[Cite as *State v. Gooden*, 2010-Ohio-1961.]

IN THE COURT OF APPEALS

NINTH APPELLATE DISTRICT

SUMMIT COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 24896**
- vs -	:	
JESSE L. GOODEN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. CR 08 10 3381.

Judgment: Affirmed.

Sherri Bevan Walsh, Summit County Prosecutor, and *Heaven Dimartino*, Assistant Prosecutor, Summit County Safety Building, 53 University Avenue, 6th Floor, Akron, OH 44308 (For Plaintiff-Appellee).

Thomas M. DiCaudo, Kaffen, Zimmerman, DiCaudo & Yoder, 520 South Main Street, Suite 500, Akron, OH 44311 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J., Eleventh Appellate District, sitting by assignment.

{¶1} After trial by jury, appellant, Jesse L. Gooden, was convicted on one count of felonious assault against a peace officer, a felony of the first degree; one count of failure to comply with the order or signal of a police officer, a felony of the third degree; and one count of vandalism, a felony of the fifth degree. The Summit County Court of Common Pleas subsequently sentenced appellant to an aggregate term of nine years.

Appellant has filed a notice of appeal from the conviction. For the following reasons, we affirm.

{¶2} On October 9, 2008, close to 11:00 p.m., appellant and a male passenger were sitting in appellant's dark-colored Ford Taurus, parked in a McDonald's parking lot located on Wolf Ledges in the City of Akron, Ohio. That night, Detective Nicholas Gray, an officer with the University of Akron's Police Department assigned to the Summit County Drug Unit was assisting with directed patrols in the area surrounding the university. Detective Gray was working in an unmarked pick-up and wearing plainclothes. The detective had parked his vehicle across the street from the Wolf Ledges' McDonalds observing the area. He testified the McDonald's parking lot is, in his experience, a common meeting area for drug deals.

{¶3} While looking on, the detective noticed appellant's vehicle with an illuminated dome light. He decided to pull into McDonalds, park next to the Taurus, and, because his truck sat high off the ground, peer into the car. Upon doing so, the officer noted he saw no items indicating the men were or had been dining at the restaurant, i.e., no McDonald's bags or cups. Instead, he saw the passenger holding a compact CD player in his right hand with his left hand "closed like a fist with the nails facing up in the air toward the ceiling." Further, the detective testified the driver had what appeared to be a clear, plastic baggy in his left hand. Although he could not verify the contents of the bag, he testified it is common for drug dealers to carry contraband in sandwich bags or Ziploc bags.

{¶4} Given his observations, Detective Gray radioed Detective Michael Yavanno, another officer assigned to the Summit County Drug Unit. According to

Detective Gray, Detective Yavanno arrived within 10 to 15 seconds in an unmarked SUV and parked behind appellant's Taurus. Both officers exited their vehicles and approached appellant's car. Detective Gray, equipped with his flashlight, knocked on the passenger-side window, which was cracked "a couple of inches," and said "Hey, guys, police, what's going on?" At approximately the same time, Detective Yavanno, who was wearing his law enforcement badge around his neck, knocked on the driver's-side window, which was closed, and stated, "police."

{¶5} Appellant looked at Detective Gray. When the latter cast his light inside the vehicle, appellant put his hand on the gearshift and put the car in reverse. Detective Gray ordered appellant to keep the vehicle in park. Appellant disregarded the order, and reversed the car. The vehicle initially moved slowly but then sped up ramming Detective Yavanno's SUV. According to Gray, appellant's car rammed Yavanno's vehicle "so hard that you could actually hear his tire spinning[,] like he [was] trying to move the vehicle.

{¶6} At that point, Detective Gray drew his firearm and shouted "Police, police, stop." Gray testified, after the Taurus had pushed Yavanno's SUV back, it had angled itself in such a way that it was facing him; according to Gray, appellant then put the car in drive and came directly towards him. He continued:

{¶7} "I thought for sure that this vehicle is going to crush me, I'm going to be killed; I'm going to be crushed underneath that vehicle.

{¶8} "***

{¶9} "I had a lot of things that went through my mind, but I thought I have to do something, and I'm not going to be able to hop on the vehicle, so I decided that

hopefully I can fire at the driver and hopefully get the vehicle to stop or get the direction to change to where he does not run me over."

{¶10} Detective Gray then fired four rounds at the Taurus and at "the last possible split second the vehicle made an abrupt left turn ***." Detective Yavanno similarly testified that when "the driver put the car into drive, you could hear the wheels chirp [and] began [going] straight forward, Detective Gray fired his weapon a few times, at the last second the vehicle cut to the left ***." Detective Yavanno further testified that, in his estimation, Detective Gray was "definitely" in danger of being struck by the vehicle when he fired his weapon.

{¶11} After veering away from Detective Gray, the vehicle jumped over a curb, drove over some bushes, and sped away into the night. Due to their unmarked vehicles, the officers were not equipped to initiate a full chase.

{¶12} The record indicates that appellant was hit by at least one of the shots fired by Detective Gray. After an investigation, he was eventually apprehended at a local hospital and arrested.

{¶13} On October 23, 2009, appellant was indicted on one count of felonious assault against a peace officer, in violation of R.C. 2903.11(A)(2), a felony of the first degree ("count one"); one count of failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B), a felony of the third degree ("count two"); and one count of vandalism, in violation of R.C. 2909.05(B)(2), a felony of the fifth degree ("count three"). Appellant pleaded not guilty to the charges and the matter proceeded to a jury trial. The jury returned a verdict of guilty on each count and, after a sentencing hearing, the trial court imposed a prison term of eight years for count one, one year on

count two, and one year on count three. Counts one and two were ordered to run consecutively with count three to run concurrently with that term for an aggregate sentence of nine years. Appellant now appeals and assigns two errors for this court's review

{¶14} For his first assignment of error, appellant contends:

{¶15} "The trial court erred and abused its discretion in violation of the due process clause of the Fourteenth Amendment, by failing to sustain defendant-appellant's motion for judgment of acquittal made pursuant to Rule 29, Ohio Rules of Criminal Procedure, both at the end of the state's case and again at the end of the case."

{¶16} Although appellant styles his first assignment of error as a challenge merely to the sufficiency of the evidence, his primary argument is a challenge to the weight of the evidence. We shall therefore address each legal challenge in turn.

{¶17} Evidential sufficiency is an inquiry into whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Johnson*, 9th Dist. No. 06CA008911, 2007-Ohio-1480, at ¶5. "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Cepec,* 9th Dist. No.

04CA0075-M, 2005-Ohio-2395, at ¶5, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶18} While a test of evidential sufficiency requires a determination of whether the state has submitted enough evidence to meet its burden of production, a manifest weight inquiry examines whether the state met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. (Cook, J., concurring). That is, a manifest weight challenge concerns:

{¶19} "'[T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible* evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) Id. at 387, citing Black's Law Dictionary (6th Ed. 1990).

{¶20} The appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, supra. As a result, a reviewing court will not reverse a conviction where there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson* (1991), 58 Ohio St.3d 40, 41.

{¶21} Appellant initially takes issue with the sufficiency and weight of the evidence upon which his conviction for felonious assault against a peace officer was based. That crime is defined under R.C. 2903.11(A)(2), and prohibits a person from knowingly causing or attempting to cause physical harm to a peace officer by means of a deadly weapon or dangerous ordnance.

{¶22} R.C. 2901.22(B) provides:

{¶23} "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."

{¶24} Furthermore, R.C. 2923.11(A) defines a "deadly weapon" as "any instrument, device, or thing capable of inflicting death, and designed or specifically adapted for use as a weapon, or possessed, carried, or used as a weapon." This court has repeatedly held that a car, used as a weapon, can be considered a deadly weapon within the meaning of the statute. See *State v. Millender*, 9th Dist. No. 21349, 2003-Ohio-4384, at ¶15; see, also, *State v. Jaynes*, 9th Dist. No. 20937, 2002-Ohio-4527, ¶12.

{¶25} With respect to sufficiency, Detective Gray testified that once he identified himself as a police officer, appellant immediately backed into Detective Yavanno's unmarked vehicle. Appellant then put his vehicle in drive and drove straight towards Detective Gray. On direct examination, Detective Gray stated he "thought for sure that this vehicle [was] going to crush [him]." He then drew his firearm and shot at the oncoming vehicle four times hoping to "get the vehicle to stop or get the direction to

change to where [the driver] does not run [him] over." According to the detective, the vehicle changed direction at the last possible second. This testimony suffices to demonstrate that appellant, as the driver of the motor vehicle at which Detective Gray discharged his firearm, made a conscious decision to steer his vehicle in the immediate direction of the officer. Thus, we hold a rational jury could conclude, beyond a reasonable doubt, that appellant knowingly attempted to cause the officer physical harm by means of a deadly weapon.

{¶26} Appellant nevertheless asserts that the weight of the evidence militates against the jury's verdict to the extent that the state's expert raised reasonable doubt regarding whether Detective Gray was actually standing in the path of the vehicle when he discharged his firearm.

{¶27} The record reveals that Mark Kollar, a crime scene special agent with the Bureau of Criminal Identification and Investigation ("BCI") with training in shooting reconstruction, testified he located four bullet holes in appellant's vehicle. Although he could not identify the order in which the bullets struck the car, he arbitrarily labeled them bullets one through four. The bullet hole designated number one entered the windshield at an angle 38 degrees from the center point of the vehicle's windshield (the zero degree point). Number two entered at a 21 degree angle from the center point; Kollar surmised bullet hole three entered through an opening in the passenger side window, eventually lodging itself in the driver's side door; and bullet number four struck the metal support adjoining the rear passenger door indicating Detective Gray was facing the side of the fleeing car when that shot was fired, i.e. at a 90 degree angle from the vehicle's center.

{¶28} As discussed above, Detective Gray testified the vehicle was traveling in his direction when he first discharged his weapon. However, appellant argues the scientific evidence presented by Kollar conclusively shows the detective was not in the vehicle's path when he fired his gun. Furthermore, appellant points out that even if the vehicle was briefly directed towards the detective, merely pointing a deadly weapon at another, without some evidence of an intention to use the weapon, is insufficient to achieve a conviction for felonious assault. *State v. Brooks* (1989), 44 Ohio St.3d 185, syllabus; *State v. Green* (1991), 58 Ohio St.3d 239, syllabus. Appellant maintains that the only reasonable conclusion one can draw from the evidence is he was simply trying to flee the scene. Therefore, appellant concludes, the jury lost its way in finding he knowingly intended to cause physical harm to Detective Gray.

{¶29} Appellant advances an interesting argument. Detective Gray did testify that he fired his weapon when the vehicle was coming directly toward him. He further testified the vehicle did not veer away from him until *after* he commenced firing. The evidence offered by Kollar demonstrates that the shots could not have been fired while the car was coming directly at Gray. Rather, Kollar's testimony indicates that Detective Gray had to be standing at an angle to the vehicle's path when he discharged his firearm. Appellant claims the scientific evidence proves that, at the time he was fired at, he could not have been charging the detective with his vehicle. Accordingly, appellant asserts he did not knowingly attempt to cause him physical harm.

{¶30} Even though the evidence is inconsistent, inconsistencies do not render defendant's conviction against the manifest weight of the evidence. *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236, 1996 Ohio App. LEXIS 2245, *8. It is

the jury's province to take note of the inconsistencies and resolve or discount them accordingly. Likewise, it is the jury's role to evaluate the credibility of the witnesses, and to determine what weight to give to any inconsistencies in the testimony. See *State v. Lakes* (1964), 120 Ohio App. 213, 217. In effect, as the barometer of evidential believability, a jury is free to accept all, some, or none of a victim's testimony. See, e.g., *State v. Anderson*, 9th Dist. No. 23197, 2007-Ohio-147, at ¶15.

{¶31} With this in mind, Detective Gray's testimony that the vehicle was coming at him when he began to discharge his firearm must be viewed in light of his acknowledgement that he was not exactly certain how the entire episode occurred. On direct examination, the detective emphasized, "[t]his is something that happens in a split second." From this, the jury could have reasonably concluded appellant was traveling directly at Gray but, given the frenzy of the moment, the officer's testimony regarding when he began discharging his weapon was slightly mistaken. That is, the jury could have determined appellant knowingly attempted to cause him physical harm but, upon seeing the officer's firearm, abruptly changed his course. This construction of the evidence is not unreasonable and, therefore, we do not believe the jury's verdict resulted in a manifest injustice. The weight of the evidence therefore supports appellant's conviction for felonious assault on a peace officer.

{¶32} Appellant next asserts the state failed to offer sufficient evidence on the charge of failing to comply with the order or signal of a police officer. Like his previous challenge, appellant's argument actually takes issue with the weight of the evidence rather than the sufficiency. We will therefore consider his position under each standard.

{¶33} R.C. 2921.331(B) provides:

{¶34} "No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop."

{¶35} The state presented evidence that, upon approaching the partially open passenger window, Detective Gray identified himself as a police officer. Similarly, Detective Yavanno approached the driver's side window wearing his badge around his neck and identified himself as a police officer. After Gray identified himself, appellant put the vehicle in reverse, at which point the officer ordered him to keep the car in park. Appellant ignored the order and rammed Yavanno's SUV. Gray testified he then drew his firearm and shouted, "Police, police, stop." Similarly, Yavanno stated he also pulled his weapon and "was yelling police." Appellant ignored Gray's order and eventually fled the scene. Viewed in a light most favorable to the prosecution, there was sufficient evidence to convict appellant under the statute.

{¶36} Appellant nevertheless argues that there was no evidence he specifically heard the officers identify themselves. He asserts that there are multiple reasons why one approached in a high crime area by two strange individuals in plainclothes would not comply with an order to stop. While there may indeed be other reasons for failing to comply with such an order, we do not believe such an explanation renders the verdict against the weight of the evidence.

{¶37} Pursuant to Gray's testimony, appellant and his passenger appeared to be in the midst of or completing a drug deal. When Gray approached the car and announced himself, the window was cracked "a couple of inches." Gray testified appellant looked directly at him and put the vehicle in reverse. Although one possible

interpretation of these events is that appellant was alarmed at being approached by a plainclothes stranger, it is also reasonable to conclude he heard Gray and did not want to explain himself to the officer. Courts have held that when evidence in a criminal case is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *State v. Fabian*, 5th Dist. No. 07 CAA 12 0071, 2008-Ohio-6582, at ¶30; *State v. Brown*, 11th Dist. No. 07-P-0014, 2008-Ohio-832, at ¶167; *State v. Love*, 7th Dist. No. 02 CA 245, 2006-Ohio-1762, at ¶121. Therefore, viewing the evidence as a whole, we cannot conclude the verdict on the failure to comply charge was against the manifest weight of the evidence.

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

{¶39} For his second assignment of error, appellant argues:

{¶40} "The trial court committed plain error by sentencing defendant-appellant to such an extensive period of time in light of the court's reasoning as set forth in the sentencing hearing."

{¶41} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio held that trial courts have discretion to impose a sentence within the statutory range without the need for findings of fact with respect to maximum sentences, consecutive sentences, or sentences greater than the minimum. Id. at paragraph seven of the syllabus and ¶99.

{¶42} Since *Foster*, the Supreme Court has established a two-step analysis for an appellate court reviewing a felony sentence. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. In the first step, we consider whether the trial court "adhered to all applicable rules and statutes in imposing the sentence." Id. at ¶14. "As a purely

legal question, this is subject to review only to determine whether it is clearly and convincingly contrary to law, the standard found in R.C. 2953.08(G)." Id. Next, we consider, with reference to the general principles of felony sentencing and the seriousness and recidivism factors set forth in Sections 2929.11 and 2929.12, whether the trial court abused its discretion in selecting the defendant's sentence. See id. at ¶19-¶20.

{¶43} Here, appellant asserts his sentence was the result of a manifest injustice because the trial court considered matters that were not part of the record. To wit, during the sentencing hearing, the court stated:

{¶44} "*** I do find that behavior, based on what I've gathered about you to be out of character for you, but that doesn't change what happened and that you - - you know, in a certain way you were him that night. You were the one getting shot, but it just as easily could have been him dead in the parking lot because you were doing drugs. It's not like you were pulling out of the church parking lot after singing in the choir that night. You were in a dark parking lot dealing drugs when an officer approached you and you panicked."

{¶45} Appellant asserts the trial court erred in rendering its sentence to the extent it drew the unsubstantiated conclusion that he was dealing drugs at the time of the incident and improperly used this conclusion as a basis for the sentence it imposed.

{¶46} Appellant did not object to the court's statement at the time it was made. As a result, we shall review the issue for plain error. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

{¶47} Appellant is correct that the court's reference to drug use and drug dealing may not have been conclusively established at trial; still, there was some evidence that, immediately prior to the episode which precipitated the charges, appellant and his passenger may have been in the process of a drug deal. This was the very reason Detective Gray decided to investigate. Consequently, the court's comments are not as outrageous as appellant represents.

{¶48} Furthermore, the trial court imposed a sentence within the statutory parameters. Also, the sentence imposed by the trial court did not go beyond or breach sentencing laws as they existed at the time appellant was sentenced. According to *Kalish*, a reviewing court must examine whether the sentence complies with all applicable rules and statutes to ensure the sentence is not clearly and convincingly contrary to law. Id. at ¶4. *Kalish* did not specifically provide guidance as to the "laws and rules" an appellate court must consider to ensure the sentence clearly and convincingly conforms with Ohio law. The specific mandate of *Kalish* is that the sentence fall within the statutory range for the felony of which a defendant is convicted. Id. at ¶15. We therefore hold that, even though the trial court may have taken some license with the facts in the record, the sentence nevertheless is in accordance with the law.

{¶49} With respect to the second prong, the record indicates the trial court considered R.C. 2929.11 and R.C. 2929.12 in imposing its sentence. Accordingly, all the requirements of the sentencing exercise were met. Given the limited scope of our review, we hold the trial court's sentence was neither arbitrary nor unreasonable. We

therefore hold the trial court did not abuse its discretion in imposing the nine year term of imprisonment.

{¶50} Appellant's second assignment of error is overruled.

{¶51} For the reasons discussed above, appellant's judgment on conviction, entered by the Summit County Court of Common Pleas, is hereby affirmed.

DIANE V. GRENDELL, J.,
Eleventh Appellate District,
Sitting by assignment,

TIMOTHY P. CANNON, J.,
Eleventh Appellate District,
Sitting by assignment,

concur.