[Cite as *State v. McCree*, 2007-Ohio-268.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87951

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MAURICE McCREE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED; REMANDED FOR CORRECTION OF SENTENCING ENTRY

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-458406

BEFORE: McMonagle, J., Sweeney, P.J., and Calabrese, J.

RELEASED: January 25, 2007

JOURNALIZED:

[Cite as *State v. McCree*, 2007-Ohio-268.]

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CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Maurice McCree, appeals from the judgment of the Common Pleas Court finding him guilty of aggravated murder, with a three-year firearm specification, and having a weapon while under disability, and sentencing him to life in prison with parole eligibility after 20 years on the aggravated murder conviction, three years on the firearm specification, and five years for having a weapon while under a disability, all counts to be served consecutively.

{¶ 2} Kimberly Walker, McCree's first cousin, testified at trial that at the time of the murder, she was addicted to crack cocaine, alcohol, and marijuana. She was at 12826 Marston Avenue, a drug house, on October 12, 2004, for the purpose of using drugs. While she was in the basement getting high, she heard an argument outside between McCree and her friend Lavelle Weeden. According to Walker, the

argument stopped and Weeden left. When Walker exited the home a short time later, however, she heard McCree arguing with a woman named Teresa Andrews. When McCree went to his car, which was parked in the driveway, Walker approached the car. She testified that she saw McCree open the glove compartment and load "a couple of guns up" as she spoke with him, but she had no idea of what would happen next.

{¶ 3} Walker testified that she asked McCree if he would give her some drugs on credit, but McCree refused. As Walker was walking back up the driveway, she saw Weeden turn the corner and walk up the driveway. Walker then asked Weeden if he would give her "a dime piece" of crack on credit. Weeden told Walker "okay," and reached his left hand into his left pocket to get the drugs. Walker then heard McCree, who was standing in the driveway approximately ten feet away, tell Weeden, "I'm a gangster and I'm going to get me respect," and "[w]hat I do is murder," and then saw him aim his gun at Weeden. As Walker ran away, she heard at least four shots.

{¶ 4} Walker admitted that she had used drugs on the day of the shooting, but testified that her drug use did not prevent her from seeing the events, knowing the people around her, or remembering the events.

{¶ 5} Teresa Andrews, who grew up around Marston Avenue and knew Weeden, testified that she went to 12826 Marston Avenue at approximately 12:30

p.m. on October 12, 2004 to visit friends. She, an acquaintance named Freddie Lane, and Weeden shared a blunt[1] that day sometime between 1-2:30 p.m. while they were sitting at a picnic table at the rear of the driveway. Sometime between 3-3:30 p.m., Andrews observed McCree and Weeden having a discussion. Subsequently, she, Weeden, and Lane left. When they returned to Marston Avenue between 4-4:30 p.m., McCree was standing close to his car, which was parked in the driveway. McCree motioned Weeden over, and they stepped to the side of the driveway to have a private conversation, while Andrews and Lane waited. Andrews testified that it appeared that Weeden was irritated by his conversation with McCree, and, as Weeden walked away from McCree, she heard him say, "you ought to know better than to come at me like that."

{¶ 6} When Andrews and Lane questioned Weeden about what he meant, Weeden told them that McCree had told him that the next drug sale was his. Andrews testified that when Weeden told her and Lane what McCree had said, she and Lane started laughing. According to Andrews, McCree got "pissed off" when he heard the laughing, and then told Weeden, "now you got Mary Poppins (in reference to Andrews) all in my business."

{¶ 7} Weeden did not respond to McCree, although Andrews told McCree that she had not disrespected him and he should treat her like a lady. Andrews and Lane

[1]A blunt is a cigar that is taken apart and re-rolled with marijuana.

then walked back to the picnic table. Shortly thereafter, McCree walked up to the table and said, "I'm a grown mother fucking man and when you see two grown mother fucking men talking, you be quiet." As he walked away, Andrews heard McCree say, "I'm a show you, I'm a show you."

{¶ 8} Andrews then saw McCree walk up to Weeden, pull out a gun and shoot him two times. As she ran away, Andrews saw McCree standing over Weeden with a gun in his hand, and then heard him ask, "Where she go?" After hiding in a neighbor's garage for several minutes, Andrews came out and saw McCree drive by. Andrews then returned to the house at 12826 Marston and told the police what had happened. She directed the police to a beer can that McCree had been drinking from earlier and subsequently identified McCree from a photo array.

{¶ 9} Freddie Lane testified that in October 2004, he and Weeden sold drugs at 12826 Marston. According to Lane, on a typical day, 70-80 people would visit the house, either to buy drugs or to have Pete, the owner of the home, work on their cars. Lane testified that there were no rules among the sellers as to who got the next sale "cause if they ain't know you they wouldn't talk to you anyway. So it wouldn't matter what anybody said ***." Lane testified that McCree was not known to the crack buyers on Marston Avenue because he was a "new face" in the neighborhood and "they don't know what you about so they don't want to deal with you."

{¶ 10} Lane testified that two days before the murder, he, McCree, Weeden and several other people were at the house on Marston Avenue, hanging out and smoking blunts. When Lane arrived at the house at approximately 8:30 a.m. on October 12, 2004, Weeden was already there. Mid-morning, Weeden made a drug sale on the sidewalk. As he walked up the driveway, McCree, who had just arrived, became angry and exchanged words about the sale with Weeden. Lane testified that he could tell from the facial expressions that both men were getting angry, but he then saw Weeden walk away "like he ain't really want to deal with the argument at all." Lane observed that McCree said something to Weeden as he walked away, but could not hear what was said. Lane then heard Weeden tell McCree, "I ain't got to listen to you." Lane testified that he was worried the incident would escalate into a fist fight, so he got both men to smoke a blunt with him, which seemed to relax them.

{¶ 11} Teresa Andrews arrived later and she, Lane, and Weeden smoked a blunt. Sometime later, Weeden told Lane and Andrews about a conversation he had just had with McCree. Lane testified that both he and McCree laughed about McCree's reference to Andrews as "Mary Poppins," but Andrews became angry with McCree and went to speak with him in the front yard. After she returned to the picnic table, McCree came back to the table, slammed his hand on the table and told Andrews, "[w]hen you hear two grown folks talking, shut the fuck up."

{¶ 12} According to Lane, Andrews got up and began walking down the driveway to the front of the house, and McCree followed her. After they moved out of his sight, Lane heard Weeden say, "you on that," and then heard five gunshots. He then saw Andrews and Walker running toward him screaming, "[h]e shot Lavelle," and he told them to run for their lives.

{¶ 13} McCree then came down the driveway toward Lane, pointed two smoking revolvers at him and said, "[w]here them bitches at?" and "I'll shoot you all, too." Lane tried to calm McCree down and McCree then got in his car and drove away. Moments later, Lane saw Brett Jackson, who lived several houses down, approach Weeden's body and begin crying. Lane subsequently ran to a nearby home to hide from McCree. He later identified McCree as the shooter from a photo array.

{¶ 14} Brett Jackson testified that he had raised Weeden since he was two years old and Weeden was like a son to him. Jackson admitted that he and Weeden had gotten into an argument in October of 2004 after Weeden tried to sell drugs in Jackson's driveway and that he had made verbal threats to Weeden. Jackson asserted that the threats were only for effect, however, and, other than this isolated incident, his relationship with Weeden was good.

{¶ 15} Jackson testified that when he heard shots on October 12, 2004, he was not immediately alarmed. After hearing more shots, however, he went outside

and then saw Lane coming toward him. After speaking with Lane, Jackson called 911.

{¶ 16} On cross-examination, Jackson admitted that he had a felony conviction in 1994 and had violated probation. He testified that he had no further criminal convictions since 1994, and was not charged with any crime in connection with Weeden's death.

{¶ 17} FBI special agent Joseph Oliver testified that McCree was not apprehended until March 7, 2005, when Oliver and other officers of the Cleveland Fugitive Gang Task Force entered a home in Cleveland after receiving a tip regarding McCree's whereabouts.

1. RIGHT TO CONFRONT WITNESSES

{¶ 18} Prior to trial, the State filed a motion for a protective order and notice of certification of nondisclosure of the names and addresses of two witnesses for the State, pursuant to Crim.R. 16(B)(1)(e). In accord with *State v. Gillard* (1988), 40 Ohio St.3d 226, paragraph one of the syllabus, certiorari denied (1989), 492 U.S. 925, 109 S.Ct. 3263, 106 L.Ed.2d 608, the case was randomly assigned to a judge for purposes of the hearing. After a hearing, the trial court granted the State's motion.

{¶ 19} In his first assignment of error, McCree contends that his right to confront the witnesses against him, as guaranteed by the United States and Ohio

Constitutions, was violated when the trial court conducted an ex parte hearing regarding the State's motion and then granted the motion.

{¶ 20} "The right to confront witnesses is guaranteed to an accused through the Sixth and Fourteenth Amendments to the United States Constitution, and by Section 10, Article I of the Ohio Constitution. However, this right is legitimately constrained by Crim.R. 16(B)(1)(e), which permits the trial court to issue an order allowing the State to withhold the name and address of a witness if the State certifies that disclosure may subject the witness to physical harm or coercion. Certification by the State under Crim.R. 16 is not satisfied by the prosecutor's merely stating his conclusion that a witness might be subject to harm, but requires the State's reasons for requesting witness protection to appear on the record. The prosecution must show the existence of an undue risk of harm to the witness to be relieved of its obligation to disclose the name of its witness. Finally, where relief from discovery is sought, the procedure must be ex parte to prevent the defense from learning the information sought to be concealed, the identities of the endangered witnesses." *State v. Daniels* (Oct. 27, 1993), 92 Ohio App.3d 473, 480. (Citations omitted.)

{¶ 21} The record reflects that during the hearing, in the presence of McCree's attorneys, the prosecutor told the judge that during the days following the murder, which occurred in the driveway of a residence and was witnessed by several people, McCree canvassed the neighborhood where the murder occurred, looking for the

witnesses. It took 13 agents from the Fugitive Gang Task Force to apprehend McCree and when he was arrested, he was in possession of a sawed-off-shotgun, assault rifle, submachine gun, clips for ammunition, and knives. The prosecutor also informed the judge of McCree's violent prior criminal history, including felonious assault, obstruction of justice, and parole violations.

{¶ 22} The hearing then continued in the judge's chambers, without McCree or his lawyers, and the judge heard testimony from Cleveland police detective James Gajowski, who investigated the murder. Gajowski testified that he had spoken with two witnesses, Teresa Andrews and Fred Lane, who told him that they had "heard on the street" that McCree was looking for them and they were in fear for their lives. Gajowski testified further that through his investigation, he had learned that McCree had a reputation for violence, was heavily involved in the drug trade, and had been investigated with respect to an earlier homicide. The trial court subsequently granted the State's motion with respect to the two witnesses.

{¶ 23} We hold that, under the circumstances of this case, the trial court did not err in granting the State's motion, because the State demonstrated the existence of an undue risk of harm to its witnesses if their identities were revealed to the defense prior to trial. Furthermore, the witnesses' identities were not absolutely withheld from the defense; both Andrews and Lane testified at trial and were subject to cross-examination. See *Daniels*, supra. Accordingly, McCree has failed to show

any prejudice to his ability to defend himself resulting from the trial court's refusal to release the names and addresses of these witnesses prior to trial.

{¶ 24} Finally, although McCree objects, an ex parte hearing is the proper procedure for determining whether the court should grant the State's motion to withhold the names and addresses of certain witnesses. See *Daniels*, supra; citing *Gillard*, supra.

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

2. MOTION FOR MISTRIAL

{¶ 26} During the cross-examination of State's witness Kimberly Walker, defense counsel questioned Walker about her employment history. The record reflects the following exchange:

{¶ 27} "Q. So you were spending all this time at your job working--

{¶ 28} "A. Actually I had five years of sobriety at one time--

{¶ 29} "Q. Let me finish my question. But meanwhile you're not there for your kids?

{¶ 30} "A. You're misunderstanding. I had five years of sobriety at one time when my cousin first came home from the penitentiary.

{¶ 31} "MR. WATSON: Objection. Move to strike.

{¶ 32} "THE COURT: And I will strike the response.

{¶ 33} "Ladies and gentlemen of the jury, I'll ask you to ignore that statement

and allow Mr. Watson to go on with his questions."

{¶ 34} In his second assignment of error, McCree contends that this testimony improperly referred to his criminal history and, therefore, constituted inadmissible "other acts" evidence in violation of Evid.R. 404(B).[2] Therefore, McCree argues, the trial court erred in denying his motion for a mistrial. We disagree.

{¶ 35} Crim.R. 33(E) provides, in relevant part:

{¶ 36} "No motion for a new trial shall be granted *** because of ***

{¶ 37} "(5) Any *** cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial."

{¶ 38} A mistrial is an extreme remedy which is only warranted in circumstances where a fair trial is no longer possible and mistrial is required to meet the ends of justice. *State v. Jones* (1992), 83 Ohio App.3d 723, 737. A mistrial should not be ordered in a criminal case "merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected." *State v. Lukens* (1990), 66 Ohio App.3d 794, 809.

{¶ 39} The grant or denial of a motion for mistrial rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 182. A

[2]Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

reviewing court will not disturb the exercise of that discretion absent a showing that the accused has suffered material prejudice. Id.

{¶ 40} We find no showing that McCree suffered any prejudice or that his substantial rights were affected as a result of Walker's isolated reference to his criminal history. The comment from Walker about McCree "[coming] home from the penitentiary" was in response to defense counsel's questions about her employment history and made to explain her period of sobriety, not to opine about McCree's criminal character. Furthermore, the trial court properly struck the testimony and advised the jury to disregard it. "A jury is presumed to follow the instructions, including curative instruction, given it by a judge." *State v. Garner* (1995), 74 Ohio St.3d 49, 59. Accordingly, the trial court did not err in denying McCree's motion for a mistrial. Appellant's second assignment of error is therefore overruled.

3. HEARSAY

{¶ 41} In his third assignment of error, McCree objects to the following testimony by Teresa Andrews:

{¶ 42} "Q. And as Lavelle is walking away from McCree, do you recall Lavelle saying anything to McCree?

{¶ 43} "A. He said, you ought to know better than to come to me like that.

{¶ 44} "***

{¶ 45} "Q. Were you able to pick up any observations about what you

perceived of Lavelle's emotional state to be?

{¶ 46} "A. I would say a little, like, irritated by the conversation.

{¶ 47} "Q. Same question, could you pick up any emotional content from Lavelle's words in terms of how he spoke using his tone of voice?

{¶ 48} "A. Like he was irritated.

{¶ 49} "***

{¶ 50} "Q. What did Lavelle tell you?

{¶ 51} "A. He said–well, when he was, like, well you know better than to come at me like that. Me and Freddie we, like what you talking about. So he said that Mr. McCree told him that the next sale that came was his."

{¶ 52} McCree contends that pursuant to *Crawford v. Washington* (2004), 541 U.S. 36, 158 L.Ed.2d 177, 124 S.Ct. 1354, the admission of Andrews' testimony regarding Weeden's statements violated the Confrontation Clause of the Sixth Amendment.

{¶ 53} In *Crawford*, the United States Supreme Court reinterpreted Sixth Amendment doctrine "to reflect more accurately the original understanding of the [Confrontation] Clause." Id. at 60. "The Court determined that the Clause's predominant objective–perhaps its *only* objective–is preventing the admission of testimonial statements against criminal defendants who never had an opportunity to cross examine the declarant. 541 U.S. at 69-70. The Court declined to 'spell out a

comprehensive definition of "testimonial,"' but held that the class of testimonial statements included, 'at a minimum, *** prior testimony at a preliminary hearing, before a grand jury, or at a former trial' [and] police interrogations.' Id. at 68. After *Crawford*, there is 'an absolute bar to statements that are testimonial, absent a prior opportunity to cross examine.' Id. at 61. Indeed, the Court summed up its holding in these word: 'Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.' Id. at 68-69." *United States v. Franklin* (C.A.6, 2005), 415 F.3d 537, 545. (Emphasis in original.)

{¶ 54} Thus, the threshold question is whether Weeden's statement to McCree that "you ought to know better than to come at me like that" and his statement to Andrews and Lane that McCree had told him that the next drug sale was his were testimonial. They were not. Neither statement was made to a government officer seeking to elicit the statements to further a prosecution against McCree. Rather, the statements were casual remarks made to friends and acquaintances.

{¶ 55} As *Crawfod* itself indicates, and as other courts have held since *Crawford*, statements of this sort are not testimonial for purposes of the Confrontation Clause. See *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."); *United States v. Manfre*

(C.A.8, 2004), 368 F.3d 832, 838, fn.1 ("Mr. Rush's comments were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.")

{¶ 56} Our conclusion that the victim's statements were not testimonial does not end our analysis. As stated by the Seventh Circuit Court of Appeals in *United States v. Thomas* (C.A.7, 2006), 453 F.3d 838, 844:

{¶ 57} "Where a hearsay statement is found to be nontestimonial, we continue to evaluate the declaration under *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), See *Crawford*, 541 U.S. at 68 (reasoning that '[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether'); see, also, *United States v. Danford* 435 F.3d 682, 687 (C.A.7, 2005). *Roberts* held that proffered hearsay may be admitted where it 'falls within a firmly rooted hearsay exception.' 448 U.S. at 66; see *White v. Illinois*, 502 U.S. 346, 356-57, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)."

{¶ 58} We therefore consider whether Weeden's statements fall under any hearsay exception. McCree contends, without explaining why or citing any caselaw, that they are "hearsay without an exception."

{¶ 59} The State, on the other hand, asserts that Weeden's statement to

McCree that "you ought to know better than to come at me like that" was admissible as an excited utterance under Evid.R. 803(2), which defines an "exited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶ 60} "To be admissible under Evid.R. 803(2) as an excited utterance, a statement must concern 'some occurrence startling enough to produce a nervous excitement in the declarant,' which occurrence the declarant had an opportunity to observe, and must be made 'before there had been time for such nervous excitement to lose a domination over his reflective faculties.'" *State v. Huertas* (1990), 51 Ohio St.3d 22, 31, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, paragraph two of the syllabus.

{¶ 61} Weeden's statement to McCree was made immediately after his argument with McCree. Weeden obviously observed the argument and the witnesses' testimony was that he was still agitated about the argument when he made the statement. Accordingly, it was properly admissible under the excited utterance hearsay exception. In addition, it was not offered to prove the truth of the matter asserted and, therefore, was an exception to the hearsay rule.

{¶ 62} McCree's objection to Weeden's statement to Lane and Andrews that McCree had told him the next drug sale was his similarly fails. Hearsay is a statement, other than one made by the declarant while testifying at the trial or

hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Weeden's statement was not offered by the State to demonstrate that the next drug sale actually belonged to McCree. Because it was not offered to prove the truth of the matter asserted, it was not hearsay and, therefore, was admissible.

{¶ 63} Andrews' testimony regarding her observations of Weeden's body language and emotional state after his argument with McCree was also properly admitted. Evid. R. 801(A) defines "statement" in the context of hearsay as "an oral or written assertion or nonverbal conduct of a person, if it is intended by him as an assertion." "Only conduct apparently intended by the actor to convey his thoughts to another comes under the ban of the hearsay rule. The rationale behind this rule is that it is unlikely a person would attempt any purposeful deception in the absence of any intent to communicate." *State v. Kniep* (1993), 87 Ohio App.3d 681, 685.

{¶ 64} There is nothing to indicate that Weeden intended to communicate anything by his tone of voice and body language. Accordingly, his nonverbal conduct was not a hearsay "statement" and, therefore, Andrews' description of Weeden's nonverbal conduct was properly admissible.

{¶ 65} Appellant's third assignment of error is overruled.

4. SUFFICIENCY OF THE EVIDENCE

{¶ 66} In his fourth and fifth assignments of error, McCree contends that the trial court erred in denying his Crim.R. 29 motion for acquittal because the evidence

was insufficient to sustain his convictions. In his fourth assignment of error, McCree asserts that the State's evidence was insufficient because the witnesses were not credible. In his fifth assignment of error, McCree argues that the State failed to produced sufficient evidence that he acted with prior calculation and design and, therefore, failed to produce sufficient evidence to support his conviction for aggravated murder.

{¶ 67} Crim.R. 29(A) provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 68} McCree contends that the evidence was insufficient to support his convictions because Walker, Andrews and Lane were admitted drug dealers or drug users and, therefore, their testimony was not to be believed. On a sufficiency question, however, the issue is not whether the evidence should be believed but whether, the evidence, *if believed*, is sufficient to convince the average mind of the

defendant's guilt beyond a reasonable doubt. In considering this question, the evidence is construed in a light most favorable to the State.

{¶ 69} R.C. 2903.01, regarding aggravated murder, provides that "no person shall purposely, and with prior calculation and design, cause the death of another ***." Here, the State's evidence, if believed, was sufficient to demonstrate, beyond a reasonable doubt that McCree, with prior calculation and design, caused the death of Lavelle Weeden.

{¶ 70} "Prior calculation and design" is not defined in the Ohio Revised Code, but is considered to be more than just an instantaneous decision to kill. *State v. Clark*, Cuyahoga App. No. 83474, 2004-Ohio-5964, at ¶26, citing *State v. Jones*, 91 Ohio St.3d 335, 348, 2001-Ohio-57. In *State v. Taylor* (1997), 78 Ohio St.3d 15, 18-20, the Supreme Court of Ohio concluded that "it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of 'prior calculation and design.'" Several factors, including whether the accused and the victim knew each other, whether there was thought or preparation in choosing the murder weapon or the murder site, and whether the act was "drawn out" or "an almost instantaneous eruption of events" should be considered under the totality of the circumstances of the homicide to determine whether there was prior calculation and design. *State v. Jenkins* (1976), 48 Ohio App.2d 99, 102. Prior calculation and design can be found even when the plan to kill was quickly conceived and executed.

State v. Coley, 93 Ohio St.3d 253, 263, 2001-Ohio-1340, citing *State v. Palmer*, 80 Ohio St.3d 543, 567-568, 1997-Ohio-312; *State v. Green*, 90 Ohio St.3d 352, 358, 2000-Ohio-182. In this case, Lane testified that McCree and Weeden were at 12826 Marston Avenue with several other people two days before the shooting hanging out and doing drugs. He also testified that he saw McCree and Weeden argue mid-morning on October 12, 2004, but both men appeared to calm down after he smoked a blunt with them.

{¶ 71} Andrews testified that at approximately 4:30 p.m. the same day, she saw McCree and Weeden have a conversation that appeared to irritate Weeden. She testified further that McCree got "pissed off" when she and Lane started laughing after Weeden told them what McCree had said to him. Walker likewise testified that she heard McCree and Weeden arguing.

{¶ 72} Walker testified that after this argument, she saw McCree sitting calmly in his car loading guns. Moments later, Walker heard McCree tell Weeden, "I'm a ganster and I'm going to get me respect," and "What I do is murder," and then saw him aim his gun at Weeden and shoot him multiple times. Andrews and Lane likewise testified that McCree shot Weeden multiple times.

{¶ 73} In light of this testimony, there was evidence that McCree and Weeden knew each other. There was also evidence that they argued early in the day on October 12, 2004, but then calmed down. Further, there was evidence that after the

second argument between McCree and Weeden, McCree sat in his car and calmly loaded his weapons before he shot Weeden multiple times.

{¶ 74} This evidence, if believed, is sufficient to demonstrate that the shooting was not "an almost instantaneous eruption of events." It is apparent that McCree's resentment of Weeden was simmering throughout the day on October 12, 2004, and he decided to shoot Weeden after they argued a second time. Reviewing the facts and totality of circumstances surrounding Weeden's death, we conclude the evidence was sufficient for any rational trier of fact to conclude that McCree engaged in more than mere momentary deliberation before shooting Weeden. Accordingly, we hold that there was sufficient evidence to support McCree's conviction for aggravated murder.

{¶ 75} McCree was also convicted of having a weapon while under a disability, in violation of R.C. 2923.13, which provides, in relevant part, that "no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if *** the person is under indictment for or has been convicted of any felony offense of violence."

{¶ 76} Although McCree makes no argument regarding the sufficiency of the evidence regarding this count, the record demonstrates that the State presented evidence regarding this count at a bench trial held subsequent to the jury trial. Cuyahoga County corrections officer William Farrell testified that McCree's

fingerprint on a booking card dated August 2, 1990 in Case No. CR-254045 and his fingerprint on the booking card for this case matched to a reasonable degree of scientific certainty. Lisa Jones, recordkeeper for the Cuyahoga County Clerk of Courts, Criminal Division, identified a certified copy of a Cuyahoga County Common Pleas Court journal entry dated October 16, 1990 in Case No. CR-254045, which reflected that McCree had pled guilty to felonious assault, with specifications, and having a weapon while under a disability, with specifications. Accordingly, there was sufficient evidence to support McCree's conviction for having a weapon while under a disability.

{¶ 77} Appellant's fourth and fifth assignments of error are overruled.

5. MANIFEST WEIGHT OF THE EVIDENCE

{¶ 78} In his sixth assignment of error, McCree contends that his convictions are against the manifest weight of the evidence.

{¶ 79} While the test for sufficiency requires a determination of whether the State has met its burden of production at trial, a manifest weight challenge questions whether the State has met its burden of persuasion. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390. When considering appellant's claim that the conviction is against the weight of the evidence, a reviewing court sits essentially as a "thirteenth juror" and may disagree with the factfinder's resolution of the conflicting testimony. Id. The reviewing court must examine the entire record, weighing the evidence and

considering the credibility of the witnesses, while being mindful that credibility generally is an issue of fact for the trier of fact to resolve. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The court may reverse the judgment of conviction if it appears that the jury, in resolving conflicts in the evidence, "'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, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 80} We find no such miscarriage of justice in this case. Although McCree again complains that "there is no credible evidence that [he] was involved in these crimes," any credibility issues regarding the testimony of Andrews, Walker and Lane–all of whom testified that McCree shot Weeden multiple times–was for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230. The jury did not lose its way in convicting McCree for the aggravated murder of Weeden, nor did the trial court err in finding him guilty of having a weapon while under a disability.

{¶ 81} Appellant's sixth assignment of error is overruled.

6. INEFFECTIVE ASSISTANCE OF COUNSEL

{¶ 82} In his seventh assignment of error, McCree contends that he was denied his right to effective assistance of counsel because trial counsel failed to request a jury instruction on the offense of voluntary manslaughter.

{¶ 83} In order to establish a claim of ineffective assistance of counsel, a

defendant must demonstrate that counsel's performance fell below an objective standard of reasonable representation and that he was prejudiced by that performance. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, certiorari denied (1990), 497 U.S. 1011, 111 L.Ed.2d 768, 110 S.Ct. 3258. Prejudice is established when the defendant demonstrates "a reasonable

{¶ 84} probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington* (1984), 466 U.S. 668, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052.

{¶ 85} A presumption that a properly licensed attorney executes his duty in an ethical and competent manner must be applied to any evaluation of a claim of ineffective assistance of counsel. *State v. Smith* (1985), 17 Ohio St.3d 98; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299. In addition, this court must accord deference to defense counsel's strategic choices during trial and cannot examine the strategic choices of counsel through hindsight. *Strickland*, supra at 689.

{¶ 86} In *State v. Clark*, 2004-Ohio-5964, at ¶21, this court explained when an instruction on voluntary manslaughter should be given in a murder trial as follows:

{¶ 87} "Voluntary manslaughter is considered an inferior degree of aggravated murder, since 'its elements are *** contained within the indicted offense, except for one or more additional mitigating elements.' Before giving an instruction on

voluntary manslaughter in a murder case, the trial court must determine 'whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction.' The initial inquiry requires an objective standard: 'For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.' If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case 'actually was under the influence of sudden passion or in a sudden fit of rage.'" (Citations omitted.)

{¶ 88} We find insufficient evidence of provocation in this case to warrant an instruction on voluntary manslaughter. Weeden's arguments with McCree about who was to have the next drug sale, his comment to McCree that "I ain't got to listen to you," and his agreement to give Walker drugs on credit are obviously insufficient provocation "to arouse the passions of an ordinary person beyond the power of his or her control." Moreover, even if we were to find sufficient provocation, the evidence demonstrated that McCree was not under the influence of a sudden fit of rage. Although McCree and Weeden argued on the morning of October 12, 2004, they calmed down after smoking a blunt with Lane. Furthermore, Walker testified that after the men argued again in the afternoon, Weeden left 12826 Marston, giving McCree time to calm down. McCree, however, went to his car, loaded his guns, and then deliberately shot Weeden when he returned a short time later. The lack of

sufficient provocation and the deliberate shooting upon Weeden's return to the scene demonstrate that a jury instruction on voluntary manslaughter was not warranted in this case.

{¶ 89} Furthermore, our review of the record indicates that trial counsel likely did not ask for a voluntary manslaughter instruction as a matter of trial strategy. During the trial, counsel for McCree argued that McCree was not the shooter and even introduced evidence that another individual, Brett Jackson, was responsible for the murder. Requesting an instruction on voluntary manslaughter would have undermined the defense theory that McCree was not the murderer by suggesting to the jury that he was provoked into shooting Weeden. Accordingly, trial counsel did not err in not requesting such an instruction.

{¶ 90} Appellant's seventh assignment of error is overruled.

6. JURY INSTRUCTION REGARDING FLIGHT FROM THE SCENE

{¶ 91} When instructing the jury, the trial court stated:

{¶ 92} "Now, in this case, there may be evidence tending to indicate that the defendant fled from the vicinity of the alleged crime.

{¶ 93} "In this connection, you are instructed that flight in and of itself does not raise the presumption of guilt, but it may show consciousness of guilt or guilty connection with the crime. If, therefore, you find that the defendant did flee from the scene of the alleged crime, you may consider this circumstance in the case in

determining the guilt or innocence of the defendant."

{¶ 94} In his eighth assignment of error, McCree contends that this "flight" instruction violated his constitutional right not to testify because it essentially placed a burden on him to explain why he fled the scene. In support of this argument, he relies on *State v. Fields* (1973), 35 Ohio App.2d 140, and this court's decisions in *State v. Williams* (Dec. 17, 1992), Cuyahoga App. No. 61262, and *State v. Harris* (Apr. 10, 1986), Cuyahoga App. No. 50117. This court analyzed these cases in *State v. Berry*, 2004-Ohio-5485, at ¶s 44-45, where we stated:

{¶ 95} "*** In *Fields*, the trial court instructed the jury that 'flight in and of itself does not raise a presumption of guilt, but *unless satisfactorily explained* ***." The trial court further instructed the jury that it could consider defendant's flight as evidence of guilt if the defendant failed to satisfactorily explain his conduct. Because such language requires a defendant to 'satisfactorily explain' the reason for his flight, the appellate court held that the instruction violated the defendant's constitutional right to remain silent. *** (Emphasis added.)

{¶ 96} "Moreover, in *Williams* and *Harris*, this court followed the holding in *Fields* because the jury instructions in those cases were similar to the one given in *Fields*. This court reiterated that an instruction requiring a defendant to 'satisfactorily explain' his flight violated the defendant's constitutional right not to testify. ***."

{¶ 97} Here, the instruction provided to the jury was not like the instructions

provided in *Fields*, *Williams*, or *Harris*. The instruction given did not contain the impermissible "unless satisfactorily explained" language, nor did it imply that McCree had any duty to explain his flight. Furthermore, the record demonstrates that the court clearly instructed the jury that McCree was not required to testify and that his silence was not to be used against him. Accordingly, we find that the jury instruction regarding McCree's flight from the scene did not violate his constitutional right not to testify.

{¶ 98} Appellant's eighth assignment of error is therefore overruled.

8. SENTENCING ISSUES

{¶ 99} In *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, the United States Supreme Court held that, in light of the Sixth Amendment's right to jury trial, any fact (other than a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt or admitted by the defendant. Subsequently, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that certain sections of Ohio's sentencing code violated the principles announced in *Blakely* because they required judicial findings of fact not proven to a jury beyond a reasonable doubt before a court could impose certain sentences. Among these provisions were R.C. 2929.14(E) regarding consecutive sentences and R.C. 2929.14(C) regarding maximum sentences. The Ohio Supreme

Court found these, and several other, provisions unconstitutional and excised them from Senate Bill 2. The Supreme Court further held that, after the severance, "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster*, supra, at ¶100.

{¶ 100} *Foster* was announced on February 27, 2006. The trial court sentenced McCree for his aggravated murder conviction on February 28, 2006, immediately after the jury verdict was announced, and on March 7, 2006, for having a weapon while under a disability, at the conclusion of the bench trial.

{¶ 101} In his ninth and tenth assignments of error, McCree argues that because his criminal conduct occurred prior to February 27, 2006, he should have been sentenced under the law in effect prior to *Foster*. He contends that the law in effect after *Foster* increases the punishment beyond what was prescribed when the crime was committed, in violation of the Ex Post Facto Clause of the United States Constitution. He argues further the trial court did not make the appropriate findings to impose maximum, consecutive sentences pursuant to the law in effect prior to *Foster* and, therefore, his sentence should be vacated and his case remanded for resentencing under the law in effect prior to *Foster*.

{¶ 102} McCree's ex post facto argument fails. As previously noted, in *Foster*, the Ohio Supreme Court found certain provisions of the sentencing law

unconstitutional and therefore void. Likewise, it found any sentence imposed pursuant to those unconstitutional statutory provisions void. Clearly, we cannot order that McCree be sentenced under unconstitutional, void sections of Ohio's sentencing statute.

{¶ 103} McCree's argument that the trial court failed to make appropriate findings also fails. After *Foster*, a trial court is not required to make findings or give its reasons for imposing consecutive or maximum sentences.

{¶ 104} We remand, however, so the trial court can correct its sentencing entry. Aggravated murder is not a felony of the first degree, as stated in the journal entry, with a possible range of sentences; pursuant to R.C. 2929.03(A)(1), it is subject to a sentence of life imprisonment, with parole eligibility after 20 years. Likewise, because aggravated murder is not a first-degree felony, there is no post-release control associated with an offense of aggravated murder.[3] Should McCree be released from prison, he would be subject to parole, not post-release control. We therefore remand so the trial court can correct its sentencing entry as noted.

{¶ 105} Appellant's ninth and tenth assignments of error are overruled.

9. ALLIED OFFENSES

{¶ 106} In his eleventh assignment of error, McCree argues that the trial

[3]R.C. 2967.28(B), regarding post-release control, provides that post-release control applies to "each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the

court erred in not merging his convictions for aggravated murder with a firearm specification and having a weapon while under a disability because they are allied offenses under R.C. 2941.25.

{¶ 107} This court has previously considered and rejected this argument. As we stated in *State v Williams*, 2003-Ohio-3950, at ¶19-20:

{¶ 108} "The flaw with [appellant's] argument is that he equates a firearm specification with a separate offense. In *State v. Willingham* (Feb. 16, 1988), Cuyahoga App. Nos. 54767 and 56464, we stated:

{¶ 109} "'A criminal defendant may not receive multiple punishments when "the same conduct by defendant can be construed to constitute two or more allied offenses of similar import ***." R.C. 2941.25(A). However, it is settled law in this district that the specification contained in R.C. 2929.71 is a sentencing provision, not a separate offense; thus, the specification cannot be an allied offense. *State v. Loines* (1984), 20 Ohio App.3d 69, 72-73; *State v. Price* (1985), 24 Ohio App.3d 186, 187-189.' (Citations omitted.)"

{¶ 110} "Because the gun specification is not a separate offense, it may not be allied with another offense for sentencing purposes."

{¶ 111} Appellant's eleventh assignment of error is therefore overruled.

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commission of which the offender caused or threatened to cause physical harm to a person."

Affirmed; remanded for correction of sentencing entry.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

JAMES J. SWEENEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR

[Cite as *State v. McCree*, 2007-Ohio-268.]