[Cite as *State v. Berry*, 2007-Ohio-278.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87493

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER BERRY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, VACATED IN PART AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-466432

BEFORE: Dyke, J., Sweeney, P.J., McMonagle, J.

RELEASED: January 25, 2007

JOURNALIZED:

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ANN DYKE, J.:

{¶1} Defendant-appellant, Christopher Berry ("appellant"), appeals his convictions and sentence. For the reasons set forth below, we affirm his convictions but vacate his sentence and remand the case for resentencing.

{¶2} On May 31, 2005, the Cuyahoga County Grand Jury indicted appellant on three counts: count one alleged aggravated murder, in violation of R.C. 2903.01(A), with notice of prior conviction pursuant to R.C. 2929.13 and repeat violent offender specifications pursuant to R.C. 2929.01; count two alleged

kidnapping, in violation of R.C. 2905.01(A)(2), with the same notice of prior conviction and repeat violent offender specifications; and count three alleged tampering with evidence, in violation of R.C. 2921.12. Appellant pleaded not guilty to all counts in the indictment.

{¶3} The trial of this matter commenced on October 31, 2005. Prior to jury selection, the trial court held a hearing to address several motions filed by appellant. First, the court denied appellant's pro se motion for a speedy trial dismissal. Next, the court heard testimony and arguments regarding appellant's motion to suppress his oral statement given to police and his motion to suppress evidence obtained during a warranted search.

{¶4} The trial court overruled both motions. Appellant then stipulated to a prior conviction and moved to bifurcate the repeat violent offender specification to a bench trial, which was granted.

{¶5} On November 1, 2005, a jury was impaneled. The trial court gave the jury preliminary instructions. In these instructions, the trial court informed the jury that they would be able to submit questions for the witnesses. Defense counsel objected to the jury's ability to ask questions.

{¶6} The case then proceeded to opening statements. Subsequently, the state presented its evidence, which established the following facts.

{¶7} On or about January 1, 2005, the police found the body of the victim, Stephanie L. Yates, in a heavily wooded area approximately 20 feet from the roadway in the Cleveland Metroparks located near Shephard Road in the city of

North Olmsted. The body was naked, no blood was present, her hands and feet were bound by ace bandages, her head was wrapped in a black plastic garbage bag, she was wearing one sock, her body was wrapped in a multi-colored bed sheet, and she was entirely placed into a second black plastic garbage bag.

{¶8} After examining the body, the coroner determined that the victim died as a result of 22 stab wounds to her body. The coroner determined the time of death to be sometime around Christmas time in 2004. Upon the victim's body, the coroner found multiple hairs, determined to be that of an African-American male and female, and fibers, believed to be carpet fibers.

{¶9} Additionally, the coroner discovered semen present in the victim's vagina. The coroner determined that the semen had been deposited shortly before the victim's death. DNA tests of the semen revealed it was appellant's sperm.

{¶10} As a result, the police conducted an investigation of appellant, which included a search of 3206 West 90th Street, Cleveland, Cuyahoga County, Ohio, the residence of his girlfriend, Rakeisha Fox on March 12, 2005. The police confirmed that the West 90th residence was the legal residence of appellant during the time of the death of the victim. Police further believed that appellant continued to reside at the residence after the murder and until the time of his arrest.

{¶11} It was at this residence that police discovered blood splatters containing the victim's DNA in a bedroom. Additionally, the police discovered a mattress, in which a portion of it had been removed.

{¶12} Police further searched the home of appellant's mother, which was

located on Fairville Road in Cleveland and which appellant listed as his legal address effective March 1, 2005. There police discovered a pillowcase that had a pattern nearly identical to the bed sheet that was wrapped around the victim's body when the police discovered the body in the Metroparks. Appellant's mother confirmed that she had purchased the bedding for appellant as a present.

{¶13} Finally, the state presented the testimony of two jail inmates who stated that appellant admitted to them that he had killed the victim.

{¶14} After the state rested its case, appellant moved for a Crim.R. 29 motion for acquittal as to all counts. The court overruled his motion. Appellant then entered two exhibits and rested his case.

{¶15} After closing arguments and prior to jury deliberation, the court provided the jury with the instruction that included in count one a charge of the lesser included offense of murder. Subsequently, the jury proceeded to deliberation. On November 8, 2005, the jury found appellant guilty of the lesser included offense of murder, kidnapping and tampering with evidence. Two days later, the trial court sentenced appellant to 15 years to life on count one, five years on count two, and one year on count three, with all sentences to be served consecutively, for a total of 21 years to life in prison.

{¶16} Appellant now appeals and submits five assignments of error for our review. Appellant's first assignment of error states:

{¶17} "The trial court erred in not suppressing the evidence obtained from Mr. Berry's residence pursuant to a warranted search."

{¶18} Within this assignment of error, appellant asserts the trial court erred in denying his motion to suppress evidence resulting from the warranted search of the 3206 West 90th Street residence, which sought discovery of the following items:

{¶19} "Physical property including a smooth-edged single-sided knife, blade or metal instrument, being less than four inches in length, any biological material including blood, skin, hair, saliva, and/or any other cloth, clothing, ankle length sock with red and green decorations with the inscription "snow-digit;" any and all ace-type bandages or other cloth medical bandage, a multi-colored bed sheet or pillow case with colored pattern consisting of a square printed pattern in a grid-like arrangement, reference fiber samples of any and all brown, beige, or tan carpeting or carpet-like material, and any and all evidence of violations of the laws of the State of Ohio, to wit: Ohio Revised Code Chapter 2903 *et seq.*"

{¶20} In maintaining this proposition, appellant makes three arguments. First, appellant contends that the warrant did not establish probable cause to believe the residence was the scene of the homicide. Second, appellant maintains that the passage of time between the homicide in December of 2004 and the search of the residence in May of 2005 did not establish probable cause that evidence would still be present. Last, appellant asserts that testimony revealed at trial that the police were informed in May that the carpet was replaced and walls repaired in the West 90th residence was not previously disclosed in the warrant application and thus constituted a material omission that should have invalidated the search warrant. For the following reasons, we find no merit in each of appellant's assertions.

Sufficiency of Evidence to Establish Probable Cause

{¶21} The Fourth Amendment to the United States Constitution guarantees people the right to be free from unreasonable searches and seizures and provides that no warrants shall issue but upon probable cause. In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, the duty of the reviewing court is to determine whether the issuing judge had a substantial basis to conclude that probable cause existed. *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 76 L.Ed.2d 527, 103 S.Ct. 2317. Neither a trial court, nor an appellate court should substitute its judgment for that of the issuing judge by conducting a de novo review. *Gates*, supra at 236; *George*, supra.

{¶22} In making the determination of whether there was a substantial basis to conclude that probable cause existed, the reviewing court must:

{¶23} "Make a practical, common-sense decision whether given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates,* supra at 238; *George*, supra at paragraph one of syllabus.

{¶24} In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, reviewing courts should afford great deference to the issuing judge's determination of probable cause, and doubtful or marginal cases in

this area should be resolved in favor of upholding the warrant. *Gates*, supra at 237, fn.10; *George*, supra at paragraph two of syllabus.

{¶25} In the instant matter, appellant first argues that the trial court erred in failing to grant his motion to suppress because the underlying search warrant was not supported by probable cause. In maintaining this proposition, appellant argues that the affidavit failed to establish a fair probability that the West 90th Street residence was the scene of the victim's death. We find appellant's argument without merit.

{¶26} The affidavit in support of the search warrant stated DNA tests established that appellant had sex with the victim shortly before her death. Additionally, the coroner concluded that the stabbing must have occurred somewhere other than the Metroparks because the body was cleaned of any traces of blood. Detective McGinty also averred that appellant legally resided at the searched residence through the time of the murder in December of 2004 until March 1, 2005. Even after March 1, 2005, at which time appellant changed his legal address, Detective McGinty believed that it was more probable than not that appellant continued to reside at the West 90th residence. On May 6, 2005, detectives appeared at the residence and appellant answered the door. The detectives had a brief encounter with appellant at that time. The affidavit further stated that for 72 hours prior to March 12, 2005, the detectives conducted periodic surveillance of the residence and witnessed appellant taking out the trash, as well as using a key twice to enter the premises. Finally, the affidavit stated that an informant

verified that the owner of the residence, Rakeisha Fox, was appellant's girlfriend and appellant lived at the residence during Christmas time, which is consistent with the time frame for the victim's disappearance and death.

{¶27} We agree with the trial court that this information provided a substantial basis upon which the magistrate could conclude that probable cause existed to search the West 90th Street residence. Appellant argues that the affidavit did not establish probable cause that biological evidence would be at the residence. Appellant argues that since appellant lived with his girlfriend at the residence, it would have been difficult for him to bring the victim there to have sexual relations with her. He also maintains that the bed sheet that the victim's body was wrapped in may have been used by an area hotel or hotel chain. Keeping in mind that we are to resolve any doubtful or marginal cases in favor of upholding the warrant, we decline to adopt appellant's far reaching assertions and find the fair probability to be, considering the averments made by Detective McGinty, that biological evidence may have been found at the residence. See *Gates*, supra at 237, n.10; *George*, supra at paragraph two of syllabus.

{¶28} Despite appellant's assertions, in order to have probable cause to search the residence, the police need not establish that the murder actually occurred on the premises. It is enough to establish that it is a fair probability that appellant was the perpetrator, that he resided at the residence, and that contraband or evidence of the crime might be found in the West 90th residence. We, therefore, conclude that from the totality of these facts and circumstances there was, at the

time the warrant was issued, probable cause to believe that evidence could be found at the subject premises. See *State v. Brown* (1984), 20 Ohio App.3d 36, 38, 484 N.E.2d 215.

Staleness

{¶29} With regard to appellant's contention that the information was stale, the court in *State v. Carlson* (1995), 102 Ohio App.3d 585, 600-601, 657 N.E.2d 591, stated:

{¶30} "Under the staleness doctrine, 'staleness is not measured merely on the basis of the maturity of the information.' Consequently, 'there is no arbitrary time limit on how old information [supporting probable cause] can be.' Rather, the test for staleness is whether the available information justifies a conclusion that contraband is probably on the person or premises to be searched." Id., citations omitted.

{¶31} Appellant asserts that, even if biological or other evidence were present in the West 90th residence in December of 2004, the affidavit failed to explain why such evidence would be present at the time of the search, six months later. In asserting this proposition, appellant relies heavily on the fact that the residence was no longer appellant's legal residence.

{¶32} Detective McGinty averred that he believed that it was more probable than not that appellant continued to reside at the West 90th residence after March 1, 2005, even though appellant did not list the residence as his legal residence. In support of this position, Detective McGinty averred that on May 6, 2005, detectives appeared at the residence and appellant answered the door. He further stated that

for 72 hours prior to March 12, 2005, the detectives conducted periodic surveillance of the residence and witnessed appellant taking out the trash and using a key twice to enter the premises. Finally, Detective McGinty averred that an informant verified that the owner of the residence, Rakeisha Fox, was appellant's girlfriend.

{¶33} In light of the foregoing averments, it was fairly probable that appellant still resided at the West 90th Street residence. Consequently, the issuing judge, as well as the trial court correctly determined that there was a fair probability that any evidence, most of which was not of the perishable kind, would be present at the residence. Thus, the officers' search under the warrant was objectively reasonable and the evidence found was admissible.

Material Omission

{¶34} Finally, appellant argues that evidence discovered at trial revealed that the police did not include in the search warrant application that Rakeisha Fox, appellant's girlfriend, told them in May of 2005 that she had recently replaced some carpeting and repaired some walls in the West 90th Street residence. Appellant contends that this information undermined the warrant application. Therefore, appellant argues, the trial court should have revisited the suppression issue when it came to light at mid-trial, or in the alternative, appellant's counsel was ineffective for failing to request a *Franks* hearing.

{¶35} The United States Supreme Court set forth the law on a defendant's burden when challenging the veracity of an affidavit used to obtain a search warrant as follows:

{¶36} “Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” *Franks v. Delaware* (1978), 438 U.S. 154, 155-156, 98 S.Ct. 2674, 57 L.Ed.2d 667.

{¶37} Omissions count as false statements if "designed to mislead, or * * * made in reckless disregard of whether they would mislead, the magistrate." *United States v. Colkley* (C.A. 4, 1990), 899 F.2d 297, 301 (emphasis deleted).

{¶38} Without addressing whether the police materially omitted evidence of remodeling done at the West 90th Street residence in the affidavit, we find the search warrant nevertheless valid. The Court in *Franks*, supra, stated that the warrant would still be valid if, by setting the false information to one side, the remaining content of the affidavit is sufficient to establish probable cause. *Franks*, supra at 156. Here, because we are dealing with an alleged material omission, we do not set the information to one side, but instead include it in the warrant application.

{¶39} By including the information that carpet had been replaced and walls

repaired in the West 90th Street residence, we nevertheless find the affidavit's remaining contents sufficient to establish probable cause. Remodeling the residence would not destroy evidence of a murder weapon, specific bed sheet, specific sock and bandages. Furthermore, the fiber samples or biological materials could have been discovered in areas not disturbed by the remodeling. In fact, allegations of recent remodeling might well support a finding of probable cause. More specifically, the police believed that appellant washed the victim's body in the bathroom of the residence due to the fact that the coroner determined that the perpetrator cleaned blood off the victim thoroughly before disposing of the body. Therefore, because we are mindful that we are obligated to resolve any doubtful or marginal cases in favor of upholding the warrant, we are unable to conclude that the search of 3206 West 90th Street violated appellant's constitutional rights. See *Gates*, supra at 237, fn.10; *George*, supra at paragraph two of syllabus. Consequently, we find the trial court did not err in failing to suppress the evidence, nor was counsel ineffective for failing to ask for a *Franks* hearing. Appellant's first assignment of error is without merit.

{¶40} Appellant's second assignment of error states:

{¶41} "The trial court erred in allowing jurors, and particularly alternate jurors, to submit questions of the witnesses at trial."

{¶42} Within this assignment of error, appellant asserts two arguments. First, appellant maintains that the trial court erred in permitting the jury to submit questions for the witnesses. Appellant correctly acknowledges that the aforementioned

position is in direct contradiction to the Supreme Court of Ohio's decision in *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, but submits that the case was wrongly decided.

{¶43} In *Fisher*, the court held "the decision to allow jurors to question witnesses is a matter within the discretion of the trial court and should not be disturbed on appeal absent an abuse of that discretion." Id. at 136. We decline to adopt any other holding than that prescribed in *Fisher*. Therefore, because appellant has made no claim that the trial court abused its discretion and in fact, acknowledges that the form of questioning employed by the trial court was consistent with that contemplated in *Fisher*, we find appellant's argument without merit.

{¶44} Next, appellant contends that the trial court, at the least, should not have permitted alternate jurors to submit questions for the witnesses. We agree with appellant that the Supreme Court of Ohio did not specifically address this issue in *Fisher*, supra. Nevertheless, we decline to make a distinction between regular jurors and alternate jurors in this regard.

{¶45} Alternate jurors are impaneled at the same time and in the same manner as regular jurors. Crim.R. 24(G)(1). Additionally, they "have the same qualifications, are subject to the same examination and challenges, take the same oath, have the same functions, powers, facilities and privileges as the regular jurors." Id. Furthermore, they are present during the entire trial and are prepared to deliberate should they become a member of the deliberating panel. *State v. Reiner*, 89 Ohio St.3d 342, 351, 2000-Ohio-190, 731 N.E.2d 662, judgment reversed on

other grounds, 532 U.S. 17, 121 S.Ct. 1252, 149 L.Ed.2d 158. Therefore, we find that because regular jurors are permitted to ask questions of witnesses, so too are alternate jurors. Appellant's second assignment of error is without merit.

{¶46} Appellant's third assignment of error states:

{¶47} "The prosecution violated Mr. Berry's constitutional rights under Article I, Section 10 of the Ohio Constitution, the Fifth Amendment to the United States Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution when it engaged in improper closing argument designed to appeal to the passions of the jury."

{¶48} In analyzing claims of prosecutorial misconduct, the test is "whether remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Jones*, 90 Ohio St.3d 403, 420, 2000-Ohio-187, 739 N.E.2d 300, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" Id., quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78. Where it is clear beyond a reasonable doubt that a jury would have found the defendant guilty even absent the alleged misconduct, the defendant has not been prejudiced, and his conviction will not be reversed. See *State v. Loza*, 71 Ohio St.3d 61, 78, 1994-Ohio-409, 641 N.E.2d 1082.

{¶49} Generally, prosecutors are entitled to considerable latitude in closing argument. *State v. Ballew*, 76 Ohio St.3d 244, 255, 1996-Ohio-81, 667 N.E.2d 369. In closing argument, a prosecutor may comment freely on "what the evidence has

shown and what reasonable inferences may be drawn therefrom." *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, citing *State v. Stephens* (1970), 24 Ohio St.2d 76, 82, 263 N.E.2d 773. "Moreover, because isolated instances of prosecutorial misconduct are harmless, the closing argument must be viewed in its entirety to determine whether the defendant has been prejudiced." *Ballew*, supra; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212.

{¶50} Initially, we note that appellant failed to object to any of the alleged improper statements that the state made during closing argument. Therefore, he has waived all but plain error. *State v. Slagle* (1992), 65 Ohio St.3d 597, 604-605, 605 N.E.2d 916. "Plain error does not exist unless it can be said that, but for the error, the outcome of the trial would clearly have been otherwise." *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894.

{¶51} Appellant complains that, during the state's closing argument, the prosecutor appealed to the passions of the jury by focusing on the life of the victim and what she could have accomplished had she not died. Additionally, appellant argues that the prosecutor improperly attacked the credibility of defense counsel by referring to his argument as a "shell game" and suggesting that defense counsel's arguments were "common" boilerplate trial tactics. Finally, appellant complains that the prosecutor improperly informed the jury of a previous case he had prosecuted. In this regard, the prosecutor stated:

{¶52} "My last thought is this; about three, four years ago, a different case, an attorney informed a jury, implored the law enforcement agency at the trial table to go

back and reinvestigate this case, go back and get the right guy, go back and get the real perpetrator and send the defendant home to his mom and his family.

{¶53} I sat there and I thought, well, who else are they going to investigate. I told them the same thing I am going to tell you. Here's the perpetrator. All others were excluded by DNA evidence and the investigation itself. This is it. There is nobody else."

{¶54} We do not find that the prosecutor's statements denied appellant a fair trial, nor do we find that the outcome of the trial court would have been different had the prosecutor not made the statements. While the arguments were emotional in nature, they were not "so inflammatory as to render the jury's decision a product solely of passion and prejudice against the appellant." *State v. Williams* (1986), 23 Ohio St.3d 16, 20, 490 N.E.2d 906. Additionally, we have previously determined that a prosecutor does not engage in prejudicial misconduct during closing arguments when he or she argues to a jury about the trial strategy being used by the defense counsel. *State v. Palmer*, Cuyahoga App. No. 87318, 2006-Ohio-4893. Furthermore, a review of the record demonstrates that ample evidence existed upon which the jury could base its verdict of guilty for murder, kidnapping and tampering with evidence. Consequently, appellant's third assignment of error is without merit.

{¶55} Appellant's fourth assignment of error states:

{¶56} "The trial court improperly instructed the jury that it could find the defendant guilty of the lesser included offense of murder, even without first finding him not guilty of aggravated murder."

{¶57} In the instant matter, appellant was indicted and tried on a charge of aggravated murder. The trial court, over appellant's objection, instructed the jury as to the lesser included offense of murder. The jury returned a verdict of guilty of murder and the trial court entered judgment thereon.

{¶58} Appellant asserts that the trial court improperly instructed the jury as to murder. Appellant maintains that the trial court should have never instructed the jury with the lesser included offense of murder because there was evidence presented that could go to prior calculation and design, which is only an element of the greater offense of aggravated murder.

{¶59} Initially, we note that murder, in violation of R.C. 2903.02, is a lesser included offense of aggravated murder, in violation of R.C. 2903.01(A). *State v. Mason* (1998), 82 Ohio St.3d 144, 161, 694 N.E.2d 932, 951. The only difference between the two offenses is murder does not have an element of prior calculation and design, while aggravated murder does. The mere fact that an offense is a lesser included offense of the crime charged does not entitle a defendant to instruction by the court on both offenses. *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of the syllabus. Rather, an instruction as to the lesser included offense is only mandated "where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." Id.

{¶60} In *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303, the Supreme Court of Ohio explained the rule regarding when instructions on lesser

included offenses must be given. In so doing, the court held:

{¶61} "The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given. The evidence must be considered in the light most favorable to defendant." Id. at 388.

{¶62} In the instant matter, the trial court properly instructed the jury with the lesser included offense of murder. The only evidence of prior calculation and design originated from the testimony of Thomas Pickney, a jailhouse informant. Under a reasonable view of such evidence, it is quite possible that a jury could choose not to believe the informant's testimony, but could believe the remainder of the state's case. Under such circumstances, "the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *Thomas*, supra. Accordingly, the trial court properly instructed the jury on the lesser included offense of murder.

{¶63} Appellant further argues that the trial court's instruction to the jury on murder as the lesser included offense to aggravated murder was improper because it allowed the jury to consider the lesser included offense without first reaching a unanimous verdict on the greater offense. In the instant matter, the trial court instructed the jury as follows:

{¶64} "You may consider the lesser-included offense if you find that the State failed to prove beyond a reasonable doubt each and every essential element of

aggravated murder but did proof [sic] beyond a reasonable doubt each and every essential element of the lesser included offense of murder. You may also consider the lesser-included offense, if all of you are unable to agree on a verdict of either guilty or not guilty of aggravated murder. In that event, you will continue your deliberation to decide whether the State has proved beyond a reasonable doubt all of the essential elements of the lesser-included offense of murder."

{¶65} It is true that the trial court instructed the jury that it may consider the lesser included offense without first reaching a unanimous verdict on the greater offense. Despite appellant's contentions, however, such an instruction is completely proper. In *State v. Thomas* (1988), 40 Ohio St.3d 213, 218, 533 N.E.2d 286, the Supreme Court of Ohio held, "[t]he jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense." Id. As we are bound by precedent, we find appellant's argument without merit and overrule his fourth assignment of error.

{¶66} Appellant's fifth assignment of error states:

{¶67} "The trial court erroneously imposed a sentence that exceeded the minimum and concurrent terms of imprisonment on the basis of findings made by the trial judge pursuant to a facially unconstitutional statutory sentencing scheme."

{¶68} In his final assignment of error, appellant contends that the trial court erred in ordering consecutive sentences without first considering concurrent sentences. Appellant recognizes *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, which was decided after he filed his notice of appeal, but before he

filed his appellate brief. Appellant, however, maintains that *Foster* is inapplicable to him because it violates his rights against ex post facto legislation and his due process rights.

{¶69} We find appellant's argument without merit and apply *Foster* to this case. In *Foster*, the Supreme Court of Ohio found several provisions of S.B. 2 unconstitutional, including R.C. 2929.14(E)(4), 2929.14(A), 2929.14(B) and (C), and 2929.19(B)(2). *Foster*, supra, applying *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621; *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403; *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. Therefore, the court severed and excised these provisions from S.B. 2 and ordered that cases on direct review be remanded for a new sentencing hearing. *Foster*, supra at 29-31. The court explained that during resentencing, the trial court has full discretion to impose a prison sentence within the statutory range and is no longer required to make findings or state reasons for imposing maximum, consecutive, or more than the minimum sentence. Id. at paragraph seven of the syllabus; see, also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus.

{¶70} In the instant matter, the trial court relied on unconstitutional provisions when it imposed appellant's consecutive sentences. Thus, appellant's sentences are void. Accordingly, we vacate his sentences and remand the case to the trial court for resentencing in accordance with *Foster*.

{¶71} Appellant insists, however, that any sentence imposed under *Foster's*

new remedy violates his rights against ex post facto legislation and due process rights. We find appellant's argument to be premature as he has yet to be sentenced under *Foster*. *State v. Erwin*, Cuyahoga App. No. 87333, 2006-Ohio-4498; *State v. McCarroll*, Cuyahoga App. No. 86901, 2006-Ohio-3010; *State v. Chambers*, Cuyahoga App. No. 87221, 2006-Ohio-4889; *State v. Rady*, Lake App. No. 2006-L-012, 2006-Ohio-3434; *State v. Pitts*, Allen App. No. 01-06-02, 2006-Ohio-2796; *State v. Sanchez*, Defiance App. No. 4-05-47, 2006-Ohio-2141. Accordingly, this argument is without merit.

Conviction affirmed, sentence vacated and remanded for resentencing.

It is ordered that appellee and appellant split the 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.

ANN DYKE, JUDGE

JAMES J. SWEENEY, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR