

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	
KEDRICK KELLEY	:	Case No. 18CA115
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2017 CR 0680 R

JUDGMENT: Affirmed

DATE OF JUDGMENT: September 3, 2019

APPEARANCES:

For Plaintiff-Appellee

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Wise, Earle, J.

{¶ 1} Defendant-Appellant, Kedrick Kelley, appeals his May 8, 2018 convictions and maximum sentence by the Court of Common Pleas of Richland County, Ohio. Plaintiff-Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶ 2} On October 5, 2017, the Richland County Grand Jury indicted appellant on one count of felonious assault in violation of R.C. 2903.11, one count of possession of a deadly weapon while under detention in violation of R.C. 2923.131, and one count of tampering with evidence in violation of R.C. 2921.12. Said charges arose from an incident between appellant, an inmate at the Mansfield Correctional Institution, and correctional officer Captain Christopher Lynch.

{¶ 3} A jury trial commenced on May 3, 2018. The jury found appellant guilty of all counts. By sentencing entry filed May 8, 2018, the trial court sentenced appellant to an aggregate term of eight years in prison.

{¶ 4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶ 5} "MR. KELLEY'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, SO THEY MUST BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL."

II

{¶ 6} "THE TRIAL COURT ERRED BY SENTENCING MR. KELLEY TO A MAXIMUM SENTENCE OF EIGHT (8) YEARS INCARCERATION FOR MR. KELLEY'S

CONVICTION OF FELONIOUS ASSAULT, AND BY SENTENCING MR. KELLEY TO A MAXIMUM PRISON SENTENCE OF TWELVE (12) MONTHS INCARCERATION FOR MR. KELLEY'S CONVICTION OF HAVING A DEADLY WEAPON WHILE UNDER DETENTION, BY FAILING TO CONSIDER THE PURPOSES OF FELONY SENTENCING PURSUANT TO OHIO REVISED CODE (R.C.) 2929.11 AND THE SERIOUSNESS OF CRIME AND RECIDIVISM FACTORS OF R.C. 2929.12."

I

{¶ 7} In his first assignment of error, appellant claims his convictions were against the manifest weight of the evidence.¹ We disagree.

{¶ 8} 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 witnesses and determine "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*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶ 9} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2) which states: "No person shall knowingly * * * [c]ause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or

¹In his appellate brief, appellant argues manifest weight in relation to his conviction for felonious assault only. We in turn will address the manifest weight argument on said count only.

dangerous ordnance." Appellant argues the evidence did not establish that he caused or attempted to cause physical harm to Captain Lynch.

{¶ 10} On August 21, 2016, Captain Lynch was making rounds in Housing Unit 1B in the Mansfield Correctional Institution. T. at 149-150. He observed some inmates engaged in suspicious behavior on the second floor at the top of the stairs. T. at 156-159. Captain Lynch and corrections officer Matthew Neubacher went to investigate. T. at 159-162, 241. They patted down several inmates. T. at 162-163, 243, 245. Captain Lynch instructed corrections officer Jennifer Myers to stop and pat down appellant. T. at 164, 245, 286. Appellant argued with Officer Myers and was noncompliant during her attempt to pat him down. T. at 164-166, 247, 288-292. Captain Lynch went over and walked appellant back to his cell. T. at 166-168, 292. Officer Neubacher accompanied them. T. at 247. Appellant was "[v]ery fidgety" and kept "playing with his waistband." T. at 168. Captain Lynch felt that appellant was either "carrying something on him or he is hiding something from me." T. at 169. Appellant was "[v]ery nervous" and a "little agitated." T. at 172.

{¶ 11} After stepping into appellant's cell, appellant turned to Captain Lynch and asked him if he was going to strip search him, to which Captain Lynch responded "yes." T. at 172, 175, 178. Officer Neubacher remained outside the cell. T. at 247-248. Captain Lynch and appellant were approximately "[t]wo, two and a half feet" apart. T. at 183. Appellant pulled down his shorts and "came out in his right hand and had a large weapon in his hand, a shank." T. at 179. Captain Lynch "immediately went into defense mode because of the look that was on his face," and "he lunged towards me at that time." T. at 181. Captain Lynch explained appellant's upper body came forward, his feet stepped

towards him, and he "[l]unged at me to attack me." T. at 183. Captain Lynch knocked the shank from appellant's hand and it fell to the floor and slid under appellant's bed. *Id.* A struggle ensued. T. at 185-186. Appellant reached to retrieve the shank and Captain Lynch fought with appellant to protect himself from harm. T. at 187-188. Captain Lynch was behind appellant when he observed the shank in appellant's hand as he brought his hand up above his head. T. at 189. When appellant brought his hand back down, the shank was no longer in his hand. T. at 189-190. Officer Neubacher entered the cell and observed the shank on the floor. T. at 252. He saw appellant grab the shank and reach for the window. T. at 254-255. The two officers struggled with appellant until he was sprayed with pepper spray. T. at 248, 256-257, 299. The shank was found in the mesh screen of the window. T. at 191-192, 258. It was eleven inches in length, made of metal, and very strong. T. at 199-200; State's Exhibit 1 and 11. The shank was capable of causing serious physical harm and could have been "deadly." T. at 304. It appeared appellant was attempting to throw the shank out the window so it could not be attributed to him. T. at 258-259. Captain Lynch engaged in psychiatric counseling following the incident due to severe anxiety. T. at 193, 233.

{¶ 12} On cross-examination, Captain Lynch's statement made several days after the incident was played for the jury wherein he did not mention that appellant had lunged at him with the shank. T. at 231. Upon being questioned about the discrepancy, Captain Lynch stated, "[l]ike I said today, he came at me with the shank." *Id.*

{¶ 13} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison*, 49 Ohio St.3d 182, 552 N.E.2d 180 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and

credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997).

{¶ 14} The jury heard that appellant lunged at Captain Lynch with an eleven inch metal shank in his hand and thereafter engaged in a struggle. If believed, there was enough evidence for the jury to find appellant's actions were an attempt to cause physical harm to Captain Lynch with a deadly weapon.

{¶ 15} Upon review, we find the evidence supports the guilty finding on the felonious assault count, and the jury did not lose its way. We do not find any manifest miscarriage of justice.

{¶ 16} Assignment of Error I is denied.

II

{¶ 17} In his second assignment of error, appellant claims the trial court erred in sentencing him to the maximum sentence of eight years on the felonious assault conviction.² We disagree.

{¶ 18} Pursuant to R.C. 2953.08(A)(1), appellant is entitled to appeal as of right the maximum sentence imposed on his conviction. Pursuant to R.C. 2953.08(G)(2), we may either increase, reduce, modify, or vacate a sentence and remand for resentencing where we clearly and convincingly find that either the record does not support the sentencing court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or

²In the assignment of error, appellant also includes the "maximum" sentence he received for his conviction of having a deadly weapon while under detention; however, he was sentenced to twelve months on the count which is not the maximum sentence for a fourth degree felony. R.C. 2929.14(A)(4). Furthermore, appellant does not reference this count in his arguments. We will consider the maximum sentence argument as it relates to the felonious assault count only.

2929.20(I), or the sentence is otherwise contrary to law. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231; *State v. Howell*, 5th Dist. Stark No. 2015CA00004, 2015-Ohio-4049.

{¶ 19} "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 20} As noted by this court in *State v. Taylor*, 5th Dist. Richland No. 17CA29, 2017-Ohio-8996, ¶ 16:

A trial court's imposition of a maximum prison term for a felony conviction is not contrary to law as long as the sentence is within the statutory range for the offense, and the court considers both the purposes and principles of felony sentencing set forth in R.C. 2929.11 and the seriousness and recidivism factors set forth [in] R.C. 2929.12. *State v. Keith*, 8th Dist. Cuyahoga Nos. 103413 and 103414, 2016-Ohio-5234, ¶ 10, 16.

{¶ 21} R.C. 2929.11 governs overriding purposes of felony sentencing and states:

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others, to punish the offender, and to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the three overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

{¶ 22} R.C. 2929.12 governs factors to consider in felony sentencing. Subsection (A) states the trial court "shall consider the factors set forth in divisions (B) and (C) of this section relating to the seriousness of the conduct, [and] the factors provided in divisions (D) and (E) of this section relating to the likelihood of the offender's recidivism." These sections state the following in relevant part:

(B) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as 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.

(C) The sentencing court shall consider all of the following that apply regarding the offender, the offense, or the victim, and any other relevant factors, as indicating that the offender's conduct is less serious than conduct normally constituting the offense:

(3) In committing the offense, the offender did not cause or expect to cause physical harm to any person or property.

(D) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is likely to commit future crimes:

(2) The offender * * * has a history of criminal convictions.

(3) The offender * * * has not responded favorably to sanctions previously imposed for criminal convictions.

(E) The sentencing court shall consider all of the following that apply regarding the offender, and any other relevant factors, as factors indicating that the offender is not likely to commit future crimes:

(5) The offender shows genuine remorse for the offense.

{¶ 23} Appellant was found guilty of committing felonious assault in the second degree. Pursuant to R.C. 2929.14(A)(2)(b), felonies of the second degree are punishable by "two, three, four, five, six, seven, or eight years." By sentencing entry filed May 8, 2018, the trial court sentenced appellant to the maximum, eight years. During the sentencing hearing held on May 8, 2018, the trial court stated the following (T. at 12-13):

Mr. Kelley, any time I sentence a felony crime there is certain things that I have to figure, to take into account to see whether there are factors that make the crime more serious or less serious, whether it would make recidivism or repeat crime more likely or less likely.

There is several factors present in your case. You did the crime while you were already in prison for a prior crime, so that would argue for a greater likelihood of recidivism and the need for a longer sentence.

You have a history of criminal convictions. You have a history of unfavorable responses to the sanctions that have been imposed for your criminal convictions because you have had a steady series of commissions of crimes from 2007 to 2013 for six or seven years there, probably ever since you have been an adult.

You have a history of discipline violations in the prison, which again, tells me that your protest that you always conduct yourself appropriately and always admit your faults, rings a little bit hollow when I see all those disciplinary violations in prison.

When we talk about the crime being more serious or less serious, in this case the victim suffered serious psychological harm. You heard him describe that. He saw his life pass before his eyes. He thought he was going to die that day, which affects every situation from now on and that never leaves his head. It is inside his head. That's what he said. That makes it very serious.

{¶ 24} The trial court went on to note that the "weapon is probably the most horrible shank I have ever seen from prison. It must be 5/8th of an inch or three-quarters of an inch in diameter and sharpened to a point that there is nothing that would have stopped that. So that is a very serious weapon." May 8, 2018 T. at 14.

{¶ 25} In his appellate brief at 20, appellant challenges the trial court's finding of "serious psychological harm." He also argues the trial court failed to consider whether he caused or expected to cause physical harm to persons or property.

{¶ 26} During trial, Captain Lynch testified he suffered from "[s]evere anxiety" from the incident because he thought he was going to die. T. at 232-233. During the sentencing hearing, he told the trial court that he the incident "plays over and over" in his head daily. May 8, 2018 T. at 10. He experiences sleepless nights and waking up in cold sweats. *Id.* He has to deal with his anxiety on a daily level, "the longest 21 months of my life." *Id.* at 11.

{¶ 27} The testimony at trial established appellant lunged at Captain Lynch with a weapon and engaged in a struggle with him. The trial court described the shank and

noted it was a "serious weapon." Appellant's actions are consistent with the expectation to cause physical harm to Captain Lynch.

{¶ 28} Under subsection (D), it was clear that appellant committed the felonious assault while he was incarcerated, and has had a history of criminal convictions. Under subsection (E), appellant did not show any remorse for his conduct, insisting at sentencing that he did not attempt to hurt Captain Lynch even though he struggled with him over the shank and was found guilty by a jury. T. at 4-5.

{¶ 29} In its sentencing entry, the trial court noted it considered all statements and the factors set forth in R.C. 2929.11 and 2929.12.

{¶ 30} Upon review, we find the sentence imposed is not clearly and convincingly contrary to law. The sentence is within the statutory range for a felony of the second degree, and the trial court considered the R.C. 2929.11 and 2929.12 factors.

{¶ 31} Assignment of Error II is denied.

{¶ 32} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Wise, Earle, J.

Wise, John, P.J. and

Delaney, J. concur.