[Cite as *State v. Dunford*, 2010-Ohio-1272.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-A-0027**
- vs -	:	
ALAN L. DUNFORD,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2008 CR 62.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Patricia J. Smith, 114 Barrington Town Square, #188, Aurora, OH 44202 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Alan L. Dunford appeals from the judgment of the Ashtabula County Court of Common Pleas, entered upon a jury verdict finding him guilty on 19 counts that arose from the brutal stabbing, murder, dismemberment, and disposal of the victim's, Mr. Cheyrone Kelley's, body.

{¶2} Mr. Dunford contends on appeal that the evidence is insufficient to support his conviction of the count of aggravated murder in violation of R.C. 2903.01(A). He claims that the only evidence of prior calculation and design was the testimony of Mr.

Dunford's girlfriend, Ms. Tiffany West, that Mr. Dunford conspired with his deceased cohort in the murder, Mr. Steven Anzells, to kill Mr. Kelley. He makes a similar argument in his contention that the manifest weight of the evidence does not support the jury's verdict, contending that Ms. West's testimony was incredible as she initially omitted crucial facts and failed to identify him as one of the murderers. Lastly, Mr. Dunford argues that the trial court erred in sentencing him to consecutive terms of imprisonment because it made no findings on the record to support the sentence, which he argues is now required in light of the recent ruling of the United States Supreme Court in *Oregon v. Ice* (2009), 129 S.Ct. 711.

{¶3} We find Mr. Dunford's contentions to be wholly without merit as the state properly introduced additional evidence apart from Ms. West's testimony that Mr. Dunford and Mr. Anzells calculated to kill Mr. Kelley and steal his crack cocaine. The jury learned of the execution-style manner of the crime and heard other witness' testimony that Mr. Dunford planned on killing Mr. Kelley so that he could take over Mr. Kelley's drug trade. The jury evaluated the credibility of all witnesses and chose to disregard Mr. Dunford's version of events. Thus, we cannot say that the evidence was insufficient or that the jury so lost its way that the manifest weight of the evidence does not support the verdict.

{¶4} Moreover, we are bound by the Supreme Court of Ohio's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which severed the portions of judicial fact-finding formerly required for the imposition of consecutive sentences. Until the Supreme Court of Ohio revisits this issue in light of *Ice*, we remain bound by *Foster,*

which is the controlling law.[1] Accordingly, we find the trial court did not err in sentencing Mr. Dunford to consecutive sentences of imprisonment, and we affirm.

{¶5} **Substantive and Procedural Facts**

{¶6} Over the span of an eight-day jury trial, the state presented evidence and testimony establishing that on the night of November 3, 2008, Mr. Cheyrone "Red" Kelley, a known drug dealer, was brutally stabbed, murdered and dismembered by Mr. Dunford and Mr. Anzells.

{¶7} Missing person notices were issued in the ensuing months by Mr. Kelley's family. Approximately three months later, the police, upon a tip from a confidential informant, Ms. Melissa Kondrat, discovered the location of the body and the perpetrators.

{¶8} **The Investigation**

{¶9} Ms. Kondrat, the aunt of Ms. West, is also a felon who is currently serving a two-to-six year term in Wyoming for aiding and abetting in grand larceny for stealing a semi-truck with her boyfriend. She lived with Mr. Dunford and Ms. West in their apartment in Conneaut Lake for a short time. At trial the defense attempted to discredit her and suggested that she turned on Mr. Dunford because she was asked to leave the apartment. She disputed the testimony of Mr. Dunford and Ms. West that they asked her to leave because she was bringing strangers home at all hours of the night, engaging in prostitution and rampant drug use, and leaving dirty syringes lying around. She claimed that she left with her new boyfriend.

1. In fact, the Supreme Court of Ohio has recently chosen to revisit this issue in light of *Oregon v. Ice*, accepting the discretionary appeal of *State v. Hodge*, No. 2009-1997, 2010-Ohio-354, on February 10, 2010.

{¶10} Ms. Kondrat informed the police that Mr. Dunford confided in her that he had killed Mr. Kelley. She was familiar with Mr. Kelley, having purchased crack cocaine from him in the past. Mr. Dunford asked her if she could keep a secret, and then confided that he had robbed somebody named "Red," killed him over crack cocaine, and disposed of the body.

{¶11} Ms. Kondrat testified that about a week later, Mr. Dunford confided in her again. He told her that "Youngstown Bob" Williams, another known drug dealer, had arranged for "Red" to come over. Mr. Dunford told her that when Mr. Kelley came in, he jumped him, repeatedly hit him in the back of his head, and then dismembered the body because it was too large. He then threw the body in the "backyard," which Ms. Kondrat understood to be a swampy area off of Rt. 20 in Pennsylvania.

{¶12} Police Interview with Mr. Dunford

{¶13} The police went to Edinboro, Pennsylvania, to interview Mr. Dunford, where he and Ms. West had moved to live with Ms. West's mother during the winter. Mr. Dunford voluntarily accompanied them back to the station, first telling them that Mr. Kelley and one of his customers, Mr. Steven Anzells, had gotten into an argument. Ultimately, he told them, the two left the apartment together and he never saw Mr. Kelley again.

{¶14} A couple of hours later, Mr. Dunford changed his statement, telling the police that Mr. Kelley and Mr. Anzells had actually gotten into a fight, in which Mr. Kelley was wounded. He helped Mr. Anzells load Mr. Kelley into Mr. Anzells' vehicle and assumed Mr. Anzells was taking him to the hospital.

{¶15} When Mr. Dunford discovered Ms. West had arrived at the station and was fully cooperating with the police, he started to give them more details about where the body might be located and identified Mr. Anzells as the murderer. He suggested that he wear a wire and speak with Mr. Anzells. Ultimately, the wired conversation never took place as Mr. Anzells did not pick up the telephone. Mr. Dunford then confessed that upon Mr. Anzells' orders, he dismembered Mr. Kelley with a construction saw and placed the body parts in several garbage bags. He then loaded the bags into Mr. Anzells' trunk.

{¶16} Police Interview with Ms. West

{¶17} Ms. West first told the detectives that Mr. Kelley had been murdered in their apartment solely by Mr. Anzells and that the body was taken "somewhere" for burial. She eventually identified all the participants in the gruesome murder, identifying Mr. Shawn Curtin; Mr. Cary Dunford, Mr. Dunford's father; as well as Mr. Dunford. The next morning she took the officers to a pond located off of Netcher Road in Ashtabula County, known as "Dead Man's Pond."

{¶18} Mr. Kelley's body was recovered in and around Dead Man's Pond. One of the bags containing several of Mr. Kelley's limbs had been buried close to the pond in a shallow grave dug by Mr. Dunford and Mr. Curtin. Two other bags were located in the pond after a dive rescue team was called in. Later, a sheathed bayonet was also recovered from the pond. Several of the limbs were not recovered, nor were Mr. Kelley's fingertips, which Mr. Curtin admitted to cutting off with metal shears and, which at some point in driving to dispose of the body, Mr. Anzells had ordered him to throw out the window.

{¶19} Ms. West confessed to assisting in the aftermath of the murder by cleaning the apartment and helping to dispose of the body. She subsequently pled guilty to one count each of gross abuse of a corpse and obstruction of justice, and was awaiting sentencing at the time of Mr. Dunford's trial.

{¶20} Mr. Anzells is Apprehended

{¶21} Upon learning that Mr. Anzells had several weapon violations and domestic violence charges, the police decided to obtain a warrant to search his home. They also learned that Mr. Anzells always carried a gun and knife on his person. As the SWAT team forcibly entered the home, Mr. Anzells jumped out of his bedroom, brandished his gun at one of the officers, and was shot. He died at the scene.

{¶22} The Night of the Murder

{¶23} Mr. Dunford had been friends with Mr. Kelley for quite some time, acting as his middle-man during drug runs and allowing Mr. Kelley to deal his crack cocaine from his apartment in exchange for some crack. Mr. Dunford had met Mr. Anzells several months prior and they would often purchase crack cocaine and oxycontins from each other. On the night of the murder, Mr. Dunford asked Mr. Kelley if he wanted to meet Mr. Anzells, and Mr. Anzells came over shortly thereafter. Throughout the night, in between drug deals, with Mr. Dunford acting as Mr. Kelley's runner, the four got high.

{¶24} Around midnight Mr. Kelley ran out of crack. Mr. Dunford called a friend and customer, Mr. Mark Kightslinger, and asked him if he would give him a ride to a gas station to wait for Mr. Kelley's supplier. When the dealers arrived, Mr. Dunford drove with the two unidentified men back to his apartment. Mr. Kelley met the men in their

vehicle, who refused to come upstairs, and resupplied while Mr. Dunford, Ms. West, and Mr. Anzells waited in the apartment.

{¶25} The four smoked more crack and while in the kitchen with Mr. Dunford and Ms. West, Mr. Anzells told them he wanted Mr. Kelley's drugs. The four continued to smoke crack, and, at some point, Mr. Kelley and Ms. West went to sit in the dining room, leaving Mr. Anzells and Mr. Dunford together in the dining room. Ms. West overheard Mr. Anzells tell Mr. Dunford he wanted Mr. Kelley's money.

{¶26} According to Ms. West, Mr. Anzells walked into the living room several minutes later and stabbed Mr. Kelley with a short knife that had a curved blade. Mr. Dunford ran out to assist him and started to stab Mr. Kelley with a long knife that had a brown handle. Somehow, Mr. Kelley managed to break free and reach the door.

{¶27} The two caught up to him and continued to stab him at the top of the stairs until he fell to the bottom landing. Mr. Anzells then turned to Ms. West and threatened to kill her and her daughter if she spoke of this to anyone.

{¶28} The Aftermath - Dismemberment and Disposal

{¶29} The three smoked more of Mr. Kelley's crack while they tried to figure out how to dispose of the body. They tried locating a truck, which after several hours proved unsuccessful. Mr. Anzells suggested they dismember the body and load it into his trunk. Mr. Anzells, in fact, did not participate in the actual dismemberment because he was physically unable. His wife testified and the coroner confirmed that he underwent kidney dialysis three times a week, had stomach and liver cancer, as well as congestive heart failure, among other medical problems such as emphysema.

{¶30} Failing to locate a truck, Mr. Dunford called his friend, Mr. Shawn Curtin, to assist them. When Mr. Curtin arrived at the apartment, the three told him that Mr. Kelley had been attempting to rape Ms. West and that Mr. Anzells and Mr. Dunford had killed him. Mr. Curtin did not believe them until Mr. Dunford showed him Mr. Kelley's body that was lying on a wooden pallet, covered in a carpet downstairs.

{¶31} The four then went upstairs to smoke more crack. Throughout the course of the night, over $300 of crack cocaine was smoked.

{¶32} Mr. Curtin testified that Mr. Anzells, after threatening his life, directed him to cut Mr. Kelley's fingertips off with metal shears. Mr. Anzells then left for a short time because he wanted to be at home when his children woke up. Mr. Curtin held the body down while Mr. Dunford dismembered the body with a saw, severing the head and limbs from the torso. Although Mr. Anzells had directed him to use a crowbar to smash Mr. Kelley's teeth, Mr. Dunford could not bring himself to do that final act.

{¶33} Mr. Anzells returned with garbage bags, in which they placed the body parts, and then loaded the bags into Mr. Anzells' car. Mr. Curtin rode in the front passenger seat with Mr. Anzells driving, while Mr. Dunford and Ms. West, who had been upstairs cleaning and painting over the blood, rode in the back. Mr. Dunford directed Mr. Anzells to his father's house, not knowing where to dispose of the body.

{¶34} When they arrived, Mr. Dunford's father, Cary, was outside with a cable service person. Mr. Dunford went to speak to his father, while the other three waited in the car. He walked with his father into the side-yard and without giving him any details or explanation, told him he killed a man and did not know where to dispose of the body. His father was in shock, and testified that he did not know what to do and that, quite

frankly, he did not want to believe his son. He told his son about a pond he knew of in Pierpont, called "Dead Man's Pond." Mr. Dunford then asked for several items, taking a fishing pole and a shovel, among other items, including several cinder blocks. At some point during their conversation, the other three went into the house and Mr. Dunford introduced Mr. Anzells and Mr. Curtin to his father.

{¶35} After Mr. Dunford collected what he needed, his father told all four of them to leave his home. Mr. Dunford's father voluntarily cooperated with the police, informing them of what he knew, and ultimately pled guilty to one count of obstruction of justice. He was sentenced to a serve one year in prison, the maximum term of imprisonment for the fifth degree felony.

{¶36} The four arrived at Dead Man's Pond and Mr. Anzells directed Mr. Dunford and Mr. Curtin to bury the various bags. Mr. Anzells and Ms. West waited a short distance away, pretending to fish. One of the bags was buried, and the two others were thrown in the pond, weighted with tied cinder blocks. According to Mr. Dunford, Mr. Anzells gave one knife to Mr. Curtin and one knife to Mr. Dunford to throw into the pond.

{¶37} Dr. Andrea McCollum, the coroner for the Cuyahoga Coroner's Office, examined the body parts. Mr. Kelley had identifying tattoos on both arms, and subsequent DNA tests linked all the body parts found as belonging to Mr. Kelley's person. The cause of death was from multiple stab wounds, approximately 48 were found on the head and trunk, with visceral, vascular, and skeletal injuries. Mr. Kelley tested positive for coke ethylene, cocaine, and cocaine metabolites, indicating he had been using for a period of several days, as did Mr. Anzells.

{¶38} Dr. Pamela Lancaster, the deputy coroner for Ashtabula County, confirmed Dr. McCollum's verdict and testified that the official coroner's verdict for Mr. Kelley was homicide from multiple stab wounds with dismemberment.

{¶39} Court Proceedings

{¶40} At the close of the state's case-in-chief, the defense moved for acquittal based upon Crim.R. 29 insufficiency of evidence, arguing that the state failed to put forth evidence of prior calculation and design; thus, the count for aggravated murder pursuant to R.C. 2903.01(A) could not stand. The defense argued there was also no evidence to support the charges of robbery. The court overruled the motion finding there was sufficient evidence by way of Ms. West's testimony as to prior calculation and design, and that all four had testified to smoking Mr. Kelley's drugs, which while illegal, were still Mr. Kelley's property.

{¶41} Mr. Dunford testified in his own defense and the case was given to the jury.

{¶42} The jury returned a verdict of guilty on all nineteen counts of the indictment: one count of aggravated murder, an unclassified felony in violation of R.C. 2903.01(A); one count of aggravated murder, an unclassified felony in violation of R.C. 2903.01(B); two counts of complicity to aggravated murder, unclassified felonies in violation of R.C. 2923.03(A)(2) and R.C. 2903.01(A); one count of complicity to aggravated murder, an unclassified felony in violation of R.C. 2923.03(A)(2) and R.C. 2903.01(B); two counts of murder, unclassified felonies in violation of R.C. 2903.02(A); one count of murder, an unclassified felony in violation of R.C. 2903.02(B); one count of complicity to murder, an unclassified felony in violation of R.C. 2923.03(A)(2) and R.C.

2903.02(A); one count of complicity to murder, an unclassified felony in violation of R.C. 2923.03(A)(2) and R.C. 2903.02(B); one count of aggravated robbery, a first degree felony in violation of R.C. 2911.01(A)(1); one count of robbery, a second degree felony in violation of R.C. 2911.02(A)(1); one count of felonious assault, a second degree felony in violation of R.C. 2903.11(A)(2); one count of complicity to aggravated robbery, a first degree felony in violation of R.C. 2923.03(A)(2) and R.C. 2911.01(A)(1); one count of complicity to robbery, a second degree felony in violation of R.C. 2923.03(A)(2) and R.C. 2911.02(A)(1); one count of complicity to felonious assault, a second degree felony in violation of R.C. 2923.03(A)(2) and R.C. 2903.119(A)(2); one count of obstructing justice, a third degree felony in violation of R.C. 2921.32(A)(4) and (C)(4); one count of tampering with evidence, a third degree felony in violation of R.C. 2921.12(A)(1); and, lastly, one count of gross abuse of a corpse, a fifth degree felony in violation of R.C. 2927.01.

{¶43} The court found that counts one through 16 of the indictment were allied offenses of similar import, and, accordingly, merged them for sentencing purposes. Thus, on counts one through 16, Mr. Dunford was sentenced to life imprisonment without the possibility of parole. On the counts of obstructing justice and tampering with the evidence, Mr. Dunford was sentenced to concurrent five-year terms, to be served consecutively to the life sentence imposed for the murder. Lastly, Mr. Dunford was sentenced to serve a one-year term of imprisonment for gross abuse of a corpse, to be served consecutively to the terms imposed for counts one through 18.

{¶44} On appeal, Mr. Dunford raises three assignments of error for our review:

{¶45} "[1.] The evidence is insufficient to sustain convictions for the element of prior calculation and design.

{¶46} "[2.] The weight of the evidence did not prove beyond a reasonable doubt that the appellant was guilty of aggravated murder, murder, felonious assault, aggravated robbery, [and] robbery.

{¶47} "[3.] The trial court erred when it imposed consecutive sentences without making a finding of fact pursuant to ORC 2929.14."

{¶48} **Sufficiency of the Evidence as to Prior Calculation and Design**

{¶49} In his first assignment of error, Mr. Dunford contends the state failed to produce sufficient evidence of prior calculation and design to support his conviction for one count of aggravated murder pursuant to R.C. 2903.01(A). We find this contention wholly without merit as the record reveals the state produced evidence of Mr. Dunford's plan by way of testimony from Ms. West and Ms. Kondrat that Mr. Dunford made a plan to murder Mr. Kelley, with his deceased cohort, Mr. Anzells, prior to the act. In addition, evidence of the methodical and execution-style murder further supports a prior plan of calculation and design.

{¶50} "[T]he standard of review for a sufficiency of the evidence claim is 'whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. ***' (Citations omitted.) 'In essence, sufficiency is a test of adequacy[;] [w]hether the evidence is

legally sufficient to sustain a verdict ***.' *State v. Davis,* 11th Dist. No. 2008-L-021, 2008-Ohio-6991, ¶68, quoting *State v. Reeds*, 11th Dist. No. 2007-L-120, 2008-Ohio-1781, ¶70, citing *State v. Pesec*, 11th Dist. No. 2006-P-0084, 2007-Ohio-3846, ¶45, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. 'Thus, sufficiency of the evidence tests the burden of production.' Id., quoting *Reeds*, citing *Pesec*, citing *Thompkins* at 390." *State v. Talkington*, 11th Dist. No. 2008-T-0111, 2009-Ohio-6229, ¶18.

{¶51} The element of prior calculation and design for aggravated murder is set forth in R.C. 2903.01(A), which states: "[n]o person shall purposely, and with prior calculation and design, cause the death of another ***."

{¶52} "As to 'prior calculation and design,' no 'bright-line test' exists that 'emphatically distinguishes between the presence or absence' of 'prior calculation and design.'" *State v. Coley* (2001), 93 Ohio St.3d 253, 263, quoting *State v. Taylor* (1997), 78 Ohio St.3d 15, 20. "Yet 'prior calculation and design' is a more stringent element than the 'deliberate and premeditated malice' *** required under prior law." Id., quoting *State v. Cotton* (1978), 56 Ohio St.2d 8, paragraph one of the syllabus. "Instantaneous deliberation is not sufficient ***." Id., quoting *Cotton* at paragraph two of the syllabus. "'Prior calculation and design' requires 'a scheme designed to implement the calculated decision to kill.'" Id., quoting *State v. D'Ambrosio* (1993), 67 Ohio St.3d 185, 196, quoting *Cotton* at 11.

{¶53} "The state can prove 'prior calculation and design' from the circumstances surrounding a murder in several ways: (1) evidence of a preconceived plan leading up to the murder, (2) evidence of the perpetrator's encounter with the victim, including

evidence necessary to infer the defendant had a preconceived notion to kill regardless of how the robbery unfolded, or (3) evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill." *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶19.

{¶54} A review of the record reveals it contains more than sufficient evidence from which the jury could have concluded beyond a reasonable doubt that Mr. Dunford acted with prior calculation and design.

{¶55} Ms. West testified that she overheard Mr. Dunford speaking with Mr. Anzells just prior to the stabbing that both wanted more crack and Mr. Kelley's money. Mr. Dunford and Mr. Anzells then came out of the dining room, rushed at Mr. Kelley, and began stabbing him with knives. The knives were identified as belonging to Mr. Dunford: one, a bayonet that he had given to Mr. Anzells earlier in the day; the other, a knife that Mr. Dunford testified came from his kitchen, although it could also have been the knife Mr. Anzells always carried. When Mr. Kelley managed to get away for a moment, the two rushed after him, catching him at the door at the top of the stairs. The two continued stabbing him until their heinous mission was complete and Mr. Kelley was dead.

{¶56} Quite simply, a short length of time from planning to implementation of the plan or poor detail in planning does not indicate lack of prior calculation and design. Rather, as the Supreme Court of Ohio explained in *Coley:* "prior calculation and design can be found even when the killer quickly conceived and executed the plan to kill within a few minutes." Id. at 264, citing *State v. Palmer* (1997) 80 Ohio St.3d 543, 567-568

(road-rage double homicide that quickly occurred after traffic accident); *Taylor* at 20-23 (chance encounter in bar between rivals for another's affections).

{¶57} Not only was there evidence of a discussion between Mr. Dunford and Mr. Anzells to rob and kill Mr. Kelley shortly before they did so, but there was also evidence that Mr. Dunford had a plan to kill Mr. Kelley that was developed well before the night of the murder. Ms. Kondrat testified that Mr. Dunford confided in her that another well-known drug dealer, "Youngstown Bob" Williams, had arranged for "Red" to deal from Mr. Dunford's apartment that night so that Mr. Dunford would have the opportunity to rob Mr. Kelley and take over his business territory. Furthermore, the execution-style mode indicates conformance with a plan, not simply an "explosive, short-duration situation." See *Taylor* at 17-18.

{¶58} Thus, the trial court properly overruled Mr. Dunford's Crim.R. 29 motion for acquittal with respect to the aggravated murder charge as there are sufficient facts in the record to prove that Mr. Dunford "adopted a plan to kill." See *State v. Brandy*, 10th Dist. No. 02AP-832, 2003-Ohio-1836, ¶42-45, citing *State v. Toth* (1977), 52 Ohio St.2d 206, 213.

{¶59} Additionally, discrepancies in the witness' testimony do not equate to insufficient evidence, rather, "the weight to be given the evidence and credibility of the witnesses are primarily of the trier of facts." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶120, quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Our review of the record reveals the testimony was neither inherently unreliable nor unbelievable. Id., citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶201-202.

{¶60} The circumstances surrounding the murder, the conversation Ms. West overheard shortly prior to the act, the bayonet Mr. Dunford allegedly gave to Mr. Anzells earlier in the night, the execution-style mode -- stabbing Mr. Kelley 48 times and pursuing Mr. Kelley as he attempted to flee -- all support the conclusion that, after construing the evidence most strongly in favor of the prosecution, a rational trier of fact could have found Mr. Dunford guilty of aggravated murder in violation of R.C. 2903.01(A).

{¶61} As an aside, we also note that even if we did find a lack of evidence as to prior calculation and design, notwithstanding Mr. Dunford's conviction of the one count of aggravated murder in violation of R.C. 2903.01(A), Mr. Dunford was also convicted of two counts of aggravated murder in violation of R.C. 2903.01(B), and all counts of murder were merged for sentencing purposes. See *Coley* at 264.

{¶62} Mr. Dunford's first assignment of error is without merit.

{¶63} **Manifest Weight of the Evidence Challenge**

{¶64} Mr. Dunford next challenges the manifest weight of the evidence as to his convictions for aggravated murder. Specifically, he argues that the only evidence presented that he was involved in the murder prior to the dismemberment was by Ms. West's testimony, which he describes as "unreliable and discredited." Our review of the transcript reveals a different story, and we find her testimony neither inherently unreliable nor unbelievable. Moreover, three other witnesses testified that Mr. Dunford told them he killed a man: Ms. Kondrat, Mr. Dunford's father, and Mr. Curtin. Thus, we cannot say the manifest weight of the evidence does not support the jury's verdict

simply because Ms. West omitted certain facts in her initial interview. She fully divulged these facts a short time after and once again at trial.

{¶65} "When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered." *State v. McFeely*, 11th Dist. No. 2008-A-0067, 2009-Ohio-1436, ¶77, quoting *Reeds* at ¶92, quoting *State v. Armstrong*, 11th Dist. No. 2007-G-2756, 2007-Ohio-6405, ¶15, citing *Pesec* at ¶74, citing *State v. Floyd*, 11th Dist. No. 2005-T-0072, 2006-Ohio-4173, ¶8, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See, also, *Thompkins* at 387.

{¶66} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction." Id. at ¶78, quoting *Reeds* at ¶88, citing *Armstrong* at ¶16, citing *Pesec* at ¶75, citing *Floyd* at ¶9, citing *Martin* at 175. "The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion." Id. See, also, *Thompkins* at 390 (Cook, J., concurring). "The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given to the evidence and credibility of witnesses." Id. (citations omitted).

{¶67} Mr. Dunford contends that Ms. West "admittedly lied as she gave three different versions to law enforcement as to the events of the evening." Yet, this statement stretches the truth as our review indicates that Ms. West did not initially

identify Mr. Dunford, his father, or Mr. Curtin, because she did not want to implicate them at the time. Nor do we find her testimony less credible because of this initial desire to shield them. Mr. Dunford admitted to lying to the police numerous times, never once giving the same statement. During trial, he testified to new facts and changed his story once again.

{¶68} Moreover, even if Ms. West had not testified, three other witnesses testified that Mr. Dunford told them he stabbed and dismembered a man. We are not persuaded by the arguments relating to threats made by Mr. Anzells. The only one who claims Mr. Anzells threatened Mr. Dunford was Mr. Dunford. Neither Ms. West nor Mr. Curtin testified that they heard Mr. Dunford threatened by Mr. Anzells, but both testified that they, themselves, were threatened. Nor did Ms. West or Mr. Curtin testify that Mr. Dunford was acting in fear. In fact, they testified to quite the contrary.

{¶69} No doubt Mr. Anzells was a nefarious character. He was a member of the hate-group, the KKK, who carried a gun and a knife on his person and was a well-known drug dealer. That, without more, does not make him the principal killer nor negate the evidence of Mr. Dunford's participation. Quite simply, the jury chose to believe the state's version of events over Mr. Dunford's.

{¶70} "It is well-settled that when assessing the credibility of witnesses, '[t]he choice between credibility of witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.'" *McFeely* at ¶81, quoting *Reeds* at ¶92, quoting *Armstrong* at ¶29, citing *State v. McKinney, Jr.*, 11th Dist. No. 2006-L-169, 2007-Ohio-3389, ¶49, citing *State v. Grayson*, 11th Dist. No. 2006-L-153, 2007-Ohio-1772, ¶31, citing *Awan* at 123.

"Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict." Id., quoting *Reeds* at ¶92, quoting *Pesec* at ¶78.

{¶71} In sum, our review of the record reveals that the weight of the evidence supports the jury's conclusion that Mr. Dunford brutally stabbed and killed Mr. Kelley for his drugs and money.

{¶72} Mr. Dunford's second assignment of error is without merit.

{¶73} **The Imposition of Consecutive Sentences**

{¶74} Lastly, Mr. Dunford contends that R.C. 2929.14(E) requires the trial court to make findings of fact to support the imposition of consecutive sentences. Mr. Dunford contends that the Supreme Court of Ohio "incorrectly excised the relevant sections of R.C. 2929.14(E) due to the Supreme Court of the United States recent decision in *Oregon v. Ice*, and thus, the trial court erred in failing to make specific factual findings on the record before imposing consecutive sentences."

{¶75} As we have previously noted, however, we are bound by the Supreme Court of Ohio's holding in *State v. Foster*, which excised those fact-finding portions of R.C. 2929.14(E) in the imposition of consecutive and maximum sentences. Until the Supreme Court of Ohio revisits the issue in the recently accepted discretionary appeal of *State v. Hodge*, *Foster* continues to be the law.

{¶76} Specifically, Mr. Dunford was sentenced to serve his sentence of life imprisonment without parole for counts one through 16, consecutively to two, five-year concurrent terms for the counts of obstructing justice and tampering with evidence, and,

lastly, a one-year term consecutive to all the other counts for the gross abuse of a corpse.

{¶77} "Regarding maximum and consecutive sentences, in *State v. Foster*, the Supreme Court of Ohio severed and excised R.C. 2929.14(C) and (E), which required judicial fact-finding for an imposition of maximum and consecutive sentences, respectively. The court held that the trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum or consecutive sentences. Consequently, when a trial court imposes such punishment on a defendant, we no longer review the record to determine if the record supports its findings." *State v. Kirkpatrick*, 11th Dist. No. 2009-T-0007, 2009-Ohio-6519, ¶22, quoting *State v. Brown*, 11th Dist. No. 2008-L-152, 2009-Ohio-2189, ¶12, quoting *State v. Stewart*, 11th Dist. No. 2008-L-112, 2009-Ohio-921, ¶8, citing *Foster* at paragraph seven of the syllabus. See, also, *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, ¶28.

{¶78} "We are aware that the United States Supreme Court recently issued an opinion in *Ice*, which permitted judicial factfinding required by an Oregon statute before a trial court sentences a defendant who committed multiple offenses to consecutive sentences, which such a defendant historically faced by default. Id. at 525." As noted above, however, until the Supreme Court of Ohio issues its decision in the recently accepted discretionary appeal of *Hodge*, we remain bound by the mandates of *Foster*. *State v. Krug,* 11th Dist. No. 2008-L-085, 2009-Ohio-3815, fn. 1. See *State v. Mickens,* 10th Dist. Nos. 08AP-743 and 08AP-744, 2009-Ohio-2554, ¶24; *State v. Reed*, 8th Dist. No. 91767, 2009-Ohio-2264, fn. 3; *State v. Starett*, 4th Dist. No. 07CA30, 2009-Ohio-

744, ¶35. See, also, *State v. Russell, Jr.,* 10th Dist. Nos. 09AP-428, 09AP-429, 09AP-430, and 09AP-431, 2009-Ohio-6420, ¶16.

{¶79} Consistent with our prior decision and that of our sister courts, we find Mr. Dunford's argument unpersuasive as we determine *Foster* still controls. Accordingly, Mr. Dunford's third assignment of error is without merit.

{¶80} The judgment of the Geauga County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.