[Cite as *State v. Hunter*, 2011-Ohio-1068.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94958

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

SAMMY G. HUNTER, JR.

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523788

BEFORE: Celebrezze, J., Boyle, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: March 10, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Sammy Hunter, Jr., appeals his convictions for attempted aggravated arson, assault of firefighters, endangering children, and obstructing official business. He claims that these convictions are against the manifest weight of the evidence, that numerous errors deprived him of a fair trial, and that his statement to the police was improperly used at trial. He also claims that his sentence is contrary to law. After a thorough review of the record and relevant law, we affirm appellant's convictions and sentence.

{¶ 2} On April 28, 2009, Jessica Turner, appellant's girlfriend at the time, testified that she was home with the couple's two sons in their apartment on Garden Drive

in Euclid, Ohio, when appellant returned from an outing with a friend. He went into the back bedroom and laid down. After a few moments, appellant said his newborn son looked like a baby doll. He then emptied out a diaper bag in the bedroom and attempted to take the baby out of Turner's arms, but she was able to retain control of the child. Turner testified that she was afraid appellant would hurt the baby. Appellant then left the room, and Turner put the child into its bed. She heard the front door shut and saw appellant in front of the apartment through a window. Turner then smelled gas and went into her kitchen to investigate. She testified that all four knobs on the kitchen stove had been turned on, but none of the burners were lit, causing gas to escape into the apartment. She turned off the stove.

{¶ 3} Appellant re-entered the apartment and retrieved his infant son from the bedroom. Turner grabbed the boy from him. Appellant then put a cigarette in his mouth and attempted to light it. Turner grabbed for the lighter and prevented appellant from igniting it. Appellant then called 9-1-1 to report a gas leak while he turned the knobs on the stove back on.

{¶ 4} Firefighters arrived and appellant became confrontational. He allowed one firefighter, Captain James Dalla-Riva, to enter the apartment, but then slammed the front door, leaving two firefighters in the hall.

{¶ 5} Captain Dalla-Riva testified that he entered the apartment and appellant slammed the door behind him. Dalla-Riva tried to go into the kitchen to investigate the gas leak, but appellant pushed him and prevented him from going into the kitchen.

Dalla-Riva retreated into the living room while appellant tried to ignite a cigarette lighter as he passed from the kitchen into the living room on his way to the front door as firefighters Randall Potts and Brian Ciami tried to open it. Appellant once again slammed the door on the firefighters. After another attempt by the men to get inside, appellant exited the apartment and charged at the firefighters. The firefighters were able to wrestle appellant to the ground and hold him down while waiting for Euclid police officers to arrive.

{¶ 6} Appellant was indicted by a Cuyahoga County grand jury on May 5, 2009 and charged with four counts of attempted murder, four counts of attempted aggravated arson, one count of kidnapping, three counts of assault of a firefighter, two counts of endangering children, one count of domestic violence, and one count of obstructing official business.

{¶ 7} Trial commenced on October 7, 2009. At the close of the state's case, the trial court granted appellant's Crim.R. 29 motion of acquittal for all counts of attempted murder, kidnapping, and domestic violence, and one count of child endangering. The jury then found appellant guilty of all counts of attempted aggravated arson, two counts of assault of firefighters, one count of child endangering, and obstructing official business. Appellant was found not guilty of one count of assault of a firefighter. On March 19, 2010, the trial court imposed an aggregate prison sentence of five years with three years of postrelease control.[1] Appellant then instituted this appeal.

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[1] Appellant's sentence consists of three concurrent three-year prison terms

Law and Analysis

Consecutive and Maximum Sentence

{¶ 8} In his first assignment of error, appellant argues that "[t]he trial court's sentence of more than the minimum sentence and the maximum sentence was contrary to law because the trial court failed to consider the required statutory criteria and principles pursuant to [R.C.] 2929.11 and 2929.12."

{¶ 9} Post-*Foster*,[2] appellate courts should apply a two-step analysis in determining the validity of a sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4.[3] "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id.

{¶ 10} In the present case, appellant was convicted of three counts of attempted aggravated arson in violation of R.C. 2909.02(A)(1) and one count in violation of R.C. 2909.02(A)(2), second and third degree felonies, respectively. See R.C. 2909.02(B) and 2923.02(E)(1). The range of punishment for a second degree felony is two to eight

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for attempted aggravated arson; one concurrent two-year term for attempted aggravated arson; two consecutive one-year terms for assaulting a firefighter, to be served consecutively to all other terms; a concurrent six-month jail term for child endangering; and a concurrent 90-day jail term for obstructing official business.

[2] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

[3] We recognize that *Kalish* is a plurality opinion, but it is instructive.

years, and one to five years for a third degree felony. R.C. 2929.14(A)(2) and (A)(3). Appellant received concurrent three-year terms for the second degree felonies and a concurrent two-year term for the third degree felony.

{¶ 11} Appellant was found guilty of assaulting two firefighters in violation of R.C. 2903.13(A), which is a fourth degree felony. R.C. 2903.13(C)(3). This is punishable by a term of incarceration of between six and 18 months. R.C. 2929.14(A)(4). Appellant received a one-year sentence. He was also found guilty of endangering children in violation of R.C. 2919.22(A), a first degree misdemeanor punishable by a jail term not exceeding 180 days, for which he received a sentence of 180 days. R.C. 2929.24(A)(1). Finally, appellant was convicted of obstructing official business in violation of R.C. 2921.31(A), a second degree misdemeanor, punishable by up to 90 days in jail. R.C. 2929.24(A)(2). Appellant received a 90-day jail term for this count.

{¶ 12} All of appellant's sentences fall within the appropriate statutory ranges, and therefore, clearly are not contrary to law.

{¶ 13} *Kalish* next instructs this court to investigate further to determine if the trial court abused its discretion when it imposed sentence. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 14} In determining an appropriate sentence, a trial court is guided by the principles set forth in R.C. 2929.11(A) — "to protect the public from future crime by the

offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." Further, R.C. 2929.12 outlines the factors to be considered, stating that "a court * * * has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in section 2929.11 of the Revised Code. In exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct and the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism and, in addition, may consider any other factors that are relevant to achieving those purposes and principles of sentencing." Misdemeanor sentencing principles and guidelines are substantially similar and contained in R.C. 2929.21 and 2929.22.

{¶ 15} In its journal entry, the trial court stated that it "considered all required factors of the law[,]" and found "that prison is consistent with the purpose of R.C. 2929.11." During the sentencing hearing, the court indicated that it had read the psychological reports and the presentence investigation report documenting appellant's mental state as well as other aspects of his life. Appellant claims the trial court ignored mitigating factors set forth in R.C. 2929.12. However, appellant had approximately a dozen prior felony convictions in Cuyahoga County, including one conviction for attempted assault of a police officer. There was also evidence that appellant was

prescribed medication for his psychological condition, but was not taking it. Further, evidence also existed that appellant was high on PCP[4] at the time of the incident.

{¶ 16} While appellant claims that the court ignored mitigating factors, the trial court actually thoroughly discussed appellant's mental condition, his drug addiction problems, and his criminal history. The court stated, "I'm required under the law to follow the remaining guidelines of the Ohio sentencing provisions, which is to punish the offender, protect the public from future crime by the offender, and that's an issue here, and others, and to consider the need for incapacitation, deterrence, rehabilitation, and restitution.

{¶ 17} "My sentence should be commensurate with and not demeaning to the seriousness of your conduct, the impact on the victims, and hopefully be consistent with sentencing for other crimes by similar defendants. * * * By the same token I will take into account the fact that you have a serious, long, ongoing dangerous drug problem and couple that with a mental illness that you periodically treat * * *."

{¶ 18} The trial court considered the mitigating factors appellant points to, as well as factors that suggest a harsher sentence. The court did not err in sentencing appellant to an aggregate term of imprisonment of five years.

Manifest Weight

{¶ 19} Appellant also argues that his convictions are against the manifest weight of the evidence. The court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717,

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[4] Phencyclidine.

has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "There being sufficient evidence to support the conviction as a matter of law, we next consider the claim that the judgment was against the manifest weight of the evidence. Here, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Martin* at 175. Moreover, it is important to note that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *Martin*, supra.

{¶ 20} In determining whether a judgment of conviction is against the manifest weight of the evidence, this court in *State v. Wilson* (June 9, 1994), Cuyahoga App. Nos. 64442 and 64443, adopted the guidelines set forth in *State v. Mattison* (1985), 23 Ohio App.3d 10, 490 N.E.2d 926, syllabus. These factors, which this court noted are in no way exhaustive, include: "(1) Knowledge that even a reviewing court is not required to accept the incredible as true; (2) Whether evidence is uncontradicted; (3) Whether a witness was impeached; (4) Attention to what was not proved; (5) The certainty of the evidence; (6) The reliability of the evidence; (7) The extent to which a witness may have

a personal interest to advance or defend their testimony; and (8) The extent to which the evidence is vague, uncertain, conflicting or fragmentary."

{¶ 21} A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the state has proved the offense beyond a reasonable doubt. *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. See, also, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25.

{¶ 22} The aggravated arson statute, R.C. 2909.02(A), prohibits, by means of fire or explosion, (1) the knowing creation of a substantial risk of serious physical harm to any other person other than the offender, or (2) to cause physical harm to any occupied structure. Appellant was convicted of four counts of attempted aggravated arson — three counts related to his sons and Turner, and one count related to the apartment building.

{¶ 23} The evidence at trial demonstrated that appellant turned on all the gas burners of the stove in his apartment while deactivating the pilot light so the burners would not ignite, at least two separate times. Appellant did so even while calling 9-1-1 to complain about a gas leak. Turner and Captain Dalla-Riva both testified that appellant attempted to ignite a lighter in the vicinity of the kitchen while gas was escaping from the stove. This testimony demonstrates that the jury did not lose its way in convicting appellant of attempted aggravated arson.

{¶ 24} Appellant was convicted of one count of domestic violence for creating a substantial risk to the health and safety of his 26-day-old son by violating a duty of care or

protection. R.C. 2919.22(A). The evidence at trial was clear that appellant became fixated on his newborn son and a belief that he was a doll. Testimony demonstrated that appellant created a substantial risk to this young child by attempting to place him in a diaper bag and then carrying him into a kitchen that appellant was attempting to fill with natural gas.

{¶ 25} Appellant was also convicted of two counts of assaulting the firefighters who came to investigate the gas leak and obstructing official business. Captain Dalla-Riva testified that appellant forcefully, with both hands, pushed him out of the kitchen. Firefighter Ciami also testified that he suffered an abrasion to his head as a result of his fight with appellant. Several firefighters and police officers testified to the altercation that occurred in the hallway of the apartment complex between appellant and at least three firefighters. The jury clearly could have found that appellant assaulted these men, who were acting in their official capacities as firefighters.

{¶ 26} No manifest miscarriage of justice was visited upon appellant in this case based upon the evidence presented.

Miranda Violation

{¶ 27} Appellant next argues that his "custodial statement was used in trial over objection when he was not Mirandized before it was taken." In this error, appellant claims that a brief statement he made to Officer Mitchell Houser while at or on the way to the hospital was used in violation of his constitutional rights.

{¶ 28} "Pursuant to *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694, statements 'stemming from custodial interrogation of the defendant' must be suppressed unless the defendant had been informed of his Fifth and Sixth Amendment rights before being questioned. 'Custodial interrogation' means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' Id." *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, 907 N.E.2d 1254, ¶23. "'The State bears the burden of establishing, by a preponderance of the evidence, that the defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights based on the totality of the circumstances surrounding the investigation. *State v. Gumm* (1995), 73 Ohio St.3d 413, 429, 653 N.E.2d 253.'" Id. at ¶26, quoting *State v. Williams*, Cuyahoga App. No. 82094, 2003-Ohio-4811, ¶12.

{¶ 29} We first note that appellant failed to challenge the statement's admission in a pretrial suppression motion. He was required to raise this issue prior to trial. Crim.R. 12(C)(3). His failure to do so waives this error for review. See *State v. Griffin* (June 20, 1977), Cuyahoga App. No. 35599, 6; Crim.R. 12(H). Appellant has not demonstrated why this court should address this error in light of his waiver of this issue.

{¶ 30} Further, admission of the statement does not result in plain error because the statement appellant made was not in response to "questioning initiated by law enforcement officers[,]" one of the requirements for *Miranda* to apply. *Miranda* at 444. Officer Houser testified that he believed appellant was under the influence of drugs, so he

did not try to interrogate him or Mirandize him. Without being questioned by the officers, appellant stated, "I had to kill him, I had to try to kill him." Officer Houser had not posed a question to appellant and did not respond or otherwise follow up.

{¶ 31} This is not the type of situation the Supreme Court, in *Miranda*, meant to exclude from the proper bounds of evidence that could be presented to a trier of fact. Id. at 477-478. While appellant was in the custody of the police at the hospital, he was not interrogated. He blurted out the statement without prompting or questioning. Its admission does not constitute plain error.

Cumulative Error

{¶ 32} Appellant finally argues that "[t]he cumulative effect of errors in the trial deprive[d] [him] of a fair trial." In *State v. Garner*, 74 Ohio St.3d 49, 1995-Ohio-168, 656 N.E.2d 623, the Ohio Supreme Court recognized that, pursuant to the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal."

{¶ 33} According to appellant, the admission of his statement and the inaccurate news story surrounding his arrest prejudiced him and culminated in an unfair trial; however, appellant has not demonstrated any error in his trial. As discussed above, his statement was not admitted in error. Additionally, although initial media reports of the

crime indicated that appellant attempted or did put his 26-day-old son in the oven, those reports were incorrect.

{¶ 34} At the beginning of jury voir dire, the trial court advised the jury that the case "was not about a baby being placed in the oven, regardless of what you heard or whoever it was from, television * * *[,] you're to set aside anything you've heard outside the courtroom." The state reiterated this point in opening statements. Appellant never requested a change of venue and never objected either before or during trial about prejudicial publicity, and the jury was asked about this publicity and their ability to be fair and impartial. None of the seated jurors indicated that they could not abide by these instructions.

{¶ 35} Appellant has failed to demonstrate that multiple errors occurred during his trial, let alone that those errors resulted in prejudice. Therefore, this assigned error is overruled.

Judgment affirmed.

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 convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR