

COURT OF APPEALS  
GUERNSEY COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 10-AP-08
JOHN W. KULYK	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Guernsey County Court of  
Common Pleas Case No. 09-CR-104

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: December 17, 2010

APPEARANCES:

For Plaintiff-Appellee:

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Guernsey County Prosecuting Attorney  
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For Defendant-Appellant:

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*Delaney, J.*

{¶1} Defendant-Appellant appeals the judgment of the Guernsey County Court of Common Pleas convicting him of one count of robbery, a felony of the second degree, in violation of R.C. 2911.02, two counts of assault, misdemeanors of the first degree, in violation of R.C. 2903.13, one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02.

{¶2} On June 16, 2009, Appellant entered Bob's Drive-Thru in Cambridge, Ohio. Clerks Cindy Mason and Barb Flesher were both working as cashiers in the drive-thru that night. When Appellant entered the store, a customer, Shannon Bishard, was also in the store.

{¶3} All three women described Appellant as looking suspicious when he entered the store. In the middle of summer, at 9:30 p.m., Appellant entered the store wearing long pajama pants, a black or dark blue jacket, a hat, sunglasses and white gloves.

{¶4} Cindy Mason, who was ringing up Shannon Bishard's order, observed Appellant ask for a twelve-pack of Bud Ice. Ms. Flesher went to the beer cooler, retrieved a twelve-pack of beer, and went to her register to ring up Appellant's beer. As she told Appellant his total, Appellant grabbed the beer and took off out of the store.

{¶5} Ms. Bishard followed Appellant out of the store, yelling at him to stop, put down the beer and just walk away. Appellant told her to get out of his way or he would punch her. When she did not get out of his way, he punched her two times on the left side of her face. She yelled for help and her husband, Al Bishard, came running down

off of the porch of their house, noticed that his wife was bent over holding her face, and ran after Appellant.

{¶6} Mr. Bishard caught up with Appellant as Appellant crossed Wheeling Street. According to Mr. Bishard, Appellant stumbled on the curb as he crossed the road. Mr. Bishard threw a punch at Appellant and could not remember if he connected with Appellant because at that time he felt something “very hard” strike him in the head. At the same time, Kevin Dingus, a resident of the town, approached the situation and hit Mr. Bishard in the back of the head after mistaking him as the aggressor. Cindy Mason, who had followed Appellant as he fled the store, stated that she told Mr. Dingus that he was hitting the wrong person. Subsequently, he assisted Mr. Bishard in restraining Appellant until the police arrived.

{¶7} On July 29, 2009, the Guernsey County Grand Jury indicted Appellant on one count of robbery, a felony of the second degree, in violation of R.C. 2911.02, two counts of assault, misdemeanors of the first degree, in violation of R.C. 2903.13, one count of theft, a misdemeanor of the first degree, in violation of R.C. 2913.02.

{¶8} Appellant proceeded to jury trial on November 5 and 6, 2009, and was found guilty of all charges. The trial court sentenced Appellant to six years on his robbery conviction and a six month sentence on each of the misdemeanors, to run concurrent with his robbery sentence. On February 9, 2009, Appellant was resentenced pursuant to R.C. 2929.19, as he was incorrectly informed regarding post-release control. At his resentencing, he was again sentenced to six years and was advised that post-release control is mandatory for three years upon his release from prison.

{¶9} Appellant now appeals his convictions and raises two Assignments of Error:

{¶10} “I. THE JUDGMENT OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN THAT GUERNSEY COUNTY PROSECUTING ATTORNEY FAILED TO PRODUCE SUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.”

{¶11} “II. THE TRIAL JUDGE ABUSED HIS DISCRETION IN SENTENCING THE APPELLANT TO SIX YEAR [SIC] ON THE ROBBERY CONVICTION.”

I.

{¶12} In his first assignment of error, Appellant argues that there was insufficient evidence to convict him of robbery and that his conviction was against the manifest weight of the evidence.

{¶13} When reviewing a claim of sufficiency of the evidence, an appellate court’s role 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Contrary to a manifest weight argument, a sufficiency analysis raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. 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.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

{¶14} Conversely, when analyzing a manifest weight claim, this court sits as a “thirteenth juror” and in reviewing the entire record, “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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 548, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶15} Pursuant to Crim. R. 29(A), a defendant may make a motion for acquittal “after the evidence on either side is closed.” When a defendant moves for acquittal at the close of the state's evidence and that motion is denied, the defendant “waives any error which might have occurred in overruling the motion by proceeding to introduce evidence in his or her defense.” *State v. Brown* (1993), 90 Ohio App.3d 674, 685, 630 N.E.2d 397. In order to preserve a sufficiency of the evidence challenge on appeal once a defendant elects to present evidence on his behalf, he must renew his Rule 29 motion at the close of all the evidence. *Id.*, citing *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 529 N.E.2d 464, paragraph one of the syllabus; see, also, *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 163, 14 O.O.3d 403, 398 N.E.2d 781, overruled on other grounds, *State v. Lazzaro* (1996), 76 Ohio St.3d 261, 667 N.E.2d 384, syllabus.

{¶16} Upon reviewing the record, we find that Appellant did not make a Crim. R. 29 motion at the close of the State's case. Moreover, Appellant then presented evidence on his own behalf, and failed to make a motion for acquittal at the close of his case. Therefore, Appellant has waived all but plain error regarding a sufficiency argument. In order to find plain error, Crim. R. 52(B) requires that there be a

divergence from a legal rule, that the error be an “obvious” defect in the trial proceedings, and that the error affect a defendant's “substantial rights.” *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240. Reversal on grounds of plain error is to be granted “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage” of justice. *Id.*

{¶17} In order to convict Appellant of robbery, the State had to prove that Appellant recklessly inflicted, attempted to inflict or threatened to inflict physical harm to another. R.C. 2911.02(A)(2).

{¶18} The evidence adduced at trial, when viewed in the light most favorable to the prosecution, was sufficient to convict Appellant of robbery. Cindy Mason, Barb Flesher, and Shannon Bishard all testified that Appellant punched Shannon Bishard twice in the face. Ms. Mason also testified that she observed Appellant take the twelve-pack of beer and hit Al Bishard in the side of the head with it. Mr. Bishard testified that he felt something very hard hit the side of his head. Mrs. Bishard stated that her face was bruised and several of her teeth were knocked loose from being punched. She testified that Mr. Bishard had a cut on his face, was bleeding a lot, and had to have butterfly stitches put on his eye at the hospital. He could not wait for them to use real sutures, as the Bishards had children at home that they needed to return to. Mr. Bishard testified that his vision was blurry for a time after he was hit.

{¶19} Based on this evidence, we find there was sufficient evidence to convict Appellant of robbery. Moreover, we do not see that the jury lost its way in convicting Appellant of robbery. The jury was in the best position to view the credibility of the witnesses. After listening to the State's witnesses, and then listening to Appellant's

rendition of events, which included him stealing the beer and then fleeing as Mr. and Mrs. Bishard, Ms. Mason, and Kevin Dingus pursued him to beat him up, the jury decided that the State's version of events was the more credible version. We see no error in their doing so.

{¶20} Accordingly, Appellant's first assignment of error is overruled.

## II.

{¶21} In Appellant's second assignment of error, he argues that the trial court erred in sentencing him to six years on his robbery conviction. We disagree.

{¶22} The statutes governing felony sentencing in Ohio used to require that a trial court make particular findings before sentencing a criminal defendant to maximum and consecutive sentences. However, in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-0856, 845 N.E.2d 470, the Ohio Supreme Court found much of Ohio's felony sentencing scheme unconstitutional because that scheme violated a defendant's right to a jury trial. Now, a trial court which is sentencing a felony offender "must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender. In addition, the sentencing court must be guided by statutes that are specific to the case itself." *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-0855, 846 N.E.2d 1, at ¶ 38.

{¶23} After *Foster*, trial courts now 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. *Foster*, supra, at paragraph seven of the syllabus.

{¶24} Appellant argues the trial court erred when sentencing him because the trial court did not properly consider R.C. 2929.11 and R.C. 2929.12. We find that the trial court did properly consider these statutes and did not abuse its discretion when sentencing Appellant.

{¶25} In sentencing Appellant, the trial court stated that the victim suffered serious psychological harm as a result of the offense, that recidivism factors weighed heavily in favor of prison, that Appellant had a lengthy history of juvenile delinquency and criminal convictions in Guernsey County. The court noted that Appellant has been sent to prison three times previously and that he had failed to respond positively to probation or community control sanctions. While the court acknowledged that Appellant seemed to show genuine remorse, the court also stated that he was lucky that the events leading up to his conviction did not result in more serious injuries to the victims.

{¶26} Accordingly, we find that the trial court properly imposed a sentence of six years and Appellant's second assignment of error is overruled.



{¶27} For the foregoing reasons, the judgment of the Guernsey County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JOHN W. KULYK	:	
	:	
Defendant-Appellant	:	Case No. 10-AP-08
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Guernsey County Court of Common Pleas is affirmed. Costs assessed to Appellant.

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HON. PATRICIA A. DELANEY

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HON. W. SCOTT GWIN

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HON SHEILA G. FARMER