

[Cite as *State v. Gary*, 2010-Ohio-5321.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090643
		TRIAL NOS. B-0700122
Plaintiff-Appellee,	:	B-0805753
vs.	:	<i>DECISION.</i>
JAMES GARY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 3, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Judge.

{¶1} Following a jury trial, defendant-appellant James Gary was found guilty of murder and having a weapon while under a disability in the case numbered B-0805753. Gary separately entered a plea of guilty to possession of cocaine under the same case number. At the time that he committed these offenses, Gary had been serving a three-year period of postrelease control in the case numbered B-0700122 for the offense of carrying a concealed weapon. Gary was found to have violated that postrelease control. The trial court sentenced Gary to an aggregate term of 25.5 years' to life imprisonment.

{¶2} Gary now appeals, raising six assignments of error for our review. For the following reasons, the judgment of the trial court is affirmed.

Factual Background

{¶3} At trial, the state presented evidence that Gary had murdered his cousin, Marvin Ramsey Jr., on May 18, 2008. The state's central witness was Maurice Smith, the uncle of both Gary and Ramsey. Smith testified that, on the day of the murder, he, Gary, and Ramsey had spent the morning together. Smith and Ramsey later separated from Gary, but the three remained in contact throughout the day. According to Smith, Gary owed Ramsey approximately \$1,200, and the two men had argued over that money. Smith testified that Gary had arranged to meet with Ramsey at the Fay Apartments later that afternoon, but that Gary had not appeared. Ramsey repeatedly called and sent text messages to Gary throughout the day in an attempt to collect his money. When Gary did not respond, Ramsey broke his phone by slamming it against the dashboard of a car belonging to Smith's

girlfriend, Keyares Webster. Ramsey then used Smith's phone to contact Gary and demand his money. The messages that Ramsey had sent were read to the jury.

{¶4} Smith testified that he had spoken to Gary around 9:30 that evening, and that Gary had revealed that he was at a friend's house on Queen City Avenue. Smith, Ramsey, and Keyares Webster drove to the house. While Smith and Webster remained in the car, Ramsey went into the house to meet Gary. The two men left the house together and got into Webster's car. Gary asked Ramsey if he had a weapon, and Ramsey responded in the negative. Gary almost immediately jumped out of Webster's car, stating, "I ain't on this bullshit." According to Smith, Ramsey followed Gary, asking, "Damn cuz, you aint gonna take me to get my money?" Smith testified that Ramsey neither sounded nor acted threatening. Gary had walked through a gate and was standing on his friend's porch, and Ramsey attempted to jump over the gate. Before Ramsey's feet hit the ground, Gary fired a gun at him. Smith heard approximately four or five shots, and he then saw Gary flee. Smith and Webster initially drove away from the scene. But after driving around the block, Smith called 911 to report the shooting.

{¶5} Smith told the jury that Gary and Ramsey had a close relationship. They often argued, but had never come to blows. Smith had never known Ramsey to own a gun, and he stated that Ramsey did not have a weapon in his possession at the time that he was murdered. Smith admitted that, on the day of the murder, he and Ramsey had smoked marijuana and that Ramsey had also taken Valium.

{¶6} Keyares Webster's testimony largely corroborated that given by Smith. She likewise testified that an unarmed Ramsey had followed Gary out of her car, and that Gary had shot at Ramsey several times as Ramsey was jumping over a fence.

According to Webster, this occurred immediately after Ramsey had stated, "Big cuz, you aint gonna take me to go get my money. Please go take me to get my money."

{¶7} The state presented testimony from Hamilton County Deputy Coroner Jan Gorniak regarding Ramsey's cause of death. Gorniak testified that Ramsey had suffered gunshot wounds to his left chest, right lower back, and right buttocks. He additionally suffered a grazing wound on his thigh. The wound to his lower back was fatal. According to Gorniak, the exact position of Ramsey at the time that he was shot could not be determined. But she further testified that Ramsey's injuries were consistent with a scenario in which Ramsey had been standing and had then fallen when he was shot. Gorniak additionally revealed that Ramsey had marijuana, cocaine metabolic, and Valium in his bloodstream.

{¶8} Gary testified on his own behalf. According to Gary, he and Ramsey had a close relationship that was often fraught with disagreements. On the occasions when they had disagreed, Gary tended to avoid Ramsey until Ramsey calmed down. Prior to the day of Ramsey's murder, Ramsey had never threatened to murder Gary. Gary testified that, on May 18, 2008, he had spent the evening at an amusement park with a friend. While at the amusement park, he had left his two cellular phones in his car. He checked his phones after his trip to the amusement park and found numerous threatening text messages from Ramsey. In these messages, Ramsey had threatened to kill Gary. Gary further testified that Smith had sent him a text message stating that Ramsey had a gun and was serious about his threats.

{¶9} According to Gary, he believed that Ramsey had a gun and that Ramsey would harm him. Gary felt that it was best to stay away from Ramsey for the time being, and he denied owing Ramsey \$1,200. Gary told the jury that Ramsey

had given Gary that money to purchase drugs for Ramsey, which Gary had done. Gary further revealed that he was a drug dealer, and that he owned a gun for protection. That night, Gary carried his .357 revolver on his person. After returning from the amusement park, Gary invited Smith and Webster to join him at his friend's home on Queen City Avenue. Gary had been unaware that Smith intended to bring Ramsey along. Once Ramsey appeared, Gary became nervous and scared.

{¶10} Gary discussed the events immediately preceding Ramsey's murder, stating that he was afraid to run away from Ramsey because he believed that Ramsey was carrying a weapon. He did not believe Ramsey's statement that he was unarmed. Wanting to escape from the situation, Gary testified, he told Ramsey, Smith, and Webster that he had left his keys on his friend's deck. He walked through the gate and towards the deck, where he intended to dispose of his gun. But before he could do so, he heard the fence rattle and looked up to see Ramsey in front of him. Believing that Ramsey was coming after him, he began to fire his gun. On cross-examination, however, Gary conceded that he had never seen a weapon in Ramsey's possession that night.

Sufficiency, Weight, and Rule 29

{¶11} In his first three assignments of error, Gary argues that his convictions for murder and having a weapon while under a disability were not supported by sufficient evidence and were against the manifest weight of the evidence, and that the trial court erred in not granting his Crim.R. 29 motions for an acquittal.

{¶12} When reviewing the sufficiency of the evidence, this court must determine whether, after viewing all the evidence and reasonable inferences in the light most favorable to the prosecution, the trier of fact could have found all the

elements of the offenses beyond a reasonable doubt.¹ We are not permitted to weigh the evidence when determining its sufficiency.² The same standard of review is employed to determine whether the trial court erred in denying a Crim.R. 29 motion for an acquittal.³ But when determining whether a conviction is supported by the manifest weight of the evidence, this court sits as thirteenth juror.⁴ We must review the record, weigh the evidence, and consider the credibility of the witnesses to determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.⁵

{¶13} Gary was found guilty of murder under R.C. 2903.02(A), which provides that “[n]o person shall purposely cause the death of another.” He was also found guilty of having a weapon while under a disability. R.C. 2923.12(A)(3) defines this offense, stating that “[u]nless relieved from disability * * * no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.”

{¶14} Following our review of the record, we conclude that Gary’s conviction for murder was clearly supported by sufficient evidence and was not against the manifest weight of the evidence. Both Smith and Webster witnessed Gary shoot an unarmed Ramsey several times. This was sufficient evidence to establish that Gary had purposely caused the death of Ramsey. Gary in fact conceded that he had shot Ramsey, but argued that he had acted in self-defense.

¹ *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

² *Id.*

³ *State v. Jordan*, 167 Ohio App.3d 157, 2006-Ohio-2759, 854 N.E.2d 520, ¶49.

⁴ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁵ *Id.*

{¶15} To successfully rely on the affirmative defense of self-defense, a defendant must establish that he was not at fault in creating the violent situation, that the defendant had a legitimate belief that he was in danger of imminent death or great bodily harm, and that the defendant did not violate any duty to retreat or avoid the danger.⁶ In this case, the evidence clearly established that Gary did not have a legitimate belief that he was in danger of death or great bodily harm. Smith, Webster, and Gary each testified that Ramsey was unarmed and was not acting in a threatening manner towards Gary at the time of the murder. Further, Gary had been in the process of retreating immediately before the murder. But rather than continuing to retreat and to avoid any potential harm, Gary chose to turn and fire at Ramsey. The jury was in the best position to judge the credibility of the witnesses. It was entitled to reject Gary's testimony and find that offered by the state's witnesses to be credible. We cannot conclude that the jury lost its way and created a miscarriage of justice in rejecting Gary's theory of self-defense and finding him guilty of murder.

{¶16} With respect to his conviction for having a weapon while under a disability, Gary testified that he had carried a .357 revolver on his person on the night of Ramsey's murder. He additionally testified that he had carried this revolver earlier in the evening, before he encountered Ramsey. The record further reveals that, at the time he carried the revolver, Gary had been indicted for trafficking in drugs. This was sufficient evidence to support the conviction. And we cannot conclude that this conviction was against the weight of the evidence.

{¶17} The first, second, and third assignments of error are overruled.

⁶ *State v. Thomas*, 77 Ohio St.3d 323, 326, 1997-Ohio-269, 673 N.E.2d 1339.

Sentencing

{¶18} In his fourth assignment of error, Gary argues that the trial court abused its discretion when imposing sentence. The Ohio Supreme Court has clarified an appellate court's role with respect to review of sentences in *State v. Kalish*.⁷ *Kalish* established that a reviewing court must first determine whether the sentences imposed were clearly and convincingly contrary to law. If they were not, the court must then determine whether the trial court abused its discretion when imposing the sentences.⁸

{¶19} In the case numbered B-0805753, the trial court sentenced Gary to 15 years' to life imprisonment for the offense of murder. It further imposed a consecutive three years' imprisonment for a firearm specification, a consecutive five years' imprisonment for the offense of having a weapon while under a disability, and a consecutive 12 months' imprisonment for the offense of possession of cocaine. In the case numbered B-0700122, the trial court imposed 18 months' imprisonment for the offense of carrying a concealed weapon. This was made consecutive to the sentences imposed in the case numbered B-0805753, resulting in an aggregate sentence of 25.5 years' to life imprisonment.

{¶20} All sentences imposed by the trial court fell within the available sentencing ranges and were not contrary to law. And considering the violent nature of the most serious crime, we hold that the trial court did not abuse its discretion when imposing the sentences. Gary further argues that, under the United States Supreme Court's decision in *Oregon v. Ice*,⁹ the trial court's imposition of

⁷ 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

⁸ Id. at ¶14-17.

⁹ *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711.

consecutive sentences was in error. But this court has held that *Oregon v. Ice* does not affect an Ohio court's authority to impose consecutive sentences.¹⁰

{¶21} No error occurred in the imposition of sentence, and the fourth assignment of error is overruled.

Jury Instructions

{¶22} In his fifth assignment of error, Gary argues that the trial court erred by failing to provide the jury with a self-defense instruction that he had requested. Gary had requested that the trial court provide the jury with the following instruction: "In this matter there was testimony that a debt was owed between Marvin Ramsey and James Gary and the existence of such debt, if any, does not cause James Gary to be at fault in giving rise to the shooting as no person may resort to violence to collect a debt." The trial court provided the jury with a basic instruction on self-defense, but it declined to give this follow-up instruction on the issue.

{¶23} A trial court should ordinarily provide a jury instruction requested by the defendant when the instruction contains a correct and relevant statement of the law and is appropriate to the facts of the case.¹¹ We review a trial court's decision whether to provide a requested instruction for an abuse of discretion.¹² In this case, no abuse of discretion occurred. The requested instruction simply was not appropriate under the facts of the case. The evidence did not demonstrate that Ramsey had resorted to violence to collect a debt. Three witnesses, including Gary, testified that Ramsey had been unarmed at the time of his death.

¹⁰ *State v. McCrary*, 1st Dist. No. C-080860, 2009-Ohio-4390, ¶35.

¹¹ *State v. Brewster*, 1st Dist. Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶58.

¹² *State v. Payne*, 1st Dist. No. C-060437, 2007-Ohio-3310, ¶8.

{¶24} The fifth assignment of error is overruled.

Guilty Plea

{¶25} In his sixth assignment of error, Gary argues that his guilty plea to possession of cocaine was invalid because the record does not contain the plea in writing.

{¶26} Gary is correct in his assertion that a written plea is absent from the record. But the absence of a written plea does not render the plea invalid. Crim.R. 11(A) provides that “[a] plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant’s attorney. All other pleas may be made orally.” This rule clearly indicates that only insanity pleas are required to be made in writing. Here, Gary tendered a plea of guilty, which Crim.R. 11(A) did not require be in writing. We hold that Gary’s plea of guilty to possession of cocaine was not invalid because it was made orally.¹³

{¶27} The sixth assignment of error is overruled. The judgment of the trial court is, therefore, affirmed.

Judgment affirmed.

CUNNINGHAM, P.J., and MALLORY, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

¹³ See *State v. Brown*, 3rd Dist. No. 13-99-20, 1999-Ohio-936.