[Cite as *State v. King*, 2010-Ohio-4400.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C.A. No. 10CA009755
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
DELAWRENCE A. KING	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 03CR064084

DECISION AND JOURNAL ENTRY

Dated: September 20, 2010

MOORE, Judge.

{¶1} Appellant, Delawrence King, appeals from the decision of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} This case has previously been before this Court. In 2005, we summarized the facts of this case as follows:

> "On November 5, 2003, Appellant was indicted on two counts of aggravated murder, in violation of R.C. 2903.01(A), with three year gun specifications; two counts of murder, in violation of R.C. 2903.02(B), with three year gun specifications; two counts of felonious assault, in violation of R.C. 2903.11(A)(1), with three year gun specifications; and one count of improperly discharging a firearm at/into a habitation, in violation of R.C. 2923.161, with a three year gun specification. Appellant entered pleas of 'not guilty' to all charges.
>
> "A jury trial commenced on September 20, 2004. After the State rested its case, Appellant made a Crim.R. 29 motion, which the trial court denied on all counts except count two, the second aggravated murder count with a three year gun specification. On September 23, 2004, the jury returned its verdict and found Appellant guilty of both murder counts with the gun specifications and one count of felonious assault with the gun specification." *State v. King*, 9th Dist. No. 04CA008577, 2005-Ohio-4259, at ¶2-3.

{¶3} The trial court sentenced King to fifteen years to life on each murder count and three years on the felonious assault count. Further, King was sentenced to three years on each firearm specification. The sentences for murder were to run concurrent with each other and consecutive to the felonious assault sentence and gun specifications, for a total of 21 years. He timely appealed to this Court.

{¶4} In our decision dated August 17, 2005, this Court affirmed King's convictions. On August 9, 2009, King filed a motion for resentencing. He contended that his judgment entry of conviction did not properly advise him of post-release control. As a result, the trial court appointed King counsel, and on December 17, 2009, held a de novo sentencing hearing.

{¶5} The trial court sentenced King to a total of 33 years to life of incarceration. The trial court sentenced King to 15 years to life on each murder count and three years on the felonious assault count, to be served concurrently. The trial court merged the gun specifications and sentenced King to three years of incarceration, to be served consecutively with the murder and felonious assault counts.

{¶6} King timely appealed from his resentencing, and has raised three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "[KING'S] CONVICTIONS FOR MURDER IN COUNTS THREE AND FOUR OF THE INDICTMENT MUST BE REVERSED BECAUSE BOTH COUNTS OMITTED A MATERIAL ELEMENT OF THE OFFENSE, IN VIOLATION OF [KING'S] CONSTITUTIONAL RIGHT TO A GRAND JURY INDICTMENT, AND HIS CONSTITUTIONAL RIGHT TO DUE PROCESS."

{¶7} In his first assignment of error, King contends that his convictions for murder in counts three and four of the indictment must be reversed because both counts omitted a material

element of the offense, in violation of his constitutional right to a grand jury indictment, and his constitutional right to due process. We do not agree.

{¶8} King contends, for the first time on appeal, that his indictment was defective for failure to state the "first or second degree felony offense of violence" required for a conviction of felony murder pursuant to R.C. 2903.02(B) as stated in Counts Three and Four. King points to the Ohio Supreme Court's decision in *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, for the proposition that a defendant can challenge for the first time on appeal an indictment that omits an essential element of a crime. He argues that "the indictment in this case fails to inform [him] of the underlying offense which forms the basis for the charge."

{¶9} The Ohio Supreme Court has recently overruled its decision in *State v. Colon*, 118 Ohio St.3d 26 and *State v. Colon*, 119 Ohio St.3d 204, explaining that an indictment that tracks the language of the statute is not defective. *State v. Horner*, Slip Opinion No. 2010-Ohio-3830, at paragraph one of the syllabus, citing *State v. Buehner*, 110 Ohio St.3d 403, 2006-Ohio-4707; see, also, *State v. Honaker*, 9th Dist. No. 09CA009687, 2010-Ohio-2515, at ¶12, citing *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, at ¶29. Further, the defendant's failure to raise this issue below forfeits all but plain error on appeal. *Horner*, at paragraph two of the syllabus.

{¶10} Pursuant to Crim.R. 52(B), a plain error or defect that affects a substantial right may be noticed although it was not brought to the attention of the trial court. "A plain error must be obvious on the record, such that it should have been apparent to the trial court without objection." *State v. Kobelka* (Nov. 7, 2001), 9th Dist. No. 01CA007808, at *2, citing *State v. Tichon* (1995), 102 Ohio App.3d 758, 767. As notice of plain error is to be taken with utmost caution and only to prevent a manifest miscarriage of justice, the decision of a trial court will not be reversed due to plain error unless the defendant has "established that the outcome of the trial

clearly would have been different but for the alleged error." *Kobelka*, supra, at *2, citing *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, and *State v. Phillips* (1995), 74 Ohio St.3d 72, 83. In the instant case, King argues that the error in the indictment rose to the level of plain error.

{¶11} The felony murder statute, R.C. 2903.02(B) states that "[n]o person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

{¶12} King contends that his indictments for felony murder failed to inform him of the underlying offense which formed the basis for the charge. King's indictments for felony murder, as stated in Counts Three and Four, track the language of R.C. 2903.02(B). "Because the indictment follows the wording of the statute, the indictment is proper." *Honaker*, supra, at ¶12; *Horner*, at paragraph one of the syllabus. King argues that even though the indictment tracks the language of the statute it does not fully inform him of all the necessary elements of the offense. This Court recently explained that "the Supreme Court of Ohio has held that 'when the indictment sufficiently tracks the wording of the statute of the charged offense, the omission of an underlying offense in the indictment can be remedied by identifying the underlying offense in the bill of particulars.' [*Buehner*, supra, at ¶10,] citing *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, at ¶30." *Honaker*, supra, at ¶12. In *Honaker*, we explained that felonious assault pursuant to R.C. 2903.11(A), a second-degree felony, was a felony of violence pursuant to R.C. 2901.01(A)(9)(a). Therefore, we determined that in an instance in which the defendant was indicted on felony murder pursuant to R.C. 2903.02(B) and separately indicted on two charges of felonious assault under R.C. 2903.11(A), "either felonious assault charge would serve

as a proper predicate offense for the felony murder charge." *Honaker*, supra, at ¶12. King was indicted, in pertinent part, on two counts of felony murder and two counts of felonious assault.

{¶13} In the instant case, King requested a bill of particulars. On December 29, 2003, the State responded, stating:

> "On or about the 26th of October 2003, and in the area of 132 Tedman Court, Elyria Ohio at approximately 7:30 p.m., the defendant did shoot and kill Darius L. Corlew and Tyron D. Francis. The Lorain County Coroner, Dr. Paul Matus, ruled both deaths were homicidal in nature."

{¶14} "The bill of particulars provided by the State does not allude to any potential crimes other than those set forth in the indictment." *Honaker*, supra, at ¶14. Accordingly, we conclude that there was no error in the indictment. Thus, King cannot show plain error.

{¶15} King's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE VERDICTS IN THIS CASE ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶16} In his second assignment of error, King contends that his convictions were against the manifest weight of the evidence. We do not agree.

{¶17} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate 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 the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶18} This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

{¶19} King contends that the weight of the evidence supported his claim of self-defense. We do not agree.

{¶20} By claiming self-defense, King "'concedes [that] he had the purpose to commit the act, but asserts that he was justified in his actions.'" *State v. Howe* (July 25, 2001), 9th Dist. No. 00CA007732, at *2, quoting *State v. Barnd* (1993), 85 Ohio App.3d 254, 260. King had the burden at trial to prove self-defense by a preponderance of the evidence. *Howe*, supra, at *2. To meet this burden, King must have demonstrated

> "'(1) that he was not at fault in creating the situation giving rise to the affray, (2) that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of deadly force, and (3) that he did not violate any duty to retreat or avoid the danger.'" *State v. Rust*, 9th Dist. No. 23165, 2007-Ohio-50, at ¶10, quoting *State v. Caldwell* (1992), 79 Ohio App.3d 667, 679.

{¶21} Presuming King presented sufficient evidence on each of these elements; the issue with regard to the manifest weight of the evidence is whether the jury clearly lost its way when it chose not to believe King's testimony with regard to self defense. *Otten*, 33 Ohio App.3d at 340.

{¶22} The State presented testimony from 12 witnesses. Charles Mason testified that in 2003 he lived in Wilkes Villa with his family. He explained that on October 26, 2003, as his family was moving out of their apartment, he heard his fiancé arguing with King about a light bulb. When his fiancé attempted to call the police, King pulled out a gun. Mason later encountered King, and King accused Mason of owing him money and calling the police. Mason

denied calling the police. King then left and Mason heard gunfire. Mason identified King and a red coat that he stated was King's coat, although he explained that King was not wearing it when he saw him that night.

{¶23} Darrine Miles testified that he lived in Wilkes Villa from August through October of 2003. He explained that he was friends with King and that on October 26, 2003, he and King hung out together and drank alcohol. He stated that King indicated that he fired his gun earlier that day. Miles explained that King carried the gun most of the time. Miles further stated the King informed him that he tried to steal a light bulb. Miles identified King's red jacket.

{¶24} Eventually, according to Miles, he and King walked to Tedman Ct., located in Wilkes Villa. Miles knew that King had a gun with him. Miles and King saw a group of males standing in a corner, walked over, and proceeded to talk to them. The group included "Michi"/Demetruis, Roy Killings, Darius Corlew; and "New York"/Tyrone Francis. According to Miles, everyone talked for about 15 minutes and then Corlew informed King that he felt threatened because King was standing next to him with a gun. King denied threatening Corlew. An argument ensued, and King pulled out his gun and cocked it. Miles stated that Corlew turned around and started walking towards an apartment door and King fired his gun until it was empty. Miles stated that he did not see anyone else with a gun.

{¶25} Miles explained that he and King fled the scene and went to his aunt's house. They both shed their coats as they ran. The two then obtained a ride to Lorain to Mile's mother's house. King went on without Miles. Miles testified that he had no idea what happened to the gun. He stated that once he talked to his father, he went to the police station.

{¶26} On cross examination, Miles confirmed that he had given police conflicting information. He affirmed that there was high drug use at Wilkes Villa, that it was a high-crime

area and that many people had guns. He verified that a few weeks before the shooting, King had been robbed at gunpoint. He stated that King was not welcome in Wilkes Villa. Miles informed police that King shot Corlew because he was either drunk or scared that Corlew was going to go get a gun.

{¶27} On redirect examination, Miles explained that Corlew was trying to go in the apartment door just before the shooting, and that he had his back to King.

{¶28} Jamie Williams, a 13-year-old resident of Wilkes Villa testified that she observed the shooting and identified King as the shooter. She stated that she saw King talking with someone, then pull out a gun and shoot. On cross examination, Williams testified that she saw two people with guns.

{¶29} Demetrius Tarrant testified that he was present during the shooting. He explained that he observed King walk up to the group, and watched him load and cock a gun and put it in his waistband. He stated that upon walking up to the group, King shook everyone's hand with the exception of Corlew. He explained that Corlew informed King that he felt threatened by the fact that King was standing near him with a gun. Tarrant testified that Corlew and King had a conversation regarding the gun, during which King stated that if he pulled out the gun, he was going to use it. Corlew told King to leave. Tarrant explained that King then pulled out the gun and opened fire. He explained that he did not see anyone else with a gun. He stated that the shooting occurred as Corlew was trying to go into an apartment and Tyrone Francis was trying to come out of the apartment. He explained that he ran from the scene with Killings.

{¶30} On cross examination, Tarrant stated that Corlew and King had had an earlier confrontation about the gun and that there was a lot of tension between Corlew and King. He explained that Corlew was "trying to get to the house, so he wouldn't get shot." He stated that

King was the only one with a gun and denied that Killings ditched a gun as they ran from the scene.

{¶31} Dr. Paul Matus, the Lorain County Coroner testified that he ruled Corlew and Francis' deaths homicides. He explained that Francis died from a single gunshot wound and that Corlew had been shot four times. He explained that the fatal wounds were the two to Corlew's chest. On cross examination, he verified that both victims tested positive for marijuana, and that they had smoked the drug 5 to 25 minutes prior to the shooting.

{¶32} Detective Scott Willis of the Elyria Police Department testified that he processed the scene and located six shell casings outside the apartment. He stated that the bullet casings and shells from both victims were from the same gun. He further testified that he recovered a red jacket about a half mile from the crime scene and it tested positive for gunshot residue.

{¶33} Roy Killings testified that at the time of the shooting he lived in Wilkes Villa. He stated that at the time of trial he was in juvenile detention. He explained that on October 26, 2003, after King approached the group of males, Corlew told him to take away the gun. King pulled out the gun and "told [Corlew] to lay down[.]" Corlew tried to run into the apartment while Francis was trying to come out and King shot both. He testified that no one else had a gun that night.

{¶34} On cross examination, Killings testified that he was in juvenile detention for trafficking in drugs. He explained that a few weeks before the incident, King hit one of Killings' friends with a beer bottle. As a result, Killings accompanied his friend, along with another friend, to find King and beat him up. Killings denied stealing King's drugs a few days before the shootings. Killings testified that prior to the incident; Corlew told him that if King came up with

a gun, he was going to "rush him[.]" Killings testified that King was not welcome in their group and that he was not surprised that King and Corlew had an argument.

{¶35} Jerrod Jackson testified that he was currently in prison for assaulting an officer and intimidation, but he was raised in Wilkes Villa. He testified that he observed the incident from across the street. He testified that he observed King approach the group and start shooting his gun. King then ran right past him and Miles ran after him; at one point King turned around and "was about to fire at [Miles]" until Miles said "'It's me, it's me.'" King and Miles continued to run and Jackson went to the apartment and found Corlew on the ground. He stayed at the scene until the police told him to leave.

{¶36} On cross examination, Jackson testified that he did not know what happened leading up to the shooting. He explained that he had been with the group prior to King's arrival, and was on his way back when the shooting occurred.

{¶37} Sade Charlton testified that at the end of August of 2003, she was King's girlfriend. She stated that on October 26, 2003, a friend told her that King shot Corlew and Francis. She explained that she did not believe the story, so she paged King. King called her back and she asked him if he killed two people. King said no. She then asked if he had "fought" two people and King said yes. Charlton explained that King thought the phones were tapped, so instead of using the word "shoot" he used the word "fight."

{¶38} On cross examination, Charlton stated that she knew that King sold drugs at Wilkes Villa and that he was not well liked. She confirmed that when he called her on October 26, 2003, King said, "'That n[ ] was coming at me crazy, and that's why I shot him.'"

{¶39} On re-direct examination, Charlton affirmed that she had told the police at the time of the incident that King told her that "'That n[ ] was talking crazy, so I did what I had to

do[.]'" Charlton confirmed her prior statement to the police three times during re-direct examination.

{¶40} The State also presented testimony of several police officers who responded to the scene. The parties stipulated to the lab examination regarding gunshot residue and to the BCI report relating to the pellets and shell casings. The State then rested its case. King moved for a Crim.R. 29 motion for acquittal. The trial court granted his motion with regard to the aggravated murder of Francis, but denied it as to the remaining counts.

{¶41} King testified on his own behalf. He explained that he a troubled childhood which resulted in incarceration in Nebraska. Upon release from prison, he returned to Wilkes Villa, where he had previously resided. To support himself, he began to sell drugs. King knew Corlew before he went to Nebraska, but upon return to Wilkes Villa, he did not have any direct dealings with him prior to the shooting. He stated that he had problems with other drug dealers in Wilkes Villa because he was taking their customers. He testified that he had previously been robbed at gun point by one of Killings' friends. The man threatened to kill him. The man was later arrested and Killings accused King of being a "snitch."

{¶42} King further testified that a few days prior to the shooting incident, he was selling drugs at a local gas station. A group of men wearing masks approached him. He recognized Killings' voice and Demetrius' height, but could not see their faces. King testified that they pulled out their guns and robbed him. They told him that he did not "'deserve to be out here; you don't deserve to be out here.'" As a result of these two incidents King obtained a gun and bullets.

{¶43} On October 26, 2003, King testified that he had been at his sister's house. He and Miles were together, drinking and shooting off his gun. The two began to walk to a friend's

house. He testified that he was wearing his red jacket, which was previously identified as being found at the scene. He stated that he had his gun in his pocket. Miles and King saw a group of men standing around. He approached the group and attempted to shake everyone's hand, but Corlew would not shake hands. He stated that Corlew "just jumps in my face" saying: "'You think you're hard with that gun, you bitch ass n[ ], you ain't hard.'" The group then surrounded him. King tried to walk away, but Corlew cut him off. King testified that Corlew said "'I feel threatened because you standing right here. You know what I do to mother[ ]? I should kill your bitch ass, you're a bitch, you're a bitch.'" King responded: "'Man, I ain't threaten you, I ain't threaten you, I ain't threaten you.'" Corlew "started pulling for his gun" and King pulled out his and fired as he ran away.

{¶44} King testified that he saw Killings with a gun, but that he did not see Corlew with a gun, but he knew that Corlew had one. King testified that he was scared that Corlew was about to kill him. As he ran away, King testified that he removed his coat because he was afraid the men were chasing after him and would recognize the coat. He further testified that he gave the gun to Miles who threw it away. Miles and King obtained a ride to Lorain, where King's grandmother convinced him to turn himself in to the police.

{¶45} On cross examination, King confirmed that he violated his parole by selling drugs and carrying a gun. King admitted that he test fired the gun and knew it was operable. King denied any problems with Mason, denying that he ever tried to steal a light bulb. King stated that he was not aiming a gun at Corlew to shoot him. He further confirmed that he chose to approach the group, even though he had recently had troubles with many members of the group.

{¶46} On re-direct, King verified that he fired the gun because he feared for his life.

{¶47} Upon examination of the testimony, this Court cannot say that the jury clearly lost its way when it convicted King of felonious assault and murder. The State presented several eyewitnesses to the shooting, all of which denied that Corlew had a gun and indicated that King's actions were unprovoked. As we have recently explained, "'The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a right to do.'" *State v. Feliciano*, 9th Dist. No. 09CA009595, 2010-Ohio-2809, at ¶50, quoting, *State v. Morten*, 2d Dist. No. 23103, 2010-Ohio-117, at ¶28.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT VIOLATED [KING'S] RIGHT TO DUE PROCESS BY IMPOSING A HARSHER SENTENCE AFTER THE COURT GRANTED HIS MOTION TO VACATE HIS CONVICTION."

{¶48} In his third assignment of error, King contends that the trial court violated his right to due process by imposing a harsher sentence after the court granted his motion to vacate his conviction. We do not agree.

{¶49} After his de novo sentencing hearing, held on December 16, 2009, the trial court sentenced King to consecutive sentences, effectively "increasing" his original sentence of 21 years, imposed in 2004. He contends on appeal not that the trial court was vindictive in imposing a longer sentence, but that the "trial court erred in considering information other than the defendant's conduct in arriving at a different result than the original judge." We do not agree.

{¶50} King points to *North Carolina v. Pearce* (1969), 395 U.S. 711, 726, for the proposition that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon

objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."

{¶51} We have recently explained that *Pearce* is inapplicable to a case in which an appellant's resentencing occurred as a result of a void judgment entry. *Honaker*, supra. "Simply put, it is as if [King's] sentence handed down [in 2004], never existed. Logically speaking, [King's] sentence from [December 17, 2009], cannot, therefore, constitute an increase or a decrease from a nullity." Id. at ¶19.

{¶52} Even if *Pearce* were applicable to this case, the Court noted that "[a] trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 U.S. 241, 245 []. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources." *Pearce*, supra, 395 U.S. at 722.

{¶53} At the December 16, 2009 sentencing hearing, the trial court stated that it "upon setting this motion for hearing, ordered presentence report, which I've considered; I've considered the Warden's Report and the Institutional Summary Report provided from Mansfield Correctional Institute, which is made part of the presentence report." The trial court further stated that "my review of the Institutional Summary Report indicates any number of violations, including one approximately a week, on 8-14-09, after you filed the motion in this case on August 30th, where you were found to have punched a female officer in the head, including one where you threatened staff back in October of '08 and said they better watch out for you because

you are on a life bit. And any number, I believe 12 conduct reports, while there." The trial court's sentence, therefore, was based in part on King's conduct since his 2004 conviction. Accordingly, the trial court affirmatively stated its reasons for increasing King's sentence, which was based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce*, 395 U.S. at 726. Thus, the trial court did not err. King's third assignment of error is overruled.

III.

{¶54} King's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

PAUL GRIFFIN, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.