[Cite as *State v. Walker*, 2011-Ohio-456.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94490

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DESHAWN WALKER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-525866-A

BEFORE: Keough, J., Stewart, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: February 3, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Deshawn Walker ("Walker"), appeals his felonious assault conviction. Finding no merit to the appeal, we affirm.

{¶ 2} In 2009, Walker was charged with murder and felonious assault, each containing one- and three-year firearm specifications. The matter proceeded to trial before a jury, at which the following evidence was presented.

{¶ 3} On the evening of the shooting, the victim, Tyshawn Harrell ("Harrell"), wearing a gray hooded sweatshirt, was in the area of Force Avenue and Warner Avenue with Darryl Gray ("Gray"). Gray was waiting for his friend, Romeo Williams ("Williams"), to pick him up. Williams drove by, so Gray borrowed a "female-styled" bicycle to catch up with him, leaving Harrell behind.

{¶ 4} Five to ten minutes later, Harrell saw two males, later identified as Walker and codefendant, Deonte Smith ("Smith"), walking west on Force heading towards Warner. Harrell thought they were "up to no good." When Walker and Smith noticed Harrell watching them from the opposite corner, they raised their shirts exposing the waistbands of their jeans. Harrell took this gesture to mean that they carried guns; however, he did not see any guns. Harrell then made a similar gesture back to Walker and Smith, even though he did not have a gun on him. As Walker and Smith turned to walk south onto Warner, Harrell called Gray to warn him and told him that "these two men are crazy." As he watched the two males walking southbound on Warner, he noticed Gray approaching the males on his bicycle from the opposite direction. As Gray rode past, either Walker or Smith said something to Gray, which prompted Gray to turn around and ask the men, "Do you know me?" Walker then repeated the question back to Gray. Walker then said, "F--- you all," and he and Smith pulled out their guns and started firing. At

this point, Walker and Smith were close to Laumer Avenue and Gray and Harrell were north near Force. Gray fired two shots back at Walker and Smith before he was shot in the chest. As Harrell fled the scene on foot, bullets were striking the ground around him. Harrell also saw Gray running from the area before collapsing.

{¶ 5} Williams testified that he first saw Gray near the intersection of Laumer and Warner. Gray indicated to Williams to meet him "at the cut" on the corner of Force and Warner. As Williams proceeded to circle back around, he heard four or five gunshots. He then saw two unknown individuals running southbound on Warner, one of whom was wearing a white t-shirt. When Williams reached the Force/Warner area, he saw Gray's bicycle in the street and found Gray shot in the chest and unresponsive.

{¶ 6} Walker and Smith then fled to their aunt's house on Jeffries Avenue. As they entered the house, Smith told their aunt to call 911 because Walker was shot in the arm. According to their aunt, Smith screamed, "They done shot my MF'ing brother." When EMS arrived, Walker had collapsed onto the front lawn. While Walker was being treated in the ambulance, Officer John Mullin ("Mullin") attempted to obtain information from him regarding his identity and who had shot him. Walker gave Mullin a false name and repeatedly stated that he did not know who shot him.

{¶ 7} Both Officers Mullin and Rachel Chapman questioned Smith regarding what happened. Smith told them he and Walker had walked their sister to the bus stop on Turney Road. From the bus stop, they crossed over on Warner to go to a nearby store. As they walked southbound on Warner, Smith noticed a large group of people. A male riding a woman's bicycle emerged from the group and said, "What's up, do you know me?" The male then fired three shots at them. Walker and Smith retreated southbound on Warner and back to their Jeffries residence. As they were running, Smith stated that he heard five or six additional shots, which is when Walker was struck in the arm.

{¶ 8} Mullin then received a radio broadcast for a homicide near Warner Road. Upon approaching the crime scene, Mullin noticed a woman's bicycle. After conferring with homicide detectives, he and Officer Chapman returned to Jeffries to interview Smith further. However, Smith was no longer present at that address. Mullin and other officers searched the Jeffries residence; specifically, the basement area where Walker and Smith rented a room. The basement consisted of two rooms, one with a washer and dryer and one with a makeshift bed and a couple of futons. A black gun holster was recovered from underneath the bed and a bloody white t-shirt was found on top of one of the futons. Additionally, a torn white t-shirt and a Cash-4-Gold envelope addressed to Walker was found near the bed.

{¶ 9} Homicide Detective Hank Veverka ("Veverka") testified that he interviewed Walker at the Homicide Unit. Walker told Veverka that he and Smith walked Smith's girlfriend to the bus stop at Ella Road and Warner Road. From the bus stop, they began walking to a store on Warner Road. They encountered a male on a bicycle on the opposite side of the street. The male on the bicycle said, "What's up," and Walker responded the same. The male on the bicycle then said, "You know me," and Walker responded the same again. The male then got off the bicycle and started shooting at him and Smith. They then fled to their aunt's house on Jeffries. Walker claimed that neither he nor Smith had a gun. Although he acknowledged he slept on the bed in the basement of his aunt's house, he denied any knowledge of the gun holster discovered there.

{¶ 10} A neighborhood witness testified that he saw Gray on a bicycle turn onto Warner. He also observed a male wearing a gray hooded sweatshirt, who he thought went by the name "Tyshawn." "Tyshawn" called out to Gray and began running in his direction. Shortly thereafter, the witness heard three shots, and from his military experience, could tell they were fired from at least two different guns. The witness testified that as the three shots were being fired, "Tyshawn" ducked down and fled westbound. After those three shots were fired, he saw Gray again and when the fourth shot rang out, Gray collapsed.

{¶ 11} After the close of the evidence, the jury found both Walker and Smith not guilty of Gray's murder, but guilty of felonious assault against Harrell.[1] The jury also found Walker and Smith guilty of both the one- and three-year firearm specifications. The trial court sentenced Walker to seven years on the felonious assault charge and merged the firearm specifications, for a total prison sentence of ten years.

{¶ 12} Walker appeals his conviction and sentence, raising four assignments of error, which will be addressed together where appropriate.

Manifest Weight and Sufficiency of the Evidence

{¶ 13} In his first assignment of error, Walker claims there was insufficient evidence to convict him of felonious assault and that his conviction was against the manifest weight of the evidence.

{¶ 14} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St. 3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. Id. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the

[1]This court recently affirmed Smith's felonious assault conviction. *State v. Smith*, Cuyahoga App. No. 94493, 2011-Ohio-90.

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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 15} To warrant reversal 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. *Thompkins*, at 387.

{¶ 16} The use of the word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence. *Smith*, at _2 This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. Id., citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." Id., citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.

{¶ 17} Although we review credibility when considering the manifest weight of the evidence, the credibility of witnesses is primarily a determination for the trier of fact. *DeHass*. The trier of fact is best able "to view the witnesses and observe their demeanor, gestures and voice

inflections, and use these observations in weighing the credibility of the proffered testimony." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, _ 24, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273.

{¶ 18} Walker was convicted of felonious assault pursuant to R.C. 2903.11(A)(2), which provides, in pertinent part, that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * [b]y means of a deadly weapon or dangerous ordnance."

{¶ 19} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B)

{¶ 20} In the instant case, Harrell, the victim, testified that he saw Walker and Smith walking down Force heading toward Warner and thought that they were "up to no good." Harrell stated that he saw Smith and Walker lift up their shirts to expose the waistbands of their jeans, indicating that they carried guns. Harrell made a similar gesture to Walker and Smith, even though he did not have a gun. Because of his suspicion and their actions, Harrell called Gray and told him about the two males and that "These two men are crazy." As he watched the two males walking southbound on Warner, he noticed Gray approaching the males on his bicycle

from the opposite direction. Harrell testified that either Walker or Smith said something to Gray, which prompted him to turn around and ask them, "Do you know me?" Corroborated by Walker and Smith's own statements to police, Walker repeated the question to Gray. According to Harrell, Walker then said, "F--- you all," and both Walker and Smith pulled out their guns and started firing. Harrell testified that Gray fired two shots before he was shot in the chest. Harrell fled the scene on foot as bullets struck the ground around him. At trial, Harrell identified both Walker and Smith as the persons who fired shots at him.

{¶ 21} Walker argues that the State failed to prove that he was attempting to cause physical harm by means of a deadly weapon with regard to Harrell, because Harrell and Gray were not near each other when the shooting occurred. Contrary to Walker's assertion, Harrell testified that when Walker and Smith fired their weapons, he was right behind Gray where he could reach out and touch him. Although other witnesses testified at trial that they did not see Harrell with Gray, there was a five to ten minute window where Gray was out of Harrell's sight. Additionally, at least two witnesses testified that prior to the shooting, they saw Gray with a male wearing a gray hooded sweatshirt.

{¶ 22} Walker also claims on appeal that Harrell's testimony was not credible and his identification of Walker as the shooter was suspect.

Harrell's inability to pick Walker from the photo array shortly after the shooting was not detrimental to the State's case because Walker's own statements to police evidenced that he and Smith exchanged words with Gray. Those words, "You know me," were identical in all versions of the statements given by Walker, Smith, and Harrell. The jury could have found that Harrell's inability to pick Walker from the photo array was immaterial because Walker conceded that he had been present on the scene at the time of the shooting. Walker's presence is further evidenced by the fact that Walker was shot. Although Harrell admitted he was a drug dealer with a prior conviction, the jury was in the best position to judge his credibility and thus, we cannot say that his testimony was so incredible and self-serving for this court to find that the jury lost its way.

{¶ 23} Walker points to the absence of any physical evidence to show that he fired shots at Harrell, arguing that the police did not recover a gun or shell casings. As we stated in *Smith*, "the absence of a recovered gun or spent casings was not fatal to the State's case." *Smith*, at _11. Several witnesses testified to hearing multiple gunshots, some of which sounded different, indicating that two different firearms were used. This was evidenced by the fact the bullet recovered from Gray's body was not that of his own firearm. Moreover, one witness opined that he heard shots fired from different directions. This testimony suggested that the witness heard

shots fired by Gray from one direction and shots fired by Walker and Smith from another direction. Although recovering the firearm would have been ideal for the State, the empty gun holster found under the bed in Walker and Smith's rented bedroom, coupled with Harrell's testimony, was strong circumstantial evidence that Walker possessed or had access to a gun.

{¶ 24} Walker further claims that the lack of gunpowder residue on his hands evidences that he had not fired a weapon. Although Walker's hands were "bagged" so that they could be tested for gunpowder residue, this was not done until after he was treated by emergency crew and hospital physicians for a gunshot wound to the arm. Testimony was given by a forensic scientist that because there was a time period between the discharge of a weapon and collection of the evidence, there is a possibility that material could be lost. Therefore, the jury could have concluded that any residue that could have been saved was tainted or destroyed during Walker's medical treatment. Finally, even though Gray's hands were also "bagged," no gunshot residue or trace metal was found on his hands. The evidence clearly showed that Gray had fired his weapon at least twice before he was fatally shot. Accordingly, the jury could have concluded that the lack of forensic evidence on Walker's hands was of no consequence.

{¶ 25} Even though there was a lack of physical evidence in this case, we conclude that the jury did not lose its way in finding Walker guilty of

felonious assault and that sufficient evidence was presented to support such conviction. Harrell testified and identified Walker as one of the persons who fired shots at him. Both Walker and Smith were seen lifting their shirts in a manner that indicated they were armed. Finally, Harrell testified that he watched Walker and Smith fire their weapons and that bullets struck the ground near him as he ran away.

{¶ 26} Accordingly, Walker's first assignment of error is overruled.

Sentence

{¶ 27} In the second, third, and fourth assignments of error, Walker challenges his sentence. Specifically, he claims that (1) his sentence is contrary to law; (2) the trial court abused its discretion in sentencing him without consideration of the overriding purposes of felony sentencing or the mandatory sentencing factors; and (3) the trial court abused its discretion in sentencing him to nearly the maximum period of incarceration without articulating judicially reviewable reasons for the imposition of such sentence.

{¶ 28} We review felony sentences using the *Kalish* framework. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. The *Kalish* court declared that in applying *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, to the existing statutes, appellate courts "must apply a two-step approach." *Kalish* at _ 4.

{¶ 29} Appellate courts must first "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." Id. at _ 26. If this first prong is satisfied, then we review the trial court's decision under an abuse-of-discretion standard. Id. at _4 and 19.

{¶ 30} In the first step of our analysis, we review whether the sentence is contrary to law as required by R.C. 2953.08(G).

{¶ 31} As the *Kalish* court noted, post-*Foster* "'trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings and give reasons for imposing maximum, consecutive, or more than the minimum sentence.'" Id. at _ 11, quoting *Foster* at _ 100; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus. The *Kalish* court declared that although *Foster* eliminated mandatory judicial fact-finding, it left R.C. 2929.11 and 2929.12 intact. *Kalish* at _ 13. As a result, the trial court must still consider those statutes when imposing a sentence. Id., citing *Mathis* at _ 38.

{¶ 32} R.C. 2929.11(A) provides that:

> **"[A] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing[,] * * * 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."

{¶ 33} R.C. 2929.12 provides a nonexhaustive list of factors a trial court must consider when determining the seriousness of the offense and the likelihood that the offender will commit future offenses.

{¶ 34} R.C. 2929.11 and 2929.12 are not fact-finding statutes. Rather, they "serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence." *Kalish* at _ 17. Thus, "[i]n considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purposes of Ohio's sentencing structure." Id.

{¶ 35} In the instant case, we do not find Walker's sentence contrary to law because it is within the permissible statutory range for felonious assault set forth in R.C. 2907.02(A)(3), as a second degree felony. In the sentencing journal entry, the trial court acknowledged that it had considered all required factors of law and found that prison was consistent with the purposes of R.C. 2929.11. See *State v. El-Berri*, Cuyahoga App. No. 92388, 2010-Ohio-146. It is axiomatic that a court speaks through its journal entries. Id., citing *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, 863 N.E.2d 1024, _ 47.

{¶ 36} We next consider whether the trial court abused its discretion. *Kalish* at _ 4 and 19. An "abuse of discretion" is "'more than an error of law or

judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" Id. at _ 19, quoting *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980) 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 37} Walker argues that the trial court abused its discretion because it did not articulate any reasons for imposing the sentence. He concedes that post-*Foster* a trial court does not have to state its reasons on the record, but maintains that the trial court must at least give an explanation so that the decision may be reviewed by our court.

{¶ 38} Here, the trial court imposed the same sentence as it did for codefendant Smith. Although Walker had no prior criminal record, we cannot say that the trial court abused its discretion in imposing a seven-year sentence for the felonious assault conviction. The sentence is within the statutory range for a second degree felony, and the court's journal entry indicates that it considered all required factors of law and found that prison was consistent with the purposes of R.C. 2929.11.

{¶ 39} Accordingly, Walker's final assignments of error are 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 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.

KATHLEEN ANN KEOUGH, JUDGE

MELODY J. STEWART, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR