[Cite as *State v. Kafaru*, 2010-Ohio-3401.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92543

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LAMIDI KAFARU

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507950

BEFORE: Sweeney, J., Rocco, P.J., and Celebrezze, J.

RELEASED: July 22, 2010

JOURNALIZED:

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JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Lamidi Kafaru ("defendant"), appeals following his multiple convictions for aggravated murder and felonious assault with specifications, and his sentence, which includes a term of life without the possibility of parole. For the reasons that follow, we affirm.

{¶ 2} This matter stems from the fatal shooting of a Cleveland Police Officer on February 29, 2008. On that day, Officer Derek Owens and his partner, Officer Robert Goines, were engaged in a foot chase of individuals in the area of Parkview and East 102nd Street when Officer Owens sustained a fatal gunshot

wound. Officer Goines, who had just witnessed the shooting of Officer Owens, became engaged in an exchange of gunfire with the shooter.

{¶ 3} After first identifying a different individual as the shooter, Officer Goines later identified defendant as the person who shot and killed Officer Owens and had fired at him.

{¶ 4} During the search of defendant's residence, police seized, among other things, items of defendant's clothing believed to match those worn by the shooter; specifically, a black and red White Sox jacket[1] and a pair of Timberland boots. Several police witnesses testified that these boots matched a trail in the snow between defendant's residence and the area of the shooting. They also believed briars found on defendant's jacket came from a patch found along that trail. The murder weapon was also found in defendant's residence with defendant's DNA on it. Defendant was arrested and charged with three counts of aggravated murder with specifications (Counts 1-3); attempted murder with specifications (Count 4); and three counts of felonious assault with specifications (Counts 5-7). The charges against defendant subjected him to the possibility of the death penalty. Further substantive facts that were presented at trial will be detailed as necessary for the resolution of defendant's assigned errors.

{¶ 5} The jury found defendant not guilty of Count 1 but guilty of all remaining counts and specifications. The matter proceeded to the penalty phase,

[1]Officer Goines had described the coat as a Chicago Bull's type jacket.

where the jury was unable to reach a unanimous verdict on the imposition of the death penalty. The trial court instructed the jurors to return to deliberate the remaining alternative life sentences. The trial court subsequently dismissed the jury when it was still unable to reach a unanimous verdict. The trial court imposed sentence upon the defendant, who received a prison term of life without the possibility of parole to be served consecutively to the sentence imposed on the remaining counts for a total sentence of 51 years plus life without parole.

{¶ 6} Defendant now appeals, asserting five assignments of error for our review.

{¶ 7} "I. The appellant was denied due process of law and his Sixth Amendment right to trial by jury when he was sentenced by the court to a sentence of life without parole after the jury could not unanimously agree on a sentence."

{¶ 8} Defendant maintains that the trial court erred by imposing sentence upon him after the jury was unable to reach a unanimous verdict as to the death penalty and also the life sentence alternatives. Defendant makes a general assertion that the trial court's sentence deprived him of his right to trial by jury and due process.

{¶ 9} R.C. 2929.03(C)(2)(b) provides that "[a] penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section * * * shall be determined by one of the following:

{¶ 10} "(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

{¶ 11} "(ii) By the trial jury and the trial judge, if the offender was tried by jury."

{¶ 12} However, when the matter is tried by a jury and the jury becomes deadlocked during its sentencing deliberations in the penalty phase and "is unable to reach a unanimous verdict to recommend any sentence authorized by R.C. 2929.03(C)(2)," the trial court is required to sentence the offender to one of the alternative life sentences. *State v. Springer* (1992), 63 Ohio St.3d 167, 586 N.E.2d 96.

{¶ 13} In *Springer*, the court observed that the statute "withholds authorization for the death penalty absent a unanimous death-penalty recommendation by the trial jury." Id. at 171-172, citing R.C. 2929.03(D)(2). However, the same provision requires the trial court to recommend a life sentence alternative "under circumstances where the penalty of death cannot be recommended or imposed [by the jury]." Id. at 172. The court found this to be "a clear statement of policy that an offender be sentenced to a term of life imprisonment where the trial jury is unable to unanimously agree that the penalty of death is appropriate. * * * [I]n cases where, as here, the jury becomes hopelessly deadlocked during its sentencing deliberations and is unable to unanimously recommend *any* sentence, including death, the penalty of death is clearly unauthorized" and one of the remaining "authorized" life sentencing options

must be imposed upon the offender by the trial court. Id., emphasis added. "To hold otherwise would be to permit one aberrant or rogue juror to frustrate the policy of the law by merely withholding his or her vote from an otherwise unanimous recommendation of life imprisonment in the hope that the defendant would be retried and that a future jury would unanimously recommend the penalty of death." Id.

{¶ 14} Defendant urges us not to follow *Springer* due to a subsequent legislative addition of a third life sentence alternative to the statute, i.e., life without the possibility of parole, which was not an option when *Springer* was decided. First, *Springer* was in effect when the legislature amended the statute, which did not explicitly negate *Springer*'s precedential value nor did it express an intention to do so. The rationale of *Springer* is grounded upon the jury's inability to achieve a unanimous verdict concerning the death penalty thereby rendering death an "unauthorized" sentence. The addition of a third life alternative, even one without the possibility of parole, does not nullify the holding and purpose of the *Springer* decision, which was to preclude a rogue juror from frustrating the process by withholding a vote on a life sentence alternative in the hope that a future jury would unanimously recommend the death penalty. Finally, we note that this Court has previously found this same assignment of error without merit in *State v. Moulder*, Cuyahoga App. No. 80266, 2002-Ohio-5327, ¶93-95.

{¶ 15} Assignment of Error I is overruled.

{¶ 16} "II. The verdict and judgment below are against the manifest weight of the evidence."

{¶ 17} At trial, the State presented the testimony of 31 witnesses and defendant offered three witnesses in addition to his own testimony. The voluminous record contains a fair number of inconsistencies; however, considering the record as a whole, the jury's verdict was not against the manifest weight of the evidence.

{¶ 18} To warrant reversal of a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 19} The version of events that transpired in the Parkview area the evening of February 29, 2009 varies with each witness's account. The only undisputed facts can be summarized as follows:

{¶ 20} Officer Goines and Officer Owens drove down Parkview, where Officer Goines exited the police car to investigate suspected drug activity. Officer Owens continued driving as Officer Goines began chasing some individuals who had been loitering on the porch of an abandoned house. Anthony Milner, a.k.a. Googieman, and Andrew Alexander both admitted to being on the porch and

running from police. Officer Owens parked the police car on Mt. Auburn and he was seen chasing the individual that shot and killed him at an address on Parkview. Officer Goines first identified Willie Wheeler as the shooter and later identified defendant as the shooter. The murder weapon was found in defendant's house with his DNA on it. Defendant hid the weapon in the vanity of his bathroom. Police also seized several items of clothing from defendant's room that appeared to match those worn by the shooter. Many officers testified about a trail of boot prints found in the snow between the defendant's house and the area of the shooting. The boot impression appeared to match the soles of Timberland boots found in defendant's bedroom. A jacket found in defendant's bedroom had briars on it that appeared to match briars found in an area along the boot-print path. After discovering he was a suspect in Officer Owens's murder, defendant voluntarily went to the police station, where he was arrested and charged in this matter. Beyond those facts, the witness's accounts vary and there are many conflicts in the evidence.

{¶ 21} Initially, Milner lied to police, stating he was not present at the abandoned house. A beer can found at the abandoned house, however, tested positive for Milner's DNA. Once confronted with this fact, Milner admitted he had been there when the police chase began and reported seeing defendant shoot Officer Owens.

{¶ 22} Milner and Alexander both testified that defendant was with them on the porch and also ran from police. Defendant said he was not on the porch with

them but was at a different abandoned house. Although defendant said he had seen Milner earlier that day, defendant did not want to talk to him. Defendant said he was at the abandoned house trying to sell drugs and did not see anyone else outside. When he heard gunshots, defendant claims he just went home.

{¶ 23} Milner testified that he saw Officer Owens chasing defendant. Immediately after, Milner heard gunshots and saw Officer Owens fall. Milner identified Exhibit 96, the jacket taken from defendant's bedroom, as the one defendant was wearing on February 29, 2009. Defendant denied wearing it that day and said he was wearing a sweatshirt. Milner testified that Exhibit 119 (later identified as the murder weapon) was the gun he saw defendant use on February 29, 2009.

{¶ 24} Alexander testified that he also saw police chasing defendant towards Parkview and he also heard the gunfire. According to Alexander, he and Milner were hiding on Mt. Auburn at this time. Conversely, Milner said he was on Parkview at the time shots were fired.

{¶ 25} Alexander said defendant had shown him a gun the night previous to the shooting. He identified Exhibit 119, as the gun defendant had shown him. Defendant had also reportedly told Alexander he would shoot at "the boys" if they ever chased him. Alexander said that the term "the boys" means the police.

{¶ 26} Other witnesses heard the gunshots and observed the defendant. After hearing the gunshots, Willie Milner[2] looked out the window of his Parkview residence and saw defendant, who appeared to be trying to hide. Wanda Dearman was outside on Parkview when she saw police chasing someone who looked like defendant. She heard shots fired and saw the officer fall. Aaron Walker called 911 and reported the gunshots. He later identified defendant from a photo array as the person he saw walking in the backyard wearing a black jacket and red hoodie. Initially, Walker testified that the person's hair was in "twisties." However, under cross-examination, Walker admitted that his 911 call described the person as having a "short afro-style haircut" that was "reddish brown in color." Walker explained that he based his identification of defendant on his face. Walker did not witness the shooting.

{¶ 27} Officer Goines witnessed Officer Owens chasing an individual. Officer Goines saw the man reaching and indicated this to Officer Owens. Officer Owens grabbed the man and then Officer Goines heard muffled shots and saw his partner fall. Officer Goines approached Officer Owens, who instructed Goines to pursue the shooter, which he did. The shooter then fired at Officer Goines. When Goines returned fire, the shooter fled. Officer Owens died later at the hospital.

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[2]Anthony Milner's grandfather

{¶ 28} Goines recalled describing the shooter over the police radio as "black male, braids, red hoodie, black jacket, Chicago Bulls-type jacket." Goines elaborated, "[h]e was * * * brown skinned, which is lighter than me, about Derek's complexion, about Derek's height, long braids in his head, wearing a reddish type hoodie with a black jacket with red stitch lettering. Jeans — blue denim jeans, brown Timberland-type boots."

{¶ 29} The record establishes that numerous individuals were detained following the shooting. The same night of the incident, Goines made a cold-stand identification of Willie Wheeler as the shooter. According to the record, Wheeler is approximately six feet tall, slim build with a reddish complexion, freckles, and a short haircut without any braids. Defendant had braids at the time of the offense, and a black Chicago White Sox jacket with red lettering was found in his bedroom. Throughout his testimony, Goines explained that he misidentified Wheeler due to the stress and shock he was experiencing from the events of that night. Officer Goines said he knows Willie Wheeler from patrolling the area and had seen him about 5,000 times over the past five years. Goines said he had associated Wheeler in his mind with the shooting because he had been chasing Wheeler just prior to seeing his partner being shot. Officer Goines was about fifteen feet away from the shooter and positively identified defendant as the shooter in both a photo array days after the incident and again at trial.

{¶ 30} Hours after the shooting, Wheeler's clothes were tested and were negative for gunshot residue. No gunshot residue was found on his hands either.

Wheeler made an oral statement to police and, despite being detained for several days, Wheeler was eventually released without charges.

{¶ 31} According to the forensic scientist, the trigger handle of the gun found in defendant's bathroom contained defendant's DNA. Defendant said he purchased the gun at 7:30 a.m. from Milner the morning after the murder of Officer Owens. Defendant lived with several relatives, including two of his sisters who testified. According to them, defendant was home the night of February 29, 2009. Although they asked him what happened on the street, defendant told them he did not know. He never told anyone he had heard shots fired. Defendant and his sisters watched the news and learned of the police shooting on Parkview. When his sisters awoke the next day, defendant had already left for school. After school, defendant went to a friend's house and then to stay with a relative.

{¶ 32} Defendant's sister informed him by telephone that police were searching his room days after the shooting. He never told anyone about the gun he had purchased from Milner. At trial, defendant claimed he was not wearing his black jacket and Timberland boots on February 29, 2009. Gunshot residue was not identified on any of the articles of clothing that were taken from his room.

{¶ 33} Additional witnesses testified including friends and relatives of Willie Wheeler, who had informed police of defendant's alleged involvement in the shooting. The defense presented a child witness from the Parkview neighborhood, who claimed she had over heard Milner saying he shot Officer Owens and that his friend was "going to go down for it." Milner denied this;

consistently maintaining that he saw defendant shoot the officer. Two other men testified that they were detained for significant amounts of time as potential suspects while police investigated the incident that night. However, both men were cleared — one was meeting with his mother and social workers and the other was working when the shooting took place.

{¶ 34} Considering the record as a whole, the jury did not clearly lose its way in weighing the evidence, considering the credibility of the witnesses, and resolving the conflicting evidence; therefore, defendant's convictions were not against the manifest weight of the evidence.

{¶ 35} Assignment of Error II is overruled.

{¶ 36} "III. State misconduct during appellant's trial denied his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution."

{¶ 37} In order for this Court to reverse a conviction on the grounds of prosecutorial misconduct, we must find that (1) the remarks were improper and (2) that they prejudicially affected the substantial rights of the defendant. *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. "[T]he effect of counsel's misconduct 'must be considered in the light of the whole case.'" *State v. Durr* (1991), 58 Ohio St.3d 86, 94, 568 N.E.2d 674, quoting *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, 473 N.E.2d 768, quoting *Mikula v. Balogh* (1965), 9 Ohio App.2d 250, 258, 224 N.E.2d 148.

{¶ 38} "[P]rosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make

outlandish remarks, misstate evidence, or confuse legal concepts." *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136. Prosecutorial conduct that was not objected to is reviewed under the plain error analysis. Id.

{¶ 39} The "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78. As such, the defendant must show that there is a reasonable probability that, but for the prosecutor's misconduct, the result of the proceedings would have been different. *State v. Loza* (1994), 71 Ohio St.3d 61, 641 N.E.2d 1082, ¶78-79, overruled on other grounds.

{¶ 40} Defendant argues that the prosecutor's cross-examination of the defense expert witness during the penalty phase constituted prosecutorial misconduct. The first instance of alleged misconduct was the State's inquiry to the defense expert as to whether he was aware that defendant had a juvenile "conviction" for sexual imposition and unlawful restraint. This inquiry followed a sidebar conference where the court permitted the State to ask whether the expert was aware of the offense without getting into "any specifics" about it. The defendant did not object to the question that was posed immediately following the sidebar and the expert said he was not aware of any such conviction. According to the expert, the defendant had denied having any such convictions.

{¶ 41} The balance of the alleged misconduct focuses on the prosecutor's treatment of this witness with disparaging commentary. However, in almost all

instances the court admonished the prosecutor both in front of the jury and at sidebar. When the prosecutor said to the expert "I don't think you know the answer to much of anything, do you?" The judge sustained the defense objection and gave a curative instruction as follows: "That's unnecessary. If you don't have any probative questions, stop. Ladies and gentlemen you will disregard that, of course." It is defendant's belief that the prosecutor's behavior diverted the jury's focus from consideration of the expert's testimony. We cannot reach this conclusion, especially in light of the fact that the jury was unable to unanimously agree on a sentence. Considering the record as a whole, defendant has not established a reasonable probability that the outcome of his sentencing phase would have been different but for the alleged prosecutorial misconduct during the cross-examination of the defense expert.

{¶ 42} Assignment of Error III is overruled.

{¶ 43} "IV. Ineffective assistance of counsel during the trial and mitigation phases violated petitioner's Sixth Amendment right."

{¶ 44} To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In 1989, the Ohio Supreme Court truncated this standard, holding that reviewing

courts need not examine counsel's performance if appellant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 143, 538 N.E.2d 373.

{¶ 45} Defendant asserts counsel's performance was ineffective in both the guilt and penalty phases of his trial. With regard to counsel's trial performance, defendant maintains that his counsel was ineffective because they did not employ an expert to examine the bullet fragment that was removed from Officer Owens's body. The State presented the testimony of Officer Wilson, who compared the bullet with the gun found in defendant's house. Officer Wilson concluded that the bullet was fired from that weapon. It is utter speculation that another expert would reach a different conclusion. The decision not to employ a second expert, who may well have corroborated Officer Wilson's findings, is trial strategy and does not constitute ineffective assistance of counsel.

{¶ 46} With regard to the penalty phase, defendant maintains his attorneys were ineffective for the following reasons: (1) the decision to request a mental examination for purposes of mitigation pursuant to R.C. 2929.03(D)(1) rather than requesting services of an independent expert pursuant to R.C. 2929.024; (2) the decision to request a presentence investigation report; (3) the decision not to employ a neuropsychological expert; and (4) the failure to object to the trial court imposing sentence after the jury was deadlocked.

{¶ 47} We have already determined that the trial court properly imposed sentence after the jury became deadlocked; accordingly, the lack of an objection did not prejudice defendant and did not constitute ineffective assistance of counsel.

{¶ 48} The argument that counsel is ineffective for requesting a report pursuant to R.C. 2929.03 rather than R.C. 2929.024 was addressed by the Ohio Supreme Court in *State v. McNeill*, 83 Ohio St.3d 438, 1998-Ohio-293, 700 N.E.2d 596. In *McNeill*, the court held that the defendant had not established prejudice because the provision of assistance pursuant to R.C. 2929.024 is dependent on its necessity for the proper representation of the defendant and McNeill did not argue this necessity. The same is true in this case. In addition, defendant has not identified any specific instances of prejudice to him that resulted from his attorney's request for a mental examination pursuant to R.C. 2929.03(D)(1) instead of R.C. 2929.024. "This court has refused to adopt a per se rule that * * * failure to request an independent referral constitutes ineffective assistance of counsel." *State v. Edwards*, Cuyahoga App. No. 85908, 2006-Ohio-2315, ¶10, citing *State v. Brown* (1992), 84 Ohio App.3d 414, 422, 616 N.E.2d 1179; *State v. Wilson* (Apr. 23, 1998), Cuyahoga App. No. 71758. The ineffective assistance claim is not supported on this ground.

{¶ 49} The decision not to employ a neuropsychological expert is also unavailing for this reason. Through the testimony of Dr. Fabian, defendant was able to suggest to the jury that defendant possibly suffered from brain damage.

Defendant has not established that the testimony of a neuropsychological expert would have changed the outcome of his sentence. A neuropsychological expert, if employed by the defense, may have found defendant suffered from brain damage, but it is equally possible that such an expert would have reached a contrary conclusion.

{¶ 50} Finally, defense counsel's request for a presentence investigation report did not rise to the level of ineffective assistance of counsel. "[I]t is not ineffective assistance to request a PSI where the record does not rebut the presumption that counsel acted reasonably." *McNeill*, 83 Ohio St.3d at 451, citing *State v. Hutton* (1990), 53 Ohio St.3d 36, 42, 559 N.E.2d 432. The record does not rebut the presumption that counsel acted reasonably in requesting the PSI. Once aware of detrimental information, defendant's attorneys withdrew the request for the PSI and it was not given to the jury.

{¶ 51} Assignment of Error IV is overruled.

{¶ 52} "V. The lower court erred and denied the appellant due process of law when it imposed consecutive sentences without making findings required by R.C. 2919.14(E)(4) and *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711."

{¶ 53} In this case, defendant maintains that the trial court erred by imposing consecutive sentences because he asserts the trial court was required to make findings under R.C. 2929.14(E)(4). In *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court held, in relevant part, "that R.C. 2929.14(E)(4) and 2929.41(A) are capable of being severed. After the

severance, judicial fact-finding is not required before imposition of consecutive prison terms." *Foster*, at ¶99.

{¶ 54} Defendant argues that the statutory findings were revived by implication due to the United States Supreme Court's decision in *Oregon v. Ice*[3] and because the legislature never repealed the statutory provisions that were excised by *Foster*.

{¶ 55} In addition to determining the length of a prison sentence for each conviction, courts have the discretion to determine whether prison sentences are to be served consecutively or concurrently. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶35 ("*Foster* did not prevent the trial court from imposing consecutive sentences; it merely took away a judge's duty to make findings before doing so. The trial court thus had authority to impose consecutive sentences on Elmore"); see, also, *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983.

{¶ 56} In *Ice*, the United States Supreme Court addressed the court's authority to impose consecutive sentences. The court in *Ice* held that Oregon statutes requiring judicial fact-finding before imposing consecutive sentences do not violate the Sixth Amendment guarantee of a jury trial. Id. at 714. However, the effect *Ice* may have on Ohio's post-*Foster* sentencing scheme has not been fully addressed by the Ohio Supreme Court. *Elmore*, 2009-Ohio-3478, ¶34-35

[3](2009), 129 U.S. 711, 129 S.Ct. 711, 172 L.Ed.2d 517.

(declining to "address fully all ramifications of *Oregon v. Ice*"). Thus, we continue to follow *Foster* when reviewing felony sentencing issues. See *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, at ¶29 (concluding that, in regard to *Ice*, "we decline to depart from the pronouncements in *Foster*, until the Ohio Supreme Court orders otherwise").

{¶ 57} Assignment of Error V is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR