

[Cite as *State v. Teets*, 2009-Ohio-6083.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ROBERT TEETS

Defendant-Appellant

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 09 CAA 37

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Delaware County Court of
Common Pleas, Case No. 07CRI0599

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

November 9, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Robert Teets appeals his convictions and sentence entered by the Delaware County Court of Common Pleas, on one count of aggravated vehicular assault and one count of vehicular assault, following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On November 9, 2007, the Delaware County Grand Jury indicted Appellant on one count of aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a); and one count of vehicular assault, in violation of R.C. 2903.08(A)(2)(b). Appellant appeared before the trial court for arraignment on November 14, 2007, and entered a plea of not guilty to the charges. The matter proceeded to jury trial on April 1, 2008. The following evidence was adduced at trial.

{¶3} On the evening of October 26, 2007, a serious automobile accident occurred on the southbound side of State Route 23 at the intersection of Home Road in Delaware County, Ohio. Law enforcement officers from multiple agencies, including the Ohio State Highway Patrol and the Delaware County Sheriff's Department, were dispatched to the scene. Dereck Keller and Scott Whatley were among the deputies from the Delaware County Sheriff's Department dispatched to the area. Among other tasks, law enforcement officials created a roadblock to divert southbound traffic around the accident scene. Deputies Keller and Whatley positioned themselves at the intersection of State Route 23 and Lewis Center Road. According to witnesses, the intersection of State Route 23 and Lewis Center Road was well lit with a bank on the

northwest corner of the intersection illuminated with various outdoor lights, and a traffic light in the middle of the intersection. Deputy Keller parked his cruiser on a lateral angle, which blocked the southbound lane of State Route 23 and caused traffic to be rerouted into a turn lane. Deputy Keller remained in the cruiser with all emergency lights activated. The cruiser completely blocked traffic and was parked directly under a traffic light. A local high school football game was being played that evening and approximately 100 cars traveled southbound on State Route 23 and were rerouted during this time. A minivan, driven by the father of one of the accident victims, traveled through the roadblock. Trooper Casey Jones of the Ohio State Highway Patrol drove his cruiser through the intersection to assist at the accident scene. Trooper Jones' cruiser-cam recorded Deputy Keller's cruiser in the intersection with all of its lights activated. Another individual, Michael Caliguri, drove through the intersection, and stopped to ask for directions.

{¶4} Caliguri testified, on October 26, 2007, he was driving southbound on State Route 23, headed for Columbus, Ohio, for a hockey tournament. Caliguri came upon the detour at the intersection of State Route 23 and Lewis Center Road. Traffic was backed up approximately a quarter of a mile from the intersection. Caliguri saw Deputy Keller's cruiser with its headlights, taillights, and strobe lights activated, parked on State Route 23, perpendicular to traffic. Caliguri drove around the cruiser and parked in the bank parking lot in order to get directions. Caliguri exited his vehicle and met Deputy Keller who had exited his cruiser and walked toward the bank parking lot to assist. As Caliguri turned back toward his vehicle, he heard the squeal of brakes and a

loud crash. Caliguri looked toward the noise and saw Deputy Keller thrown into the air as Appellant's car crashed into the cruiser. Caliguri called 911.

{15} Deputy Keller recalled he was on the road three or four steps directly in front of his cruiser when he was hit. The deputy remembered being thrown over the roof of Appellant's vehicle and landing facedown on the roadway. Deputy Keller heard a vehicle hit his cruiser and then heard the car try to re-start. Deputy Keller was transported to the hospital. He suffered numerous injuries, including a torn meniscus. The deputy missed several months of work, underwent surgery on his knee, and at the time of trial, was still attending physical therapy.

{16} Immediately following the accident, Deputy Scott Whatley ran to assist Deputy Keller. Deputy Whatley recalled Deputy Keller did not respond to him at first, but when he regained consciousness, Deputy Keller complained of pain in his leg and elbow.

{17} When Trooper Frank Applegate arrived at the scene, he observed Deputy Keller's cruiser blocking traffic at the intersection of State Route 23 and Lewis Center Road. His in-cruiser camera recorded the exact location of Deputy Keller's cruiser and the visibility of the emergency lights. Trooper Applegate returned to the intersection of State Route 23 and Lewis Center Road following Deputy Keller's being struck by Appellant's vehicle. Trooper Applegate found Deputy Keller face down on the pavement. Because Deputy Keller was being attended to by other deputies, Trooper Applegate turned his attention to Appellant. The trooper immediately noticed an odor of alcoholic beverage coming from Appellant. Trooper Applegate instructed Appellant to exit his vehicle. The trooper smelled the odor of alcoholic beverage emanating from

Appellant's person as he led Appellant to his cruiser. The trooper also notice Appellant's speech was slurred, and his eyes were bloodshot and glassy. Appellant refused to perform any field sobriety tests, when asked by the trooper to do so. Appellant was placed under arrest and transported to the Delaware County Sheriff's Department. Appellant also refused to take breath and urine tests. Trooper Applegate noted he was with Appellant for approximately fifteen to twenty minutes, and during that time, the odor of alcohol did not dissipate.

{118} Trooper Casey Jones was originally dispatched to the crash at State Route 23 and Home Road, and as she traveled to the accident scene, she drove past the barricade Deputy Keller had set up at State Route 23 and Lewis Center Road. The camera in Trooper Jones' cruiser captured the exact location and lighting of Deputy Keller's cruiser. Trooper Jones was at the accident scene at the intersection of Home Road for approximately thirty to forty minutes before she was dispatched to the Lewis Center Road accident involving Deputy Keller. Trooper Jones processed the accident scene and found there were no skid marks, yaw marks, or gouges in the pavement of Appellant's lane of travel which would indicate Appellant had not applied his brakes or taken any evasive action prior to striking Deputy Keller and his cruiser. The trooper also found a bottle of Bud Light in Appellant's car, and the bottle was cold.

{119} After hearing all the evidence and deliberations, the jury found Appellant guilty as charged in the Indictment. The trial court conducted a sentencing hearing on June 5, 2008, at which time the trial court imposed the maximum prison sentence of five years on the aggravated vehicular assault charge and the maximum sentence of eighteen months on the vehicular assault charge. The trial court ordered the sentences

to be served concurrently. The trial court also imposed the maximum license suspension of ten years to commence upon Appellant's release from prison.

{¶10} It is from these convictions and sentence Appellant appeals raising the following assignments of error:

{¶11} "I. THE TRIAL COURT'S IMPOSITION OF THE MAXIMUM SENTENCE IS CONTRARY TO LAW AND IS NOT SUPPORTED BY THE EVIDENCE.

{¶12} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY DENYING DEFENDANT'S MOTION FOR ACQUITTAL UNDER CRIMINAL RULE 29 AND SUBMITTING THE CHARGES TO THE JURY DESPITE INSUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENT OF 'SERIOUS PHYSICAL HARM' UNDER RC 2901.01(5).

{¶13} "III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF OPERATING A VEHICLE UNDER THE INFLUENCE OF ALCOHOL UNDER RC 4511.19(A)(1(a).

{¶14} "III. THE FINDING THAT APPELLANT CAUSED SERIOUS PHYSICAL HARM TO DERECK KELLER IS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶15} "IV. THE CUMULATIVE EFFECT OF ERRORS IN THE TRIAL COURT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT OF A FAIR TRIAL."

I

{¶16} In his first assignment of error, Appellant contends the trial court's imposition of a maximum sentence is contrary to law and is not supported by the record.

{¶17} R.C. 2953.08(G) allows an appellate court to modify a sentence or remand for resentencing if the court clearly and convincingly finds (1) the record does not support the sentence, or (2) the sentence is otherwise contrary to law. *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276, ¶ 10, (Quotations and citations omitted). In applying this standard, we will look to the record to determine whether the trial court considered and properly applied the appropriate statutory guidelines and whether the sentence is otherwise contrary to law.

{¶18} Appellant acknowledges a trial court is no longer required to make statutory findings, however, he notes the court is still required to consider the general guidance factors set forth in R.C. 2929.11 and 2929.12 when sentencing an offender.

{¶19} Appellant asserts because the only R.C. 2929.12(B) factor evident in the instant action is subsection (2)¹ and because “serious physical harm” is an element of both offenses for which Appellant was convicted, the trial court could not consider this factor to find Appellant’s conduct in committing the offense was “more serious than conduct normally constituting the offense”. Appellant further argues Deputy Keller’s conduct contributed to the collision which is one of the R.C. 292912(C) factors making the offense less serious than conduct normally constituting the offense. Appellant explains the weather conditions at the accident scene were dark and slightly rainy; Deputy Keller was wearing a black and gray uniform without reflective clothing; the deputy failed to look north toward oncoming traffic prior to stepping out into the

¹ R.C. 2929.12(B) provides: “The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, indicating that the offender’s conduct is more serious than conduct normally constituting the offense: * * * (2) the victim of the offense suffered serious physical, psychological, or economic harm as a result of the offense.”

roadway; and Appellant was traveling within his lane of travel at a speed consistent with that which is expected in the area.

{¶20} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Ohio Supreme Court reviewed its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, and discussed the affect of the *Foster* decision on felony sentencing. The *Kalish* Court explained, having severed the judicial fact-finding portions of R.C. 2929.14 in *Foster*, “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, consecutive, or more than the minimum sentences.” *Kalish* at paragraphs 1 and 11, citing *Foster* at paragraph 100, See also, *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306. “Thus, a record after *Foster* may be silent as to the judicial findings that appellate courts were originally meant to review under 2953.08(G)(2).” *Kalish* at paragraph 12. However, although *Foster* eliminated mandatory judicial fact finding, it left intact R.C. 2929.11 and 2929.12, and the trial court must still consider these statutes. *Kalish* at paragraph 13. See also, *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1.

{¶21} “Thus, despite the fact that R.C. 2953.08(G)(2) refers to the excised judicial fact-finding portions of the sentencing scheme, an appellate court remains precluded from using an abuse-of-discretion standard of review when initially reviewing a defendant's sentence. Instead, the appellate court must ensure that the trial court has adhered to all applicable rules and statutes in imposing the sentence. As a purely legal question, this is subject to review only to determine whether it is clearly and

convincingly contrary to law, the standard found in R.C. 2953.08(G).” *Kalish* at paragraph 14.

{¶22} In reviewing felony sentences and applying *Foster* to the remaining sentencing statutes, appellate courts must use a two-step approach. “First, they must examine the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court’s decision in imposing the term of imprisonment shall be reviewed under an abuse of discretion standard.” *Id.* at paragraph 4.

{¶23} The *Kalish* Court ultimately found the trial court’s sentencing decision was not contrary to law. “The trial court expressly stated that it considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12. Moreover, it properly applied post release control, and the sentence was within the permissible range. Accordingly, the sentence is not clearly and convincingly contrary to law.” *Kalish* at paragraph 18. The Court further held the trial court “gave careful and substantial deliberation to the relevant statutory considerations” and there was “nothing in the record to suggest that the court’s decision was unreasonable, arbitrary, or unconscionable”. *Id.* at paragraph 20.

{¶24} We find Appellant’s sentence is not contrary to law. The trial court expressly stated, in its June 5, 2008 Judgment Entry on Sentence, it considered the two overriding purposes of felony sentencing set forth in R.C. 2929.11 and considered the seriousness and recidivism factors set forth in 2929.12. Furthermore, Appellant’s sentences are within the permissible statutory ranges.

{¶25} Having satisfied step one, we next consider whether the trial court abused its discretion. *Kalish*, at ¶ 4, 19. An abuse of discretion is "more than an 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.

{¶26} We the trial court did not abuse its discretion. The trial court considered the statutory factors under R.C. 2929.11 and 2929.12. The trial court also considered the factual background of the case, the jury verdicts, the presentence report, the statement of defense counsel, the statement of the prosecutor, and Appellant's own statements. Appellant had three prior OVI convictions as well as a reckless operation conviction, all indicating a pattern of alcohol abuse. The BMV printout revealed Appellant had 15 license suspensions of varying kinds, including refusals to submit to alcohol tests in 2000, and 2003, as well as the instant action.

{¶27} We find no merit in Appellant's assertion the fact Deputy Keller suffered serious physical harm cannot be considered in sentencing merely because the causing of serious physical harm is an essential element of the crime for which he was convicted, aggravated vehicular assault.

{¶28} R.C. 2901.01(A)(5), which defines "serious physical harm to persons" as including "any of the following" :

{¶29} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶30} "(b) Any physical harm that carries a substantial risk of death;

{¶31} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶32} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶33} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

{¶34} The injuries suffered by Deputy Keller in this case met more than one of these statutory factors. Immediately following the accident, Deputy Keller was transported to the Ohio State University Trauma Center. Doctors determined he had not broken any bones, but due to swelling and bruising, the doctors could not determine the full extent of his injuries. His knee was placed in an immobilizer which he wore until December, 2007. Deputy Keller suffered a torn meniscus in his left shoulder for which he underwent surgery on December 19, 2007. Deputy Keller attended physical therapy three times a week for two months. He could not put any weight on his knee. As of the date of trial, the deputy still could not run for more than 10 minutes at a time. Deputy Keller was out of work for over four months. We find the trial court could reasonably conclude such injuries were more extensive and serious than what is minimally or normally required to constitute the element of serious physical harm for aggravated vehicular assault.

{¶35} Based upon the foregoing, Appellant’s first assignment of error is overruled.

II, IV

{¶36} Because Appellant's second and fourth assignments of error require similar analysis, we shall address said assignments of error together. In his second assignment of error, Appellant maintains the trial court committed prejudicial error in denying his Crim. R. 29 Motion for Acquittal because the State did not present sufficient evidence of serious physical harm. In his fourth assignment of error, Appellant challenges, as against the sufficiency and the manifest weight of the evidence, the jury's finding he caused serious physical harm to Deputy Keller.

{¶37} In *State v. Bridgeman* (1978), 55 Ohio St.2d 261, the Ohio Supreme Court set forth the standard to be used by a trial court when ruling on a Crim.R. 29 motion. The *Bridgeman* Court found: " 'Pursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.' " An appellate court reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. See *State v. Carter* (1995), 72 Ohio St.3d 545, 553, 1995-Ohio-104. Thus, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus."

{¶38} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the

defendant's guilt beyond a reasonable doubt. Again, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Id.*

{¶39} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶40} Appellant's second and fourth assignments of error are both predicated upon his position Deputy Keller's injuries did not rise to the level of serious physical harm. We disagree.

{¶41} As set forth in Assignment of Error I, supra, "serious physical harm" is defined in R.C. 2901.01(A)(5), as including "any of the following" :

{¶42} "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶43} "(b) Any physical harm that carries a substantial risk of death;

{¶44} “(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶45} “(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶46} “(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.” Id.

{¶47} Deputy Keller testified he was rendered unconscious after being struck by Appellant’s vehicle. He suffered a contusion to his left elbow and a large contusion to his left knee, as well as a torn left shoulder meniscus. The deputy underwent surgery, and thereafter, attended physical therapy three days a week for several months. Deputy Keller was required to wear an immobilizer on his leg for approximately two months. As of the time of trial, the deputy was unable to run for more than ten minute stretches. He missed over four months of work.

{¶48} Based upon the evidence set forth above and the entire record in this matter, we find Appellant's convictions were not based upon insufficient evidence and were not against the manifest weight of the evidence. The trier of fact did not lose its way in finding the essential elements of the crimes charged proven beyond a reasonable doubt. Further, the trial court did not err in overruling Appellant’s Crim. R. 29 motion for acquittal.

{¶49} Appellant's second and fourth assignments of error are overruled.

III

{¶50} In his third assignment of error, Appellant submits the trial court committed prejudicial error in failing to instruct the jury on the lesser included offense of operating a motor vehicle under the influence of alcohol. We disagree.

{¶51} An instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support *both* an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Robb* (2000), 88 Ohio St.3d 59, 74 (emphasis added). Thus, if the jury can reasonably find the state failed to prove one element of the charged offense beyond a reasonable doubt but that the other elements of the lesser included offense were proven beyond a reasonable doubt, a charge on the lesser included offense is required. *Id.*

{¶52} Trial courts have broad discretion in determining whether the evidence adduced at trial was sufficient to warrant a jury instruction. *State v. Morris*, Guernsey App. No. 03CA29, 2004-Ohio-6988, reversed on other grounds, 109 Ohio St.3d 313, 847 N. E.2d 1174, 2006-Ohio-2109; *State v. Mitts* (1998), 81 Ohio St.3d 223, 228, 690 N.E.2d 522. “When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case.” *State v. Sims*, Cuyahoga App. No. 85608, 2005-Ohio-5846, ¶ 12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. A trial court does not abuse its discretion by not giving a jury instruction if the evidence is insufficient to warrant the requested instruction. *State v. Lessin* (1993), 67 Ohio St.3d 487, 494, 620 N.E.2d 72. An

“abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.” *Blakemore*, supra.

{¶53} Upon our review of the record, we find the trial court did not abuse its discretion by not giving a jury instruction on the lesser included offense of operating a motor vehicle under the influence of alcohol. The record clearly supports the jury's finding Appellant caused serious physical harm to Deputy Keller, an essential element of aggravated vehicular assault. As such, the evidence did not support an acquittal on that greater charge. The fact the lesser included offense is an element of the greater offense does not in and of itself require an instruction on the lesser offense as an independent, separate included offense of the greater.

{¶54} Appellant's third assignment of error is overruled.

V.

{¶55} In his final assignment of error, Appellant asserts he was denied a fair trial due to the cumulative effect of the errors occurring during trial.

{¶56} Under the doctrine of cumulative error, a judgment may be reversed when the cumulative effect of errors deprives a defendant of his constitutional rights, even though such errors, standing alone, are not prejudicial. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 196-197.

{¶57} Having found no prejudicial errors during the course of the trial, we find appellant was not denied a fair trial.

{¶58} Appellant's fifth assignment of error is overruled.

{¶59} The judgment of the Delaware County Court of Common Pleas is affirmed.

By: Hoffman, J.

Farmer, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ John W. Wise
HON. JOHN W. WISE

