

[Cite as *State v. Storey*, 2010-Ohio-1664.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92946

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PEPPE STOREY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515971

BEFORE: McMonagle, P.J., Blackmon, J., and Sweeney, J.

RELEASED:

April 15, 2010

**JOURNALIZED:
ATTORNEY FOR APPELLANT**

Kelly A. Gallagher
P.O. Box 306
Avon Lake, OH 44012

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Belinda Kyles-Gest
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant Peppe Storey appeals his convictions for firearm specifications, forfeiture specifications, felonious assault, and having a weapon while under disability, rendered after a jury trial. He also challenges his 13-year sentence. We affirm in part and reverse and remand in part.

Procedural History

{¶ 2} Storey was charged in a six-count indictment. Count 1 charged felonious assault (knowingly cause or attempt to cause physical harm by means of a deadly weapon or dangerous ordnance); Count 2 charged felonious assault (knowingly cause serious physical harm); and Count 3 charged domestic violence. Counts 1, 2, 3 each contained one- and three-year firearm specifications and three forfeiture specifications — one each for a zip gun, a .38 caliber handgun, and .38 caliber ammunition. Count 4 charged unlawful possession of a dangerous ordnance (zip gun) and contained a forfeiture specification relative to same. Counts 5 and 6 charged having a weapon while under disability and contained forfeiture specifications relative to the zip gun.

{¶ 3} Counts 4, 6, and all the forfeiture specifications relative to the zip gun were dismissed pursuant to Storey's Crim.R. 29 motion. The jury found Storey guilty of the remaining charges and specifications. The trial court sentenced him to eight years concurrent on each of the two felonious assault counts, concurrent to 18 months on the domestic violence count, consecutive

to two years on the having a weapon while under a disability count and three years for the merged firearm specifications, for a 13-year sentence.

Facts

{¶ 4} Storey and the victim in this case, Cheryl Davis, had an off-and-on relationship for several years and at times cohabited. Prior to the August 2008 incident here, they had lived together at Davis's apartment. Storey ended the relationship in July 2008 and moved out of the apartment. According to Davis, he returned the key to get inside the apartment complex, but not the key to her apartment unit.

{¶ 5} Davis testified that on the day of the incident, Storey had been continually calling her to ask if he could come to her apartment to take a shower and she told him no. She testified that after she arrived home at work, and while relaxing on her couch, she heard someone opening the door to her apartment. As she approached the door, it opened, and Storey entered the apartment with a .38 caliber gun in one hand and a duffel bag in the other.

{¶ 6} Davis stated that Storey then beat her for about 15 minutes, hitting her mostly with the gun. She identified the .38 caliber gun at trial as the gun Storey used. Davis testified that Storey was angry with her based on his belief that she was involved with another man. Davis testified that she eventually told Storey that she loved him and would do whatever he wanted if he would stop the assault. She persuaded him to let her call 911 so that she

could get medical treatment. She told the 911 operator that she had been “jumped.”

{¶ 7} Meanwhile, a neighbor who knew Storey and Davis and the issues in their relationship, and had earlier seen Storey entering the building, heard arguing and Davis’s pleas for the altercation to stop. He likewise called 911.

{¶ 8} Upon seeing the police and ambulance arrive, Davis convinced Storey that she should go outside and meet them so that he would not be implicated. Once outside, she told the police that Storey was in her apartment with a gun. The police went to the apartment and knocked; Storey initially did not respond. After several minutes, Storey even eventually opened the door. The police observed that the carpet appeared to be wet and that Storey had just gotten out of the shower.

{¶ 9} When asked about any weapons in the apartment, Storey told the police that he knew Davis had a gun somewhere in the apartment, but that he was a convicted felon and therefore he could not have weapons. The officers searched the apartment for weapons and found a zip gun in a nightstand by Davis’s bed. The police did not find the .38 caliber gun. Davis admitted to having the zip gun and testified that it was not used in the assault.

{¶ 10} Davis was treated in the emergency room for facial lacerations and received several stitches. Several weeks after the assault, while moving

out of the apartment, Davis found the loaded .38 caliber gun used in the assault under her bed mattress and turned it over to the police.

Law and Analysis

{¶ 11} In his first assignment of error, Storey contends that his convictions on the firearm and forfeiture specifications were against the manifest weight of the evidence. In his second assignment of error, Storey contends that his felonious assault conviction under Count 1 (knowingly cause or attempt to cause physical harm by means of a deadly weapon or dangerous ordnance) was against the manifest weight of the evidence. And in his third assignment of error, he contends that his conviction for having a weapon while under a disability was against the manifest weight of the evidence. All three assigned errors are based on the following contention made by Davis: “there is absolutely no evidence to connect the gun that was found to the gun that was allegedly used to commit these offenses. The officers were unable to find this gun in their initial search and it magically appeared weeks later.”

{¶ 12} A manifest weight challenge questions whether the prosecution has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When considering a manifest weight claim, a reviewing court must examine the entire record, weigh the evidence and consider the credibility of witnesses. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356. The court may reverse the judgment of

conviction if it appears that the factfinder “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. A judgment should be reversed as against the manifest weight of the evidence “only in the exceptional case in which the evidence weighs heavily against the conviction.” *Thompkins* at 387.

{¶ 13} At trial, Davis identified the .38 caliber gun that she turned over to the police as the one Storey had used in the assault. She testified that she was familiar with the gun because Storey possessed it during the years they were involved with each other. Further, while one police officer testified that he looked under the mattress, he admitted that he only partially looked under it — he did not lift the mattress up completely — and the testimony was that the gun was found “deep” under the mattress. Finally, the injuries sustained by Davis were consistent with having been struck with a hard object, such as a gun.

{¶ 14} On this record, the convictions on the firearm specifications, forfeiture specifications, felonious assault (knowingly cause or attempt to cause physical harm by means of a deadly weapon or dangerous ordnance), and having a weapon while under a disability were not against the manifest

weight of the evidence. Accordingly, the first, second, and third assignments of error are overruled.

{¶ 15} For his fourth and final assigned error, Storey contends that his “consecutive sentences are contrary to law and violative of due process because the trial court failed to make and articulate the findings and reasons to justify it.” Storey admits that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, specifically held that such findings were not required, but relies on *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, 172 L.Ed.2d 517, to argue that *Foster* was incorrect and should be overturned.

{¶ 16} This court has repeatedly chosen to apply the holding in *Foster* rather than *Ice* and reserve any reconsideration for the Ohio Supreme Court. Specifically, in *State v. Woodson*, Cuyahoga App. No. 92315, 2009-Ohio-5558, this court stated: “We have responded to *Oregon v. Ice* in several recent decisions and concluded that we decline to depart from the pronouncements in *Foster* until the Ohio Supreme Court orders otherwise.” *Id.* at ¶33, citing *State v. Reed*, Cuyahoga App. No. 91767, 2009-Ohio-2264, *State v. Robinson*, Cuyahoga App. No. 92050, 2009-Ohio-3379, and *State v. Eatmon*, Cuyahoga App. No. 92048, 2009-Ohio-4564.

{¶ 17} In light of the above, the fourth assignment of error is overruled.

{¶ 18} Sua sponte, we consider the convictions on the two felonious assault charges. In *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, 911

N.E.2d 882, the Ohio Supreme Court held that felonious assault charges under R.C. 2903.11(A)(1) (knowingly cause serious physical harm) and 2903.11(A)(2) (knowingly cause or attempt to cause physical harm by means of a deadly weapon or dangerous ordnance) are allied offenses of similar import if the State is unable to show that there was a separate animus for each count. *Id.* at paragraph two of the syllabus.

{¶ 19} There was only one felonious assault in this case; Storey was indicted and found guilty of both ways of committing this felonious assault “with a deadly weapon” and “by causing serious physical harm.” The trial court therefore should have merged the felonious assault counts for sentencing. *State v. Carter*, Cuyahoga App. No. 90504, 2009-Ohio-5961, ¶11. “Although the court ran the sentences concurrently, running counts concurrent is not the equivalent of merging them.” *Id.*; *State v. Underwood*, Montgomery App. No. 22454, 2008-Ohio-4748, at ¶ 27-28 (“The failure to merge allied offenses of similar import constitutes plain error, even when the defendant received concurrent sentences.”).

{¶ 20} The State retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d. 937, paragraph three of the syllabus; *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraph one of the syllabus.

{¶ 21} Affirmed in part; reversed and remanded in part for further proceedings consistent with this opinion.

It is ordered that appellee and appellant equally share the 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR