

[Cite as *State v. Nuh*, 2010-Ohio-4740.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-31
 : (C.P.C. No. 06CR-11-8937)
 Felis A. Nuh, : (REGULAR CALENDAR)
 :
 Defendant-Appellant. :

D E C I S I O N

Rendered on September 30, 2010

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*,
for appellee.

Todd W. Barstow, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Felis A. Nuh, appeals from a judgment of the Franklin County Court of Common Pleas finding her guilty of felonious assault, a felony of the second degree, and attempted murder, a felony of the first degree. Because (1) the trial court did not err in imposing consecutive sentences without making the statutory findings contained in R.C. 2929.14(E)(4), severed under the Supreme Court of Ohio's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856; (2) the trial court did not err in sentencing defendant on both attempted murder and felonious assault; and (3) sufficient

evidence and the manifest weight of the evidence support defendant's convictions, we affirm the judgment.

I. Facts and Procedural History

{¶2} On November 30, 2006 the state indicted defendant on one count of attempted murder in violation of R.C. 2923.02(A) as it relates to R.C. 2903.02 and one count of felonious assault in violation of R.C. 2903.11. The charges arose out of a November 22, 2006 incident where defendant allegedly stabbed Hawo Farah multiple times with a knife.

{¶3} According to the state's evidence, defendant and Farah lived across the hall from one another in an apartment complex on Columbus' west side. Defendant previously accused Farah on several occasions of having an affair with defendant's husband, though Farah denied the accusation. On November 22, 2006, the two women exchanged words over the phone; defendant reiterated her belief Farah was having an affair with defendant's husband and threatened to kill Farah. Shortly after the call, Farah left her apartment to talk to defendant, who was in the hallway between their apartments. Defendant punched Farah in the face with a knife. As Farah attempted to defend herself, defendant cut her again. Farah tried to restrain defendant by pushing her up against a wall, but one of defendant's friends, identified only as Kaltun, came out of defendant's apartment and pulled Farah down to the ground. Defendant then stabbed Farah's arm, shoulder, and finally her back, where the knife blade broke off and remained lodged until one of the men from the apartment complex removed it. Farah estimated a minute or two elapsed between the initial slash to her face and defendant's stabbing her back. Farah's friend Keyf Ismail witnessed defendant stab Farah in the back with the knife.

{¶4} Defendant's testimony differed markedly. She testified Farah started the altercation when she telephonically threatened to harm defendant's unborn child, came to defendant's apartment and grabbed defendant's hair. Although defendant stated Farah pulled a knife on her, defendant could not remember anything after Farah displayed the knife because the "flashing" started and everything went dark in her mind. Defendant's husband Dhodan Gessod also testified Farah started the fight, but he stated he never saw a knife.

{¶5} On December 7, 2009 the jury returned a verdict finding defendant guilty of attempted murder as charged in count one of the indictment and felonious assault as charged in count two of the indictment. At the sentencing hearing held on December 14, 2009, the trial court sentenced defendant to eight years imprisonment for attempted murder and four years imprisonment for felonious assault, with the sentences to be served consecutively.

II. Assignments of Error

{¶6} Defendant appeals, assigning the following errors:

I. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUISITE FACTUAL FINDINGS; THEREBY DEPRIVING APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIXTEEN OF THE OHIO CONSTITUTION.

II. THE TRIAL COURT ERRED BY SENTENCING APPELLANT TO TERMS OF IMPRISONMENT FOR BOTH ATTEMPTED MURDER AND FELONIOUS ASSAULT, AS IN THE INSTANT CASE FELONIOUS ASSAULT IS AN ALLIED OFFENSE OF ATTEMPTED MURDER.

III. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION SIXTEEN OF THE OHIO CONSTITUTION BY FINDING APPELLANT GUILTY OF ATTEMPTED MURDER AS THAT VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. First Assignment of Error – Consecutive Sentences

{¶7} Defendant's first assignment of error contends the trial court erred in imposing consecutive sentences because the trial court did not make the findings of fact required under R.C. 2929.14(E)(4).

{¶8} As enacted pursuant to S.B. 2 in 1996, R.C. 2929.14(E) directed trial courts to make specified findings of fact before imposing consecutive sentences. Due to United States Supreme Court decisions which called into question the constitutionality of provisions like R.C. 2929.14(E), the Ohio Supreme Court considered the requirements of the statute in *Foster*. See *Blakely v. Washington* (2004), 542 U.S. 296, 303, 124 S.Ct. 2531, 2537 (determining judicial fact finding which not only increased a defendant's sentence beyond the statutory maximum for the standard range of sentences but was not based on "the facts reflected in the jury verdict or admitted by the defendant" violated the defendant's Sixth Amendment right to trial by jury); see also *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348.

{¶9} *Foster* found R.C. 2929.14(E) unconstitutional. *Id.* at paragraph one of the syllabus. It concluded R.C. 2929.14(E) violated the principles announced in *Blakely* because "the total punishment increase[d] through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant." *Id.* at

¶67. The Supreme Court of Ohio accordingly severed R.C. 2929.14(E) and 2929.41(A). *Id.* at paragraph four of the syllabus. After *Foster*, Ohio trial courts could impose consecutive sentences without making any findings of fact. *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904.

{¶10} Defendant argues the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), 129 S.Ct. 711 effectively overruled *Foster*. In *Ice* the court held, "in light of historical practice and the authority of the States over administration of their criminal justice systems, that the Sixth Amendment does not exclude" a state law requiring a judge to make certain factual findings before imposing consecutive instead of concurrent sentences. *Id.* at 714-15. Defendant argues *Ice* requires trial courts to comply with the findings under severed R.C. 2929.14(E). See *Evans v. Hudson* (2009), 575 F.3d 560, 566.

{¶11} Defendant's contentions are unpersuasive. This court, acknowledging *Ice*, concluded that because the "Supreme Court of Ohio has not reconsidered *Foster* * * * the case remains binding on this court." *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶18. Indeed, this court has recognized on several occasions that we are bound to follow *Foster* until the Supreme Court of Ohio directs otherwise. *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554, ¶33; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420, ¶16; *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶8; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372, ¶8. Defendant's first assignment of error is overruled.

IV. Second Assignment of Error – Allied Offenses

{¶12} Defendant's second assignment of error asserts the trial court erred in sentencing defendant to terms of imprisonment for both attempted murder and felonious assault because the two offenses are allied offenses of similar import and, as such, defendant could be convicted of only one offense. Here, attempted murder and felonious assault, even if allied offenses, are not subject to merger because the evidence supports the trial court's conclusion the two offenses were committed with a separate animus.

{¶13} R.C. 2941.25, Ohio's Multiple Counts statute, provides that where a defendant's same conduct "can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." R.C. 2941.25(A). Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them." R.C. 2941.25(B). R.C. 2941.25 is a legislative attempt "to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that the component elements, in legal effect, are merged in the major crime.'" *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶42, quoting *State v. Botta* (1971), 27 Ohio St.2d 196, 201.

{¶14} Whether two offenses will merge under R.C. 2941.25 requires a two step analysis. The first step determines whether the two offenses charged are allied offenses of similar import. If the two offenses are allied offenses, the second step determines

whether the offenses were committed separately or with a separate animus. If the allied offenses were committed separately or with a separate animus the court may sentence the defendant on both offenses. *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14; *State v. Rance*, 85 Ohio St.3d 632, 1999-Ohio-291. Even if we assume, without deciding, that felonious assault and attempted murder as charged in defendant's indictment are allied offenses under the first step of the analysis, the second step of the analysis reveals defendant committed the offenses separately or with separate animus.

{¶15} The second step of the R.C. 2941.25 analysis requires the court to look at the defendant's actual conduct to determine whether the "crimes were committed separately" or "there was a separate animus for each crime." *Cabrales* at ¶14, quoting *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. If the crimes were committed separately or with a separate animus, the court may sentence the defendant of both offenses even though they are allied offenses of similar import. R.C. 2941.25(B). *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, ¶30.

{¶16} Separate conduct or separate animus may occur when a court determines the "defendant at some point broke 'a temporal continuum started by his initial act.'" *State v. Roberts*, 180 Ohio App.3d 666, 2009-Ohio-298, ¶14, quoting *State v. Williams*, 8th Dist. No. 89726, 2008-Ohio-5286, ¶37; *State v. Hines*, 8th Dist. No. 90125, 2008-Ohio-4236, ¶48. Alternatively, a separate conduct or animus may exist when "facts appear in the record that 'distinguish the circumstances or draw a line of distinction that enables a trier of fact to reasonably conclude separate and distinct crimes were committed.'" *Id.* (noting facts also may support a separate animus where the defendant's conduct "created a 'substantial independent risk of harm' ").

{¶17} *Cooper* illustrates facts that the trial court conclude two separate crimes were committed. The state charged the defendant with both involuntary manslaughter involving child endangering and a separate charge for child endangering. Although the charges arose out of the same incident, the Supreme Court decided the defendant could be sentenced on both offenses because the state offered evidence of separate conduct. To support the involuntary manslaughter charge, the state presented evidence the defendant slammed the child victim against a hard surface; to support the separate charge of child endangering, it presented evidence the defendant shook the child. *Id.* at 27-29. See also *State v. Coffman*, 10th Dist. No. 09AP-727, 2010-Ohio-1995, ¶8, citing *Williams*, *supra* (concluding that even though "there was a single shooting incident, * * * when one shot was fired to commit involuntary manslaughter, and another was fired to commit felonious assault, separate conduct existed for each offense for purposes of R.C. 2941.25" such that the offenses did not merge). Accordingly, the court properly could sentence the defendant on both offenses.

{¶18} Similarly here, defendant's convictions for both felonious assault and attempted murder were proper under *Cooper* because separate conduct supports the trial court's decision to sentence defendant on both offenses. As the trial court noted, the trial testimony reflected felonious assault in defendant's slash to Farah's face, and attempted murder in defendant's separate later stab to Farah's back,

{¶19} *Roberts*, by contrast, illustrates a break in the time continuum. *Roberts* initially stabbed his girlfriend with a steak knife but, after the blade broke off, *Roberts* obtained a butcher knife and chased her down the hallway, continuing to stab her. *Id.* at ¶17. The court concluded "a line of distinction or break in the 'temporal continuum' "

occurred when Roberts obtained the butcher knife. *Id.* As a result, the court found the initial stabbing "with the steak knife constituted a separate animus for felonious assault" and the "resumption of the stabbing with a butcher knife constituted a separate animus for attempted murder," even though the charges arose from a single stabbing incident. *Id.*

{¶20} Similarly here, the break in the temporal continuum between defendant's initial punch or slash to Farah's face and her later stab to Farah's back supports the trial court's finding of a separate animus for each charge. Farah testified that after the initial punch or slash to her face, she tried to restrain defendant by holding her up against the wall. At that point defendant's friend Kaltun came out of defendant's apartment and pulled Farah to the ground. Defendant came back at Farah and stabbed her three more times, the final stab being to the back where the knife blade broke. Kaltun's intervention created a decisive break in the time line of defendant's actions against Farah and supports the trial court's finding that defendant had a separate animus for the initial felonious assault and the subsequent attempted murder. See also *Hines* at ¶47 (finding a separate animus for felonious assault and attempted murder in a shooting incident where "the first shot that wounded the victim, [constituted] felonious assault, and the subsequent attempt to shoot the victim [constituted] an attempted murder" because the second attempt to shoot the victim "entailed a substantial independent risk of harm").

{¶21} Because defendant committed attempted murder and felonious assault with separate conduct, separate animus, or both, defendant's second assignment of error is overruled.

V. Third Assignment of Error – Sufficiency and Manifest Weight

{¶22} Defendant's third assignment of error contends the state failed to present sufficient evidence to support the jury verdict finding her guilty of attempted murder; she further asserts the verdict is against the manifest weight of the evidence. Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

A. Sufficiency of the Evidence

{¶23} Whether evidence is legally sufficient to sustain a verdict is a question of law. *Id.* Sufficiency is a test of adequacy. *Id.* The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶79.

{¶24} To prove attempted murder, the state had to demonstrate, beyond a reasonable doubt, that defendant purposely engaged in conduct which, if successful, would have caused Farah's death. R.C. 2903.02(A), R.C. 2923.02(A). A person acts purposely when it is his or her specific intention to cause a certain result. R.C. 2901.22(A). Intent to kill may be inferred "where the natural and probable consequence of a wrongful act is to produce death" and "may be deduced from all the surrounding circumstances, including the instrument used to produce death, its tendency to destroy

life if designed for that purpose, and the manner of inflicting a fatal wound." *State v. Robinson* (1954), 161 Ohio St. 213, paragraph five of the syllabus.

{¶25} Here, Farah testified that after a phone conversation where defendant threatened to kill her, defendant came out of her apartment and "punched" Farah in the face with a knife. After Farah tried to restrain defendant and defendant's friend intervened, defendant stabbed Farah three more times, the final stab being to Farah's back where the knife blade broke and remained lodged in Farah's back. The natural and probable consequence of defendant's stabbing Farah with a knife was Farah's death. Defendant's repeatedly stabbing Farah with a knife only further supports the conclusion that she intended to cause Farah's death. See *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶19 (concluding repeated firing of weapon established intent to kill).

{¶26} Defendant nonetheless contends the state's failure to introduce any medical evidence that Farah's injuries were life threatening renders the state's evidence insufficient. A victim need not sustain any injuries, and the state need not prove the severity of the injuries through medical testimony, in order to establish the requisite intent for attempted murder. *State v. Locklear*, 10th Dist. No. 06AP-259, 2006-Ohio-5949, ¶17. Rather, in the context of an attempted murder charge the victim does not need to sustain any injuries because it is the "intent of the accused, not the result, [which] is determinative." *Id.*, quoting *State v. Clay* (Mar. 28, 2000), 10th Dist. No. 99AP-404, citing *State v. Talley* (Sept. 25, 1998), 11th Dist. No. 97-L-169.

{¶27} The evidence, construed in the light most favorable to the prosecution, is sufficient to allow a rational trier of fact to conclude that when defendant stabbed Farah

multiple times with a knife, defendant purposely engaged in conduct which, if successful, would have killed Farah.

B. Manifest Weight of the Evidence

{¶28} When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether 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." *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶29} Farah testified defendant over the telephone threatened to kill her and then stabbed her multiple times, the last stab being so forceful that the knife blade broke off in Farah's back. By contrast, defendant testified Farah started the altercation by threatening defendant during the telephone conversation, coming to defendant's apartment and pulling defendant's hair. Although, defendant stated Farah pulled a knife on her,

defendant could not remember anything further because the "flashing" started in her mind and everything went dark. Defendant's husband also testified Farah started the fight but added he never saw a knife.

{¶30} The jury thus was presented with two contrary versions of what happened. Charged with the responsibility to resolve the contrary testimony, the jury found Farah to be more credible than defendant. The evidence presented a basis for the jury to so conclude. Initially, the medical records corroborate Farah's testimony not only as to how many times defendant stabbed her with the knife but where. The jury further could conclude defendant's belief Farah was having an affair with defendant's husband prompted defendant to the actions she took against Farah. Defendant's testimony, by contrast, offered little because her "flashing" started and her mind went dark. In light of such evidence, we cannot say the jury lost its way when it concluded defendant stabbed Farah multiple times with a knife and in doing so purposely engaged in conduct which, if successful, would have resulted in Farah's death.

{¶31} Because sufficient evidence supports the jury's verdict finding defendant guilty of attempted murder, and the verdict is not against the manifest weight of the evidence, defendant's third assignment of error is overruled.

{¶32} Having overruled defendant's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

KLATT and SADLER, JJ., concur.
