

[Cite as *State v. Cooper*, 2010-Ohio-4106.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92911

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CHRISTOPHER COOPER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-499651

BEFORE: Kilbane, J., Gallagher, A.J., and Jones, J.

RELEASED AND JOURNALIZED: September 2, 2010
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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Christopher Cooper (“Cooper”), appeals his convictions for attempted murder and felonious assault, arguing that his convictions are against the manifest weight of the evidence and that the trial court erred in ordering that his sentences be served consecutively. After a review of the record and pertinent law, we affirm.

{¶ 2} On August 9, 2007, a seven-count indictment was issued against Cooper, pertaining to two separate incidents. Counts 1 and 4 charged Cooper with attempted murder, in violation of R.C. 2903.02(A), felonies of the first degree. Counts 2, 3, 5, 6, and 7 charged Cooper with felonious assault, in violation of R.C. 2903.11(A), felonies of the second degree. All seven counts contained both one-year and three-year firearm specifications.

{¶ 3} On December 9, 2008, the matter proceeded to a jury trial where the following testimony was adduced.

{¶ 4} Betty Morris (“Betty”) testified that in 2007 she was living at 13113 Cedar Road, Cleveland Heights, Ohio, with her grandson, Christopher Morris (“Morris”). On July 5, 2007, at approximately 7:00 p.m., Cooper, Morris’s longtime friend, arrived at the house, and the two left together around 8:00 p.m.

{¶ 5} Ramon Randall (“Randall”) testified that on July 5, 2007, he spent the evening at the home of his sister, Melinda Love-Cottoe, and her children, 13-year-old Darrie Love (“Darrie”) and 11-year-old Devon Love (“Devon”), located at 13517 Cedar Road, Cleveland Heights, Ohio. At approximately 11:00 p.m., Randall, Darrie, and Devon walked to the CVS store located on the corner of Cedar and Lee Roads, just a short distance from their home, to purchase a bag of ice. Randall testified that they were approached by two African-American males. Randall stated that one of the males hit him in the

head with a gun. All three fled, and then reported the incident to the Cleveland Heights Police Department. Darrie later identified one of the males as Cooper.

{¶ 6} Later that night, on July 6, 2009, at 12:30 a.m., Willie Hines Sr. (“Hines”) drove into the United Dairy Farmers parking lot located at 1900 Lee Road, Cleveland Heights, Ohio. Hines was accompanied by Lauren Carbone, Willie Hines, Jr., Shawna Hines, Curtis Gay (“Gay”), Patricia Gay, and Leray Eddy (“Eddy”). Eddy testified that immediately after pulling into the parking lot, a light-skinned African American male approached Hines’s window and asked him if he wanted to purchase marijuana. Hines stated that no one in the car used marijuana.

{¶ 7} Hines and Gay both got out of the car and walked towards the front entrance of the store. Gay testified that the male approached him and attempted to take a cigar from behind his ear, at which point the two began to argue. The male pushed Gay up against a car and a second male approached with a gun, shooting Gay three times in the abdomen, once in the thigh, and once in the hip. Eddy, Gay’s son, got out of the car to intervene, at which point he was shot once in the thigh. When the shooter ran out of bullets, he approached Gay, hit him in the head with the gun, and then ran down the street. The other male ran to the front porch of a nearby house.

{¶ 8} Employees at the store contacted the Cleveland Heights Police Department, who immediately arrived to investigate. Officers located Morris on the front porch of the nearby home and brought him back to the store where he was placed in a lineup. Hines identified Morris as one of the individuals involved in the shooting. Morris was then arrested.

{¶ 9} At approximately 1:00 a.m., Cooper arrived on Betty's front porch with blood on his white tee-shirt and told her that he had been in a fight. Cooper informed Morris's mother, Renee Morris ("Renee"), that he disposed of shell casings in the sewer located in the front of the home. Renee contacted the Cleveland Heights Police Department. When Cooper saw police cars approaching the home, he ran. Cleveland Heights Police Officer Michael D'Amico testified that, upon arriving at Betty's home, officers unsuccessfully searched the area for Cooper; however, they did manage to find several shell casings in the sewer.

{¶ 10} Morris testified on behalf of the State and admitted that he was with Cooper on the evening of July 5, 2007. Morris testified that he and Cooper went to the United Dairy Farmers store that night and, while they were in the store, he noticed that Cooper had a gun. Morris admitted that he got into a physical altercation with Gay upon leaving the store, but stated that when he heard gunshots he ran to a nearby house. He did not wait for Cooper and could not say whether it was Cooper who fired the shots.

{¶ 11} On December 12, 2008, the jury found Cooper guilty of Count 1, attempted murder, and Counts 2 and 3, felonious assault, all with respect to the attack on Gay. The jury also found Cooper guilty of Counts 5 and 6, felonious assault, with respect to the attack on Eddy. Cooper was found not guilty on Count 4, the attempted murder of Eddy, and not guilty of Count 7, the felonious assault of Randall. Cooper was not convicted of any of the firearm specifications.

{¶ 12} On February 2, 2009, the trial court sentenced Cooper to serve six years of imprisonment each on Counts 1, 2, and 3, and merged the counts for sentencing. On Counts 5 and 6, the trial court imposed five years of imprisonment on each and merged the counts for sentencing. The sentences imposed on Count 1 and Count 5 were ordered to be served consecutively, for an aggregate sentence of 11 years of imprisonment.

{¶ 13} Cooper appealed, raising two assignments of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

{¶ 14} **“The verdicts are against the weight of the evidence.”**

{¶ 15} Cooper argues that his convictions are against the manifest weight of the evidence because the only witness who conclusively identified Cooper was Morris, a codefendant whose testimony lacks credibility. Cooper also contends that, even if there was evidence to indicate he was with Morris

during the attacks, there was no evidence presented to establish that he was an active participant. After a review of the record, we disagree.

{¶ 16} When determining if a conviction is against the manifest weight of the evidence this court “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. This court must determine whether there is substantial evidence upon which a jury could reasonably conclude that all the elements of the crime were proven beyond a reasonable doubt. *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235, 818 N.E.2d 229.

{¶ 17} When an appellate court reverses a conviction as being against the manifest weight of the evidence, it acts as the thirteenth juror and disagrees with the jury’s resolution of the testimony presented at trial. *State v. Thompkins* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652. The discretionary power to reverse a conviction based upon the manifest weight of the evidence should be exercised only in the exceptional case where the evidence weighs heavily against the conviction. *Martin* at 175.

{¶ 18} First, Cooper argues that Morris's testimony lacks credibility and should have been disregarded by the jury. Morris testified that Cooper was with him throughout the evening of July 5, 2007, and into the early morning hours of July 6, 2007. Morris also stated that the two went to United Dairy Farmers, that he saw that Cooper had a gun, and that Cooper was present when Morris and Gay were fighting. Morris acknowledged that he pled guilty to three counts of felonious assault, all with firearm specifications stemming from the two incidents that occurred that day, and stated that testifying against Cooper was not part of his plea agreement.

{¶ 19} While Cooper urges us to discount all of Morris's testimony, we cannot simply substitute our judgment for that of the jury. The jury was in the best position to assess the credibility of the witnesses. *State v. Bates*, Cuyahoga App. No. 92323, 2009-Ohio-5819, at ¶25, citing *State v. Awan* (1986), 22 Ohio St.3d120, 489 N.E.2d 547.

{¶ 20} Further, Cooper's contention that Morris is the only witness who places him at the scene is not supported by the record. While there was conflicting testimony as to whether it was Cooper or Morris that had the gun, the witnesses identified both Cooper and Morris as the individuals involved in the attack. Morris's grandmother, Betty, corroborated the testimony of the victims and testified that Morris and Cooper left her home together on the

evening of July 5, 2007, and that Cooper returned to her home wearing a bloody tee-shirt late that night.

{¶ 21} Hines identified Morris the night of the shooting when Cleveland Heights police arranged a line-up in front of the United Dairy Farmers' store. Eddy identified the other individual as Cooper three days later in a photo array. The victims in the first incident near the CVS store identified both Cooper and Morris and stated that they were working together. The testimony of these several witnesses, taken as a whole, places Cooper with Morris on the evening of July 5, 2007.

{¶ 22} Next, Cooper argues that even if the evidence established that he was with Morris that evening, the evidence does not establish that he was an active participant in the crimes. Cooper contends that because he was not convicted of the firearm specifications, that the jury determined that he was not the shooter, but at most, aided and abetted Morris.

{¶ 23} While we disagree with Cooper's contention that the jury conclusively determined that he was not the shooter when it failed to convict him of the firearm specifications, even if we accept Cooper's contention for purposes of this analysis, there is still significant evidence in the record indicating that both individuals were actively involved in the attack.

{¶ 24} The trial court properly instructed the jury:

“If you find that the defendant knowingly or purposely aided, helped, assisted, encouraged, directed, or acted in concert with another, Christopher Morris, for the purpose of committing a crime, he is regarded as if he were the principal offender and is just as guilty as if he personally performed every act constituting the offense.”

{¶ 25} Therefore, even if we assume that Morris was the shooter, there was still significant evidence presented that demonstrates he aided and abetted Morris in the commission of these crimes. Gay testified that the first individual who approached him instigated a physical altercation, during which the second individual approached and shot both him and his son, Eddy. Eddy testified that the individuals were working together and described them as friends. Hines also testified that the two males appeared to be working together and both approached as he and Gay walked up to the store.

{¶ 26} Consequently, we determine that the jury’s verdict was not against the manifest weight of the evidence. This assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶ 27} **“The trial court erred by sentencing the appellant to serve consecutive sentences.”**

{¶ 28} Cooper argues that the trial court erred when it ordered his six-year sentence on Count 1, attempted murder against Curtis Gay, to be served consecutively to the five-year sentence imposed on Count 5, felonious assault against Eddy.

{¶ 29} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, the Ohio Supreme Court excised portions of the Ohio Revised Code's sentencing scheme that required trial courts to make factual findings prior to sentencing. Pursuant to *Foster*, trial courts could sentence defendants to any sentence within the statutory range and determine whether those sentences should be served concurrently or consecutively.

{¶ 30} Cooper argues that the holding in *Foster* is no longer applicable in light of the United States Supreme Court's recently decided, *Oregon v. Ice* (2009), ___ U.S. ___, 129 S. Ct. 711, 172 L.Ed.2d 517. *Ice* called the validity of *Foster* into question when it upheld an Oregon statute that required judicial factfinding prior to imposing consecutive sentences.

{¶ 31} In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, the Ohio Supreme Court acknowledged the *Ice* decision, but declined to address its application to Ohio sentencing law because the parties did not specifically brief the issue. In *Elmore*, the court ultimately applied *Foster* and reiterated its earlier conclusion that trial courts are not required to

make findings before imposing “maximum, consecutive, or more than the minimum sentences.” *Elmore* at 482, quoting *Foster*.

{¶ 32} This court has stated in numerous cases decided subsequently to *Ice* that, “we decline to depart from the pronouncements of *Foster*, until the Ohio Supreme Court orders otherwise.” *State v. Robinson*, 8th Dist. No. 92050, 2009-Ohio-3379, at ¶29. See, also, *State v. Waite*, 8th Dist. No. 92895, 2010-Ohio-1748; *State v. Buitrago*, 8th Dist. No. 93380, 2010-Ohio-1984; *State v. Alhajjeh*, 8th Dist. No. 93077, 2010-Ohio-3179. Consequently, we will leave consideration for the application of *Ice* to Ohio sentencing law for the Ohio Supreme Court to decide and apply *Foster* in analyzing Cooper’s sentence.

{¶ 33} Shortly after *Foster*, the Ohio Supreme Court outlined a two-prong test for determining if a sentence merited reversal, in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.¹ In accordance with *Kalish*, this court must first determine whether the sentence complies with all applicable statutes and rules. If this court determines that the first prong is met, the sentence is reviewed only for an abuse of discretion. *Kalish* at 23. In order for a trial court to have abused its discretion, there must be “more than an

¹We note that *State v. Kalish* is a plurality opinion, therefore, it is merely persuasive. However, this court has previously applied the two-pronged analysis to reviewing sentences. See *State v. Logan*, Cuyahoga App. No. 91323, 2009-Ohio-1685, at ¶4.

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

{¶ 34} On Count 1, attempted murder, Cooper received a sentence of six years of imprisonment. Attempted murder is a first degree felony, and carries a possible maximum sentence of ten years of imprisonment. On Count 5, felonious assault, Cooper received a sentence of five years of imprisonment. Felonious assault carries a possible maximum sentence of eight years of imprisonment. Clearly, Cooper's sentences fell within the statutory range; therefore, pursuant to *Kalish*, we review the sentence for an abuse of discretion.

{¶ 35} Based upon the record we cannot conclude that the trial court abused its discretion in sentencing Cooper. Gay was shot a total of five times, which resulted in him being in the hospital for a month. Gay continues to have difficulty walking or standing for long periods of time, and walks with a limp. Eddy was shot while trying to help his father. Eddy walked with a limp for several weeks and required continuous pain medications. At the sentencing hearing, Cooper failed to accept responsibility for his part in the crimes.

{¶ 36} Based upon these facts, we find that the trial court did not abuse its discretion in ordering Cooper's sentences on Count 1 and Count 5 to be served consecutively; therefore, this assignment of error is 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.

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

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, A.J., and
LARRY A. JONES, J., CONCUR