

STATE OF OHIO, COLUMBIANA COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 CO 47
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
KAREEM JAMES aka	)	
CALVIN WINSTON,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court, Case No. 05CR286.

JUDGMENT: Affirmed.

APPEARANCES:  
For Plaintiff-Appellee:

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Prosecuting Attorney  
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JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: August 19, 2009

VUKOVICH, P.J.

¶{1} Defendant-appellant Kareem James appeals from his conviction of felonious assault with a firearm specification which was entered in the Columbiana County Common Pleas Court. He raises issues concerning prosecutorial misconduct, weight of the evidence and sufficiency of the evidence. These arguments are without merit. Appellant also contends that his sentence should be remanded where the trial court failed to state that it considered the general guidance sentencing statutes. We disagree and hereby hold that a silent record raises the presumption that the sentencing court considered R.C. 2929.11 and 2929.12. In accordance, appellant's conviction and sentence are affirmed.

#### STATEMENT OF THE CASE

¶{2} Appellant was indicted for felonious assault with a firearm specification for attempting to cause physical harm to Derrick George. This charge arose from a shooting incident which occurred on Friday, September 16, 2005 at 1:00 p.m. in East Liverpool, Ohio. At that time, police responded to multiple calls concerning gunshots being fired by the occupants of a maroon or purple Dodge Intrepid at the intersection of McKinnon and St. Clair Avenues.

¶{3} At trial, witnesses testified that the front passenger, who was described as young, short, stocky and African-American, exited the Dodge Intrepid and fired shots at a red Pontiac waiting at the intersection behind the Intrepid. (Tr. 330, 343, 345, 373-374, 376). The red vehicle, driven by Mr. George, was later found to have been hit by multiple bullets. (Tr. 407, 410). The red Pontiac reversed, turned around and sped away. At such time, another occupant of the Doge Intrepid started firing from the driver's side without exiting the vehicle. (Tr. 343). The Intrepid then turned and sped north on St. Clair Avenue.

¶{4} A couple testified that they saw the purple Intrepid stopped on Jennings Avenue containing only a driver. (Tr. 291, 307). They heard someone yell to get in the car and then saw two black males walk over a hill and enter the vehicle, which then peeled out and tailgated the couple's vehicle. (Tr. 291-292, 304). When a police car passed and then turned around, the Intrepid started to pass the couple's vehicle

through construction barrels at which time another police car angled across the road to stop the Intrepid. (Tr. 294, 305-306).

¶{5} When the police removed the occupants from the vehicle, appellant was the front seat passenger, Wazir Minter was the driver, and Kevin Street, who had been shot at a bar in town four days earlier, was the backseat passenger. Appellant admitted that he was the front seat passenger. (Tr. 235). He theorized that the shots were fired at, not from, the Intrepid. He denied that he had a gun, and he claimed that their vehicle did not stop after the shooting until it was stopped by police. (Tr. 236).

¶{6} With the help of the couple who witnessed the Intrepid stopped on Jennings, the police were able to locate the burn marks on the street from where the Intrepid peeled out. A police dog discovered two firearms in the brush: a Glock 9mm semiautomatic, which had been reported stolen in a house burglary a week prior, and a .22 caliber revolver containing 9 spent shell casings. (Tr. 230-231, 237-238). At the scene of the shooting, the police recovered eight shell casings, which they found had been fired from the Glock 9mm discovered in the brush. (Tr. 317, 446). Gunshot residue was discovered on appellant's shirt and on one of the shirts worn by the backseat passenger. (Tr. 472).

¶{7} On September 14, 2006, a jury found appellant guilty as charged. In an April 30, 2007 entry, the court sentenced appellant to the maximum of eight years for felonious assault consecutive to a mandatory three-year sentence for the firearm specification. Appellant filed untimely notice of appeal, but this court granted leave to appeal on February 14, 2008.

#### ASSIGNMENT OF ERROR NUMBER ONE

¶{8} Appellant sets forth four assignments of error, the first of which provides:

¶{9} "THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE OF PROSECUTORIAL MISCONDUCT."

¶{10} Appellant takes issue with various comments made during opening statements and closing arguments. In evaluating a claim that certain statements constituted prosecutorial misconduct, the key consideration is the fairness of the trial, not the culpability of the prosecutor. *State v. Hill* (1996), 75 Ohio St.3d 195, 203. A defendant must show that the remarks were improper and that the remarks prejudicially affected his substantial rights. *State v. Treesh* (2001), 90 Ohio St.3d 460,

464. A prosecutor is entitled to a certain degree of latitude in opening statements and closing arguments. *State v. Ballew* (1996), 76 Ohio St.3d 244, 255. The state can present a fair comment on the evidence and suggest what can be inferred from the evidence. *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 149. Moreover, any contested remarks must be viewed in their context. *Treesh*, 90 Ohio St.3d at 466.

¶{11} Initially, appellant complains that the prosecutor's opening statement mentioned September 11, 2001 and contests the prosecutor's labeling of the shooting as an incident that changed the way one looks at the community as it constitutes a new level of violence. (Tr. 192-193). The closing argument made a similar statement about the shooting constituting a life-changing event which transformed the community. (Tr. 495, 527).

¶{12} These are fair comments on the facts of the case. A shooting from a person who alights from a car in the middle of an intersection in the middle of a Friday afternoon near residences and businesses can be thought of as a new level of violence and a community-changing event. Although the comparison to September 11, 2001 "on a much smaller scale" may be exaggerated, there is no indication that the jurors were inflamed or misled into convicting appellant of a street shooting based upon their feelings regarding the terrorist attack.

¶{13} In fact, no objection was raised regarding these statements. Instead, defense counsel responded to them in his statements to the jury. As such, any error was waived in the absence of plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶84. Use of the discretionary plain error doctrine requires an obvious error that affected substantial rights under exceptional circumstances. Crim.R. 52(B); *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. It cannot be utilized unless the outcome clearly would have been different if not for the error. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166. The aforementioned statements do not constitute the exceptional circumstances envisioned by the Supreme Court.

¶{14} Next, appellant contests remarks within the prosecutor's rebuttal portion of closing arguments. Appellant suggests that the prosecutor compared the jury's role to that of Helen Keller's teacher, a role that requires holding an actor accountable. The state responds that this was merely an illustration used to describe the concepts of responsibility, accountability and consequences.

¶{15} First, the prosecutor's statements about the teacher were meant to distinguish between the role of the jury and that of the judge. The prosecutor noted that defense counsel suggested in voir dire that the jury's role was to provide a fair trial. The prosecutor disagreed, stating that such was the judge's function. (Tr. 526). The story about a teacher imposing consequences was specifically said to be related to the judge's function of imposing consequences, not the jury's function. The prosecutor specified that the jury's function was to tell the judge if the defendant should be held accountable for his actions. (Tr. 527).

¶{16} Thus, contrary to appellant's suggestion, the jury was not misled in the state's defining its role. Furthermore, any problems with the remarks were waived when no objection was entered. (Tr. 526-527). Plain error is not apparent. Although the story may have been an odd way to close a case, there is no indication that it resulted in inflamed passions or prejudices; nor would the outcome have clearly been different in the absence of the Helen Keller story. See *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶84-85 (story that lacked relevance and did not rebut evidence, as it asked jury to suppose the defendant killed a whole stadium rather than just two people, was improper but made no difference in the outcome).

¶{17} Appellant then argues that the state accused him of being a gangster in its opening statement. However, the remark was solely that the testimony would show that the shooter pulled out a handgun "gangster style, which is, hand turned sideways". (Tr. 194). Thus, appellant was not labeled a gangster; his shooting style was merely labeled. Moreover, the evidence showed that the gun was held sideways during the shooting. (Tr. 373-374). Finally, any error was waived as no objection was entered, and outcome-determination prejudice is not apparent.

¶{18} Appellant complains that the state implied that he was the one who stole the 9mm and that the state should not have mentioned a shooting at the University Club days earlier. However, the evidence established that the 9mm had been stolen in a house burglary that occurred on September 8, 2005. (Tr. 230-231). Counsel objected in closing; however, there was no objection during the presentation of this testimony. The state did not ask the jury to infer that appellant stole the gun; the state merely reiterated the established fact that the gun used in the street shooting had been stolen. (Tr. 496).

¶{19} Similarly, the state did not suggest that appellant committed the prior shooting. In fact, the opposite was true. The facts established that appellant's codefendant, Kevin Street, was the victim of the prior shooting. (Tr. 255-257). This provided a possible retaliation motive for the later street shooting. In any event, no objection was entered to the statement regarding the University Club shooting. In fact, it was defense counsel who first broached the subject in his cross-examination of a detective. (Tr. 250). As such, this argument is wholly without merit.

¶{20} Next, appellant complains that the state suggested in opening that an eyewitness would testify that appellant was the shooter. He notes that no one actually positively identified him. First, this argument is waived due to the lack of objection. Second, the prosecutor specifically informed the jury that the witnesses cannot identify appellant but noted that appellant was admittedly the front seat passenger and was the only occupant of the vehicle who was very short. (Tr. 194). Thus, appellant misconstrues the prosecutor's remark.

¶{21} Appellant then complains that the state said that the gun was in the Intrepid when in fact no gun was ever recovered from inside the car. (Tr. 523). However, this argument is without merit as appellant again mistakes the facts. The state did not say that guns were recovered in the car, but rather the state inferred from the evidence that guns must have been in the car prior to the stop of Jennings. This was a proper characterization of the evidence. The state's evidence showed that guns had been in the car before, during and after the shooting until they hid them in the bushes on Jennings Avenue just prior to being pulled over.

¶{22} Finally, appellant urges that the prosecutor violated the "golden rule" which prohibits an argument that the jury should place themselves in the position of the victim. The prosecutor did ask the jury to put themselves in the witnesses' position. (Tr. 497). However, he did not ask them to put themselves in the victim's position. Moreover, the point of the exercise was not to elicit sympathy or arouse passions. Rather, it seemed to be an attempt to explain the sequence of the events and to show the various points of view of each witness. Regardless, any error was waived when the defense failed to lodge an objection. For all of these reasons, this assignment of error is overruled.

ASSIGNMENTS OF ERROR NUMBERS TWO & THREE

¶{23} Appellant's second and third assignments allege:

¶{24} "THE EVIDENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

¶{25} "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION."

¶{26} Sufficiency of the evidence and weight of the evidence are distinct legal concepts. When both are raised, the legal sufficiency of the evidence is reviewed first. Thus, we begin by stating that sufficiency is a question of law dealing with the adequacy of the evidence to legally sustain a conviction. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. In conducting a sufficiency review, this court views the evidence in the light most favorable to the prosecution. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. We then determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.*

¶{27} The relevant essential elements of felonious assault are to knowingly cause or attempt to cause physical harm by means of a deadly weapon. R.C. 2903.11(A)(2). The testimony established that the front seat passenger of a maroon or purple Dodge Intrepid stood in the street with a black handgun and fired multiple shots behind him at a red Pontiac, which reversed in response to the shooting. The red Pontiac was discovered with bullet marks and holes in the vicinity of the driver, e.g. the driver's side windshield and hood.

¶{28} Appellant mainly contests his identity as the shooter. However, he admitted that he was present during the shooting at the intersection, and he admitted that he was the front seat passenger in the Dodge Intrepid. This is enough to pass the test of sufficiency.

¶{29} Moreover, the Intrepid in which appellant was riding was seen to have stopped prior to being spotted by police. Two guns were found in the area where the two men were spotted reentering the Intrepid. The black Glock 9mm was established to have fired the bullets whose casings were discovered in the street at the scene of the shooting. The shooter was described as short, stocky, young and African-American, and appellant was said to be the only occupant of the vehicle which fit this description. Viewed in the light most favorable to the state, a rational person could

find that appellant was the shooter. As such, there was sufficient evidence to sustain a conviction for felonious assault.

¶{30} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences 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 conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387. Still, determinations of witness credibility and the assigning of weight to various pieces of evidence are issues that remain primarily the province of the factfinders. *State v. DeHass* (1967), 10 Ohio St.2d 230, ¶1 of syllabus. This concept is so important that an unanimous appellate court is required to reverse on manifest weight grounds after a jury trial. *Thompkins*, 78 Ohio St.3d at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution.

¶{31} Contrary to appellant's position, the fact that no guns were found in the Dodge Intrepid in which he was riding when stopped by police is not some highly favorable piece of evidence. The discovery by the police dog of two guns, one of which was scientifically established as being the gun that ejected the nine shell casings found at the site of the shooting, combined with the testimony of the couple who witnessed the Intrepid on Jennings clearly established where the guns went.

¶{32} Testimony by some that the Dodge Intrepid was purple and by others that it was maroon is also not significant. When speaking of car colors, purple and maroon are nearly synonymous. The jury saw a picture showing the color of car and could judge for themselves the reason why different witnesses use a different word to describe the color. Moreover, it was explained that the color of the car was hard to pinpoint. Finally, appellant admitted to police that he was in the car when the shots were fired (he claimed that the shots were being fired at him, not by him) and he was indisputably in the car when it was pulled over.

¶{33} The jury's decision to disbelieve appellant's claim to police that he did not fire a gun and never exited the car was not contrary to the manifest weight of the evidence. He admitted that he was the front seat passenger and more than one witness placed the front seat passenger as the initial shooter who was outside the vehicle while shooting behind the vehicle. He was described as short and stocky,

words that describe appellant but not the other two occupants. The front seat passenger was also said to have been shooting a black gun that appeared to be a 9mm, and 9mm shell casings at the scene were fired by the 9mm discovered in brush off Jennings Avenue.

¶{34} After reviewing the entire transcript, weighing the evidence and the inferences that can be drawn therefrom, we conclude that the jury did not lose its way and create a manifest miscarriage of justice. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER FOUR

¶{35} Appellant's fourth assignment of error provides:

¶{36} "THE TRIAL COURT ERRED BY IMPOSING THE MAXIMUM SENTENCE."

¶{37} Appellant argues that his sentence should be reversed and remanded because the trial court failed to state that it considered the general guidance statutes, R.C. 2929.11 and 2929.12. He claims that at least a rote recitation that the court considered the statutory principles and factors is required by *State v. Arnett* (2000), 88 Ohio St.3d 208.

¶{38} We acknowledge that the appellate courts in this state, including this court, have changed positions on the subject of whether the sentencing court must express its consideration of R.C. 2929.11 and R.C. 2929.12 on the record or whether a silent record raises a rebuttable presumption that the court considered those statutes. See, e.g., *State v. Barnette*, 7th Dist. No. 06MA135, 2007-Ohio-7209, ¶25 (citing *Arnett* as requiring an indication in the record that the court considered the factors); *State v. Gant*, 7th Dist. No. 04MA252, 2006-Ohio-1469, ¶59-60 (utilizing *Adams* and *Cyrus* to hold that silent record allows presumption that statutes were considered); *State v. Jones*, 7th Dist. No. 04MA76, 2005-Ohio-6937, ¶39 (applying *Arnett* and holding that the court is required to state that it considered the statutes).

¶{39} As will be seen from the analysis below, this is a subject which is ripe for a definitive review by the Ohio Supreme Court. This case, where the sentencing court was absolutely silent on the topic both at sentencing and in its judgment entry, is the ideal case from which to resolve the issue.

¶{40} Initially, it should be noted that there is some dispute over whether *Arnett* affected (by implicitly overruling) the direct holding in *Adams* and other cases. That is,

*Adams* specifically held that a silent record raises the presumption that a trial court considered the factors in R.C. 2929.12. *State v. Adams* (1988), 37 Ohio St.3d 295, 297. This concept was reiterated in *Cyrus* where the Court addressed what must appear in the record to reflect that the trial court considered the sentencing guidelines. *State v. Cyrus* (1992), 63 Ohio St.3d 164, 165. The *Cyrus* Court quoted the *Adams* holding regarding a silent record, concluded that a statement that the court considered the guidelines is not required, and placed the burden on the defendant to come forward with evidence to rebut the presumption that the trial court considered the sentencing criteria. *Id.* at 166 (while noting that it is preferred practice to pass sentence with a statement that the sentencing criteria were followed).

¶{41} Thereafter, in *Arnett*, the Court recognized that “[t]he Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors.” *State v. Arnett* (2000), 88 Ohio St.3d 208, 215, citing R.C. 2929.12. However, without mentioning *Adams* or *Cyrus* or suggesting that there had been a change in precedent or statutory law, the *Arnett* Court added: “For this reason, the sentencing judge could have satisfied her duty under R.C. 2929.12 with nothing more than a rote recitation that she had considered the applicable age factor of R.C. 2929.12(B)(1).” *Id.*

¶{42} This latter statement has often been read as implicitly overruling *Adams* and *Cyrus*. Alternatively, it has been suggested that the S.B. 2 changes to the statute changed the trial court’s duty. See *State v. Hughes*, 6th Dist. No. WD-05-24, 2005-Ohio-6405, at ¶7. See, also, *Barnette*, 7th Dist. No. 06MA135 at ¶24, citing *State v. Pickford* (Feb. 22, 1999), 7th Dist. No. 97JE21 (noting that S.B. 2 deleted the provision that the factors “do not control the court’s discretion”). Notably, however, the statutes always contained the mandatory language that the sentencing court “shall consider” the contents of the statutes, and such mandatory language did not influence the Court in *Adams* or *Cyrus*.

¶{43} In any event, various recent changes in the case law have occurred that showed prompt reconsideration of the proper interpretation or application of *Arnett*. For instance, after recognizing the mandatory nature of R.C. 2929.11 and R.C. 2929.12, the *Foster* court noted that there is no mandate for judicial fact-finding in the general

guidance statutes and simply stated: “The court is merely to ‘consider’ the statutory factors.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶42. The *Foster* court did not state that the court is to “evinced consideration of the statutory factors”, which would have been more appropriate if some indication of the court’s consideration of the statutes were in fact required.

¶{44} This alone may not initiate the reconsideration of the effect of *Arnett*. However, the recent *Kalish* case contains certain statements that suggest *Arnett* does not stand for the proposition that the sentencing court must express on the record that it considered R.C. 2929.11 and R.C. 2929.12. Although the *Kalish* plurality pointed out that the sentencing court expressly stated that it considered R.C. 2929.11 and R.C. 2929.12, the plurality immediately inserted a footnote specifying:

¶{45} “Of course, where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes.” *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶18, fn. 4, citing *Adams*, 37 Ohio St.3d 296 at ¶3 of syllabus. (Emphasis added).

¶{46} A visiting appellate judge in *Kalish* disagreed, declaring that *Arnett* implicitly overruled *Adams*. *Id.* at ¶37 (Williamowski, J., concurring in judgment only). The “dissenting” portion of *Kalish*, in discussing how the trial court must carefully consider R.C. 2929.11 and R.C. 2929.12, stated: “Even though, except for downward departures, mandatory fact-finding is gone, a court *may* still, and usually will, create a record explaining why a particular sentence was selected.” *Id.* at ¶58 (emphasis added).

¶{47} This language does not suggest that the sentencing court must create a record stating or showing that it considered the factors. Rather, the dissenters’ statement suggests more of an agreement with the plurality’s *Adams* cite than an adoption of the concurring opinion’s statement that the court must expressly evince consideration of the general guidance statutes. See *State v. Esne*, 8th Dist. No. 90740, 2008-Ohio-6654, ¶10, fn.1 (“Given that the three members of the *Kalish* majority approved *Adams* and the three dissenting justices did not cite to *Adams*, we find no basis for concluding that *Adams* had been implicitly overruled.”).

¶{48} Furthermore, there is a recent decision out of this court that cites *Kalish* as standing for the proposition that a silent record raises the presumption that the trial court considered the factors. *State v. Gratz*, 7th Dist. No. 08MA108, 2009-Ohio-695, ¶9 (also finding that the sentencing court did in fact make statements that showed it considered the statutes). As aforementioned, the Eighth District interprets *Kalish* likewise. *Esne*, 8th Dist. No. 90740 at ¶10, fn.1.

¶{49} Finally, we recognize that other districts have held in the past that the reviewing court no longer presumes consideration of R.C. 2929.11 and R.C. 2929.12 from a silent record, and this court has utilized these cases as persuasive authority. However, many of these courts have recently applied the opposite rule and reverted to the *Adams* holding. See *State v. Federle*, 3d Dist. No. 15-09-01, 2009-Ohio-1916, ¶8; *State v. Reed*, 10th Dist. No. 08AP-20, 2008-Ohio-6082, ¶64, fn.4; *State v. Noble*, 5th Dist. No. 08CAC040018, 2008-Ohio-5556, ¶22; *State v. Franco*, 9th Dist. No. 07CA0090-M, 2008-Ohio-4651, ¶10-11; *State v. Greitzer*, 11th Dist. No. 2006-P-0090, 2007-Ohio-6721, ¶28; *State v. Sloane*, 2d Dist. Nos. 2005CA79, 2006CA75, 2007-Ohio-130, ¶20. The addition of *Kalish* to the mix makes an even stronger case for reversion to *Adams* and *Cyrus*.

¶{50} As such, we hold that reversal is not automatic where the sentencing court fails to provide reasons for its sentence or fails to state at sentencing or in a form judgment entry, “after considering R.C. 2929.11 and 2929.12”. We return to the *Adams* rule that a silent record raises the rebuttable presumption that the sentencing court considered the proper factors. We hereby adopt the Second District’s statement that where the trial court’s sentence falls within the statutory limits, “it will be presumed that the trial court considered the relevant factors in the absence of an affirmative showing that it failed to do so” unless the sentence is “strikingly inconsistent” with the applicable factors. *Sloane*, 2d Dist. Nos. 2005CA79, 2006CA75 at ¶20.

¶{51} In the case before us, appellant made no affirmative showing that the sentencing court failed to consider the proper purposes, principles and factors. Additionally, the eight-year maximum sentence here is not in the least bit inconsistent with those considerations. That is, appellant alighted from a vehicle that had stopped in traffic and opened fire in the middle of an intersection in the middle of the afternoon. He essentially attempted to murder the person in the car at which he was shooting as

bullets hit the driver's side windshield and the hood of the vehicle. Various bystanders could easily have been shot in the barrage of gunfire as well and evidence showed that a bullet may have entered a child's bedroom across the street. This shows a total disregard for human life. In addition, appellant's record was described by the state as "absolutely deplorable". (Sent. Tr. 5). In fact, appellant failed to appear for the second day of trial. After trial, he had to be apprehended for failing to appear, and he admitted that he "ran." (Sent. Tr. 5-6).

¶{52} Regardless of whether we apply the abuse of discretion or a clearly and convincingly contrary to law standard, appellant's sentence is affirmed. See *State v. Gray*, 7th Dist. No. 07MA156, 2008-Ohio-6592, ¶12-17; *State v. Mann*, 7th Dist. No. 08JE12, 2008-Ohio-6365, ¶19-24, citing and applying *Kalish*, 120 Ohio St.3d 23. The trial court's decision was not clearly and convincingly contrary to law as the statutes do not require express proof that the court considered them, and the court's imposition of a maximum sentence under the totality of the facts and circumstances was not an abuse of discretion.

¶{53} Under this same analysis, the sentence was not constitutionally disproportionate to the circumstances involved here. Finally, we note that the consecutive nature of the three-year firearm specification was mandatory and thus did not involve a discretionary decision. This assignment of error is overruled.

¶{54} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Waite, J., concurs in part, dissents in part; see concurring in part, dissenting in part opinion.

DeGenaro, J., concurs; see concurring opinion.

Waite, J., concurring in part and dissenting in part.

¶{55} I join in the majority's opinion affirming Appellant's conviction, however, I cannot agree with the decision affirming his sentence and must dissent for the following reasons. Following the enactment of S.B. 2 in 1996, various panels of this Court have concluded that amendments to R.C. 2929.12 effectively overruled the long-standing Supreme Court precedent, first announced in *State v. Adams* (1988), 37 Ohio

St.3d 295, 525 N.E.2d 1361, that a silent record raises the presumption that the trial court considered the factors set forth in that statute. See *State v. Pickford* (Feb. 22, 1999), 7th Dist. No. 97-JE-21, *State v. Barnette*, 7th Dist. No. 06 MA 135, 2007-Ohio-7209, *State v. Mayor*, 7th Dist. No. 07 MA 177, 2008-Ohio-7011, *State v. Jones*, 7th Dist. No. 05MA218, 2008-Ohio-3336.

¶{56} Post-*Foster*, we recognized the continuing viability of our holding in *Pickford*, supra, in *Barnette*, supra, where we cited *State v. Arnett* (2000), 88 Ohio St.3d 208, 724 N.E.2d 793 as implicitly overruling *Adams* and requiring that, “there at least be an indication in the record that the trial court considered the factors in R.C. 2929.12.” *Id.* at ¶25; *Mayor* at ¶39. In *Jones*, supra, we reasoned that the record must also reflect that the trial court had considered the factors in R.C. 2929.11 in order to survive appellate review. *Id.* at ¶13.

¶{57} The foregoing rule has been the law in this District for approximately ten years. Although *Adams* has been cited with favor by two panels since 1999, *State v. Gant*, 7th Dist. No. 04 MA 252, 2006-Ohio-1469, and *State v. Gratz*, 7th Dist. No. 08-MA-101, 2009-Ohio-695, in each case, this Court ultimately determined that the record contained evidence that the trial court had considered the general sentencing statutes. Furthermore, neither panel acknowledged the intra-District split concerning the “silent record” rule.

¶{58} The majority relies on the Supreme Court’s decision in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶26, to overturn established precedent in this District. While it is true that the plurality opinion (joined by two justices) cites *Adams*, supra, with favor in a footnote, the fourth member of the plurality, a visiting judge, concurred in judgment only, and recognized that *Adams* had been implicitly overruled in *Arnett*, supra. Despite the sharp disagreement regarding the status of the “silent record” rule between the plurality and concurring opinions in *Kalish*, the three dissenting justices provided no indication of their position on *Adams*.

¶{59} The majority in this case believes that the three dissenters in *Kalish* still consider *Adams* to be good law based upon the statement that, “[e]ven though, except for downward departures, mandatory fact-finding is gone, a court may still and usually will, create a record explaining why a particular sentence was selected.” *Kalish* at ¶58.

¶{60} The majority's opinion conflates articulating a reason for a particular sentence (which has always been discretionary) with stating on the record that R.C. 2929.11 and 2929.12 have been considered (which, according to *Pickford*, supra and its progeny, is mandatory).

¶{61} While appellate courts often cite a trial court's reasons for a particular sentence as evidence that the trial court has considered the general sentencing statutes, it does not follow that the two acts are interchangeable. In other words, simply because the *Kalish* dissenters acknowledged that a trial court has the discretion to provide an explanation for its sentence, it does not follow that placing into the record that the trial court considered R.C. 2929.11 and 2929.12 is also discretionary. I am not convinced that the dissenters in *Kalish* intended to hold that it is within a trial court's discretion to give no indication at all whether it has considered the general sentencing statutes.

¶{62} The majority cites at ¶47, *State v. Esner*, 8th Dist. No. 90740, 2008-Ohio-6654, for the proposition that, "[g]iven that the three members of the *Kalish* majority [sic] approved *Adams* and three dissenting justices did not cite to *Adams*, [there is] no basis for concluding that *Adams* has been implicitly overruled." While I agree that the authority of *Adams* is not entirely clear, this Court premised its holding in *Pickford*, supra, to interpret the amendments to S.B. 2. The oft-quoted "rote recitation" rule articulated in *Arnett*, supra, merely bolstered this Court's conclusion that *Adams* was no longer good law.

¶{63} Among the cases cited by the dissent in *Kalish*, are several post-*Foster* opinions from other districts wherein the appellate courts conclude that *Adams* is still good law. However, the law in this District has been otherwise since our first pronouncement in *Pickford*, supra, despite the alternative reasoning of some of our sister districts.

¶{64} Ironically, both members of the majority in this case chastised counsel for the appellant in *Mayor*, supra, for relying on case law from another district. In *Mayor*, the appellant argued that a trial court errs by merely asserting in its sentencing entry that it has considered R.C. 2929.11 and 2929.12. In reaching the opposite conclusion, the *Mayor* panel wrote, "Firstly, the Tenth District has since revised its

position to align with that of other districts. Secondly, it is the established position of this court that matters, not that of another district.” *Id.* at ¶39 (internal citation omitted).

¶{65} Of greater import, the majority in *Mayor* interpreted the dissenting opinion in *Kalish* as supporting the conclusion that a reference to the R.C. 2929.11 and 2929.12 satisfies the general sentencing statutory requirements. The *Mayor* Court wrote, “[t]he three dissenters on the applicable standard of review expressed no problem with the trial court’s judgment entry stating that it considered the purposes and principles in R.C. 2929.11 and the factors in R.C. 2929.12. See *id.* at ¶ 5, 18, 724 N.E.2d 793.” *Id.* at ¶40.

¶{66} The doctrine of stare decisis “provide[s] continuity and predictability in our legal system” and requires that appellate judges abide by their prior decisions in order to provide “a clear rule of law by which the citizenry can organize their affairs.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶43. Until a clear directive is issued from the Ohio Supreme Court regarding the authority of *Adams*, *supra*, I am unwilling to depart from a decade of established precedent in this District. Therefore, I respectfully dissent.

DeGenaro, J., concurs with concurring opinion.

¶{67} It appears that yet again, Sisyphus, in the form of an appellate panel, takes up the boulder that is post-S.B.2/*Foster/Kalish* felony sentencing and pushes it to the top of the mountain that is legal clarity in the hopes of reaching it and staying there.

¶{68} I concur in both the judgment and the reasoning of the majority. However, I write separately to address the dissent's mischaracterization of this court's reasoning in *State v. Mayor*, 7th Dist. No. 07 MA 177, 2008-Ohio-7011, and of the history of this district's opinions regarding the validity of *State v. Adams* (1988), 37 Ohio St.3d 295, 525 N.E.2d 1361. Moreover, when considering the validity of *Adams* through the prism of the *syllabus* of *State v. Arnett*, 88 Ohio St.3d 208, 2000-Ohio-302, 724 N.E.2d 793, and the text of the plurality opinion from *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, a clear directive from the Ohio Supreme Court is needed to resolve a widespread, unresolved debate within and among the

twelve appellate districts in this state: does a silent record create a presumption that the trial court considered the appropriate sentencing criteria which the defendant must overcome, or is the silence error?

¶{69} First, this court did not state in *Mayor* that the 1996 amendments from S.B.2 overruled *Adams*. And contrary to the dissent's contention, *Mayor* cannot be used to support the proposition that *Arnett* implicitly overruled *Adams*, or that a sentence is invalid absent some minimal indication from the trial court that it considered the factors in R.C. 2929.12. Instead, we held that a mention of the sentencing court's consideration of R.C. 2929.11 and R.C. 2929.12 in the sentencing entry was sufficient to survive appellate review. *Mayor* at ¶39. Saying that rote recitation is sufficient does not mean that it must be a mandatory minimum requirement. This is particularly so given *Mayor's* third basis for holding the sentencing entry was sufficient: that the plurality in *Kalish* "expressly abides" by the silent record presumption of *Adams*. *Mayor* at ¶40. Therefore, the majority's opinion is consistent with *Mayor*.

¶{70} Secondly, this district has not consistently stated that *Adams* has been overruled and is thus bad law upon which reliance should not be placed. In our recent precedent, this court has cited *Adams* as providing foundational law upon which our analysis of the trial court's sentencing decision was framed. See *State v. Gant*, 7th Dist. No. 04 MA 252, 2006-Ohio-1469, at ¶59-60 (Waite, J., Donofrio, Vukovich, JJ., concurring); and *State v. Gratz*, 7th Dist. No. 08 MA 101, 2009-Ohio-695, at ¶9 (Donofrio, J., Vukovich, Waite, JJ., concurring). See also *Mayor*, supra, at ¶40 (Vukovich, J., DeGenaro, J., concurring, Donofrio, J., concurring in part and dissenting in part); *State v. Warren*, 7th Dist. No. 05 MA 91, 2006-Ohio-1281, at ¶65 (Waite, J., Donofrio, DeGenaro, JJ., concurring).

¶{71} The dissent argues that our use of *Adams* in *Gant* and *Gratz* was dicta, given that the actual facts of each case did not involve silent records. However, just because the use of the 'silent record presumption' rule of *Adams* did not result in a reversal of either of the above two cases, it does not follow that the rule is dicta. Instead, in each of these cases, this court used *Adams* to explain a minimum requirement of the law, and then discussed the manner in which the facts exceeded the minimum. *Gant* at ¶59-65, *Gratz* at ¶9. Significantly, *Gant*, *Gratz* and *Warren*

reiterated the *Adams* silent record presumption, which must then be rebutted by the defendant to warrant a reversal of his or her sentence. *Id.*; *Warren* at ¶65.

¶{72} In addition to our explicit references to *Adams* as authoritative law, this court's precedent has also evolved away from strict requirements that the trial court voice its consideration of R.C. 2929.11 and R.C. 2929.12 on the record. A close reading of the cases in which this court "followed" *Arnett* is instructive. For example, in *State v. Jones*, 7th Dist. No. 07 MA 159, 2008-Ohio-3336 (DeGenaro, J., Donofrio, Waite, JJ., concurring) where the defendant appealed his post-*Foster* resentencing, we reiterated the "some indication on the record" language. However, we gave a broad interpretation of what constitutes "some indication." Although *Jones* stated that it would not follow the silent presumption rule of *Adams*, it so reduced the requirement that a mere whisper of evidence in the record sufficed:

¶{73} "Of course, a trial court need not specifically state that it is considering those statutes in order for the record to reflect that it actually has considered them. For instance, some courts have said that the record in a particular case indicates that the trial court considered the statutes because it used the language set forth in those statutes, even if it did not cite to those statutes. See *State v. Lewis*, 2d Dist. No. 2006CA0119, 2007-Ohio-6607, at ¶ 16; *State v. Smith*, 3d Dist. No. 2-06-37, 2007-Ohio-3129, at ¶ 27. Others, including decisions from this court, have affirmed a felony sentence when the trial court relied on facts which fit within the overriding purposes of felony sentencing in R.C. 2929.11 and the factors in R.C. 2929.12. See *State v. Starkey*, 7th Dist. No. 06 MA 110, 2007-Ohio-6702, at ¶ 15; *State v. Teel*, 6th Dist. No. S-06-045, 2007-Ohio-3570, at ¶ 15; *State v. Sharp*, 10th Dist. No. 05AP-809, 2006-Ohio-3448, at ¶ 4-6.

¶{74} "This second set of cases is most similar to the one currently under appeal. In this case, the trial court did not specifically cite to R.C. 2929.11 or 2929.12 at either Jones's sentencing hearing or in its judgment entry. Furthermore, the trial court's language does not track the statutory language. Instead, the trial court merely stated that it was imposing a maximum sentence 'having taken everything into account and recognizing the seriousness of the offense for which Mr. Jones was convicted.'" *Id.* at ¶16-17.

¶{75} *Jones* affirmed the defendant's sentence, concluding that while not as

substantive as in other cases, the trial court's statement that: "having taken everything into account and recognizing the seriousness of the offense for which Mr. Jones was convicted" evinced its consideration of the sentencing criteria. *Id.* at ¶21. When coupled with the observation that at sentencing counsel did not give any substantive reason for a lesser sentence, it would appear that, in essence, we concluded in *Jones* that the defendant did not overcome the presumption contemplated by *Adams*.

¶{76} Thus, our court has already departed from prior assertions that the Ohio Supreme Court's ruling in *Adams* was overruled and no longer good law, and our court's reasoning has evolved towards the silent record presumption even in cases that have not applied *Adams*. The majority's holding today does not thwart the rule of *stare decisis* by supposedly departing from ten years of consistent interpretation of Ohio Supreme Court and statutory law.

¶{77} Moreover, if the crux of *stare decisis* is to look back to the most definitive statement of the law and apply that precedent unless a subsequent definitive statement of the law is made, then in the case of intermediate courts of appeals, that includes following the precedent clearly stated by the Ohio Supreme Court. Thus, it follows we should apply *Adams* until the Ohio Supreme Court *explicitly* overrules it, rather than operating under the assumption that it was *impliedly* overruled by *Arnett*. This should certainly be the case, considering the absence of indications from the Ohio Supreme Court that it has done so. In fact, the only indication we have is to the contrary in the plurality opinion of *Kalish*. But this presupposes that *Arnett* did impliedly overrule *Adams*. I contend it did not.

¶{78} The argument can be made that the rote recitation language in *Arnett* was dicta, given the syllabus by the Court:

¶{79} "When a sentencing judge acknowledges that he or she has consulted a religious text during his or her deliberations and quotes a portion of that text on the record in the sentencing proceeding, such conduct is not *per se* impermissible and does not violate the offender's right to due process, when the judge adheres to the sentencing procedures outlined in the Revised Code and when the judge's religious references do not impair the fundamental fairness of the sentencing proceeding." *Arnett* at syllabus.

¶{80} The defendant in *Arnett* challenged the trial court's use of Bible passages during her deliberations as well as on the record during sentencing. The felony sentencing statutes were not the focus of the analysis per se. Instead, the felony sentencing statutes were a part of the analysis to determine primarily whether the trial court's consideration of Bible passages violated the defendant's due process right to a fundamentally fair hearing. And based upon that analysis, the Court concluded that citation to and consideration of particular Bible passages was not contrary to felony sentencing principles, and merely assisted the judge when considering the seriousness factor. *Id.* at 213, 216-217.

¶{81} The rote recitation language from *Arnett* must be considered within the context of the case. The defendant was not arguing the record was devoid of any evidence that the trial court considered the sentencing criteria, rather, that the judge used criteria that was not contemplated by the principles and purposes of felony sentencing. *Id.* at 214. The following is instructive: "[T]he Code does not *prohibit* the trial judge from describing the nature of her deliberations on the record." *Id.* at 213 (emphasis added). This puts the disputed language from *Arnett* in a whole new light:

¶{82} "*The Code does not specify that the sentencing judge must use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors. R.C. 2929.12. For this reason, the sentencing judge could have satisfied her duty under R.C. 2929.12 with nothing more than a rote recitation that she had considered the applicable age factor of R.C. 2929.12(B)(1). See State v. Edmonson (1999), 86 Ohio St.3d 324, 326, 715 N.E.2d 131, 134. Arnett's sentencing judge, however, helpfully supplemented the record \* \* \*. These remarks confirm that the sentencing court considered the statutory age factor.*" *Id.* at 215 (emphasis added).

¶{83} Thus, R.C. 2929.12 neither requires nor prohibits a trial court from stating on the record the basis for its deliberations and sentence. All that is required is that the trial court *consider* the factors and that the record does not belie the presumption that such consideration was made. The court in *Arnett* contrasted this with R.C. 2929.19(B)(2) and *State v. Edmonson*, 86 Ohio St.3d 324, 1999-Ohio-110, 715 N.E.2d 131, which required stated findings and reasons, both of which are no

longer good law pursuant to *State v. Foster.*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. *Id.* at 217.

¶{84} Given the foregoing, the rote recitation language of *Arnett* was offered as a non-essential illustration of compliance with the statutory factors in effect at the time. The language was neither an explanation of a mandatory minimum requirement, nor was it the law of the case. Because the law of *Arnett* did not augment the requirements placed on a trial court judge as compared to *Adams*, it did not implicitly overrule *Adams*.

¶{85} As a final note, the Ohio Supreme Court has not stated that the changes from S.B.2 overruled the presumption articulated in *Adams*. Included in the goals of S.B.2 was the intent to reduce sentencing disparities and promote uniformity. It was not the intent of S.B.2 to change the general rule that a reviewing court presumes the regularity of underlying proceedings in the absence of evidence to the contrary. Certainly a trial court must consider the purposes and principles of the sentencing statutes, just as it needs to consider the constitutional rights of the defendant and the interests of the State. However, just as a trial court does not need to recite the Ohio Constitution in order to abide by it, a rote recitation regarding R.C. 2929.11 and R.C.2929.12 seems similarly unnecessary.

¶{86} For these reasons, I concur with the majority.