is against the manifest weight of the evidence. It has held,

> The court, 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 reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 20} "In determining whether a conviction is against the manifest weight of the evidence, we do not view the evidence in a light most favorable to the state. Instead, we sit as a 'thirteenth juror' and scrutinize 'the factfinder's resolution of the conflicting testimony.'" *State v. Robinson*, 6th Dist. Lucas No. L-10-1369, 2012-Ohio-6068, ¶ 15, citing *Thompkins*, 78 Ohio St.3d at 388, 678 N.E.2d 541. Reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id.* at 387. "A reversal based on the weight of the evidence,

moreover, can occur only after the State both has presented *sufficient evidence* to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment." (Emphasis in original.) *Id.* at 388, quoting *Tibbs v. Florida*, 457 U.S. 31, 43, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

{¶ 21} In support of his argument that his conviction was against the manifest weight of the evidence, appellant argues that the state's evidence was "inconsistent and confusing" for the jury.

{¶ 22} Appellant states that Ms. Ballard identified Tello Allen as the shooter. Appellant is incorrect. Ms. Ballard was asked twice at trial whether she ever saw anyone shoot, and she answered "no."

{¶ 23} Second, appellant argues that "Robee Ware * * * testified that when Toledo Police interviewed him while he was at the hospital he told them 'Bo' shot him." Again, appellant misstates the record. Under cross-examination, when Ware was asked whether he told Detective Schroeder at the hospital whether the shooter was named "Bo," he testified, "I don't remember it. I can't recall me saying that."

{¶ 24} Third, appellant argues that the evidence presented "could indicate two different types of guns were used." Appellant is referring to the testimony of Todd Wharton. Wharton testified to a reasonable degree of scientific certainty that the four cartridge cases came from the same weapon. Under cross-examination, Mr. Wharton testified that it was "possible" that there could have been another weapon.

{¶ 25} Finally, appellant argues that the fingerprint evidence "does not provide clarity as to who the gunman was." Appellant concedes, however, that the fingerprint evidence ties appellant to the SUV and that shots were fired from the SUV.

{¶ 26} While a reviewing court considers the credibility of the witnesses in a weight of the evidence review, "that review must nevertheless be tempered by the principle that weight and credibility are primarily for the trier of fact." *State v. Pena,* 6th Dist. Lucas No. L-12-1309, 2014-Ohio-423, ¶ 22, quoting *State v. Kash,* 1st Dist. No. CA2002-10-247, 2004-Ohio-415, ¶ 25. The trier of fact is in the best position to "view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Pena* at ¶ 22, quoting *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). A jury may believe all, part, or none of a witness's testimony. *Id.* at ¶ 22.

{¶ 27} The jury in this case found that the testimony of the state's witnesses and evidence were credible and sufficient for conviction. After reviewing the record, this court finds that there was substantial, probative evidence upon which the jury could conclude that the elements of felony murder and felonious assault had been proven beyond a reasonable doubt. Appellant's conviction is not against the manifest weight of the evidence. Appellant's second assignment of error is found not well-taken.

Sentencing

{¶ 28} In his final assignment of error, appellant challenges the consecutive nature of the sentences. The court sentenced appellant to a term of 15 years for murder, seven

years for his felonious assault of Mr. Ware, and five years for his felonious assault of Ms. Ballard. Appellant argues that because the shootings took place at the same time and place, they constituted "one transaction and occurrence and as such the sentences should have been ordered to be served concurrent to one another." Appellant cites no authority to support his position. Appellant does not challenge the additional three-year terms imposed as to each count for the gun specifications, also ordered to be served consecutively.

{¶ 29} Appellant was sentenced on August 30, 2012. At that time, the standard of review for felony sentences was that established by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124*; see also State v. Barnhart*, 6th Dist. Ottawa No. OT-10-032, 2011-Ohio-5685, ¶ 14, fn. 1 (Applying *Kalish's* two-prong test.)[1] Under *Kalish*, appellate courts apply a two-step approach when reviewing a felony sentence. *Kalish* at ¶ 4. First, a court 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." *Id.* at ¶ 4. If the trial court's sentence is contrary to law, "the appellate court's review is at an end. The sentence cannot stand." *Id.* at ¶ 15. If, however, the first prong is satisfied, then the trial

[1] R.C. 2953.08(G)(2) took effect and became law on March 22, 2013. The statute directly defines and establishes the proper appellate standard of review in felony sentencing cases. For a discussion regarding the differences between the standards set forth in *Kalish* and R.C. 2953.08(G)(2), *see State v. Tammerine*, 6th Dist. Lucas No. L-13-1081, 2014-Ohio-425, ¶ 9-15.

court's decision shall be reviewed under an abuse of discretion standard. *Id.* at ¶ 4. 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." *Id.* at ¶ 19, quoting *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 30} The trial court explicitly found that it had considered the principles and purposes of sentencing as set forth in R.C. 2929.11. It also properly considered the seriousness of defendant's crimes, noting defendant's "blatant disrespect for human life" exhibited by his "randomly shooting in a crowded gas station." The record also shows that the trial court properly applied and advised defendant of his lifetime parole and, if applicable, his three-year postrelease control. Finally, the permissible statutory sentencing range for murder is between fifteen years to life pursuant to R.C. 2929.02. The permissible statutory sentencing range for a felony of the second degree, such as the conviction underlying Counts III and IV, is between two and eight years. R.C. 2929.14(A)(2). Therefore, we find that the fifteen-year term of incarceration as to Count I and the seven and five-year terms as to Counts III and IV, respectively, fall squarely within the permissible range. In sum, the record does not show that appellant's sentence is clearly and convincingly contrary to law. *Kalish* at ¶ 18.

{¶ 31} Likewise, we find no abuse of discretion in the trial court's decision. There were sufficient facts contained in the record to support the court's finding as to the seriousness of appellant's conduct, the danger he posed to the public, and the great harm

he caused. In short, there is nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable.

{¶ 32} Lastly, with regard to appellant's argument that the shootings constituted one transaction or occurrence and therefore should have been ordered to be served concurrently, not consecutively, we disagree. "Although a defendant may have a single goal, if he commits multiple offenses, or even the same offense, against different victims during the same course of conduct, the offenses are not allied and could be separately punished." *State v. Swiergosz,* 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 40 (6th Dist.), citing *State v. Mitchell,* 6th Dist. Erie No. E-09-064, 2011-Ohio-973, ¶ 41-42 ("In the present case, appellant's conduct put three separate people at risk of serious harm. Relevant precedent clearly supports a finding that the crimes against each victim are of dissimilar import with separate animus."). For these reasons, we find that the trial court did not err in imposing consecutive sentences.

{¶ 33} Based upon the foregoing, we find that the disputed sentence was not clearly and convincingly contrary to law, nor was it an abuse of discretion. Therefore, we find appellant's third assignment of error not well-taken.

{¶ 34} The judgment of the Lucas County Court of Common Pleas is affirmed. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

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JUDGE