

[Cite as *State v. McCrary*, 2010-Ohio-2011.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23360
v.	:	T.C. NO. 2008 CR 3580/2
GREGORY J. McCRARY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 7th day of May, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Gregory J. McCrary appeals his conviction and sentence for one count of aggravated robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree, with an attendant firearm specification, in violation of R.C. 2941.145. After a jury trial, McCrary was found guilty of the charged offenses and sentenced to an aggregate term

of thirteen years in prison. McCrary filed a timely notice of appeal with this Court on April 1, 2009.

I

{¶ 2} The facts of the instant case arise from an incident which occurred at approximately 2:00 p.m. on September 6, 2008, when two black males entered a BP gas station located at 5835 North Main Street in Harrison Township, in Montgomery County, Ohio. The two men were both wearing pantyhose over their heads, apparently in order to disguise their appearances. One of the men was also brandishing a small handgun which he pointed at the head of the store owner, Ehab Husein, immediately upon entering the store. Husein testified that the man who pointed the gun at him during the robbery smelled very bad. The armed man demanded all of the money in the register. Husein testified that he opened up the register, and the man with the handgun took \$176.00. Husein testified that while the robbery was going on, he was able to see the men's faces because the masks they wore were transparent.

{¶ 3} After emptying the cash register, the men ordered Husein to open the store's safe located behind the register. Husein testified that he told the men that the key to the safe was in the store office. The armed man ordered Husein to get the key from the office. The men, however, were unaware that Husein kept his German Shepherd dog in the office. When Husein opened the door to the office, the dog got loose and chased both men out of the store into the parking lot of the gas station. As he followed the men outside, Husein picked up his cell phone and called 911.

{¶ 4} Once outside, Husein observed a red pick-up truck leaving the gas station

parking lot. The truck stopped as it pulled into the street, and one of the suspects entered the passenger side of the vehicle, while the other man jumped in the bed of the truck and laid down. Before the truck pulled away from the gas station, Husein was able to observe the vehicle's license plate number, which he promptly relayed to the 911 dispatcher.

{¶ 5} As the men were pulling away from the gas station, they almost ran into a red Hummer H2 driven by Keith Moore, who happened to be traveling in that area at the time of the robbery. Keith's wife, Tonya Moore, was also present as a passenger in the vehicle. Tonya testified that the red pick-up truck almost backed into their vehicle as it pulled out of the parking lot. Just before the suspects drove away at a high rate of speed, Tonya testified that she was able to closely observe the suspect who jumped in the bed of the truck. Realizing that something was wrong, the Moores decided to follow the men in the red truck in order to help the police locate them.

{¶ 6} The Moores followed the truck for approximately fifteen minutes, during which time they stayed in constant communication with the police dispatch regarding the suspects' location. At some point, the suspects pulled into the parking lot of a woodworking store, drove to the back of the lot, and did not move. Tonya testified that her husband stopped their vehicle at the entrance of the lot. Tonya further testified that from this position, she could still see the truck, but not what the men inside of the truck were doing.

{¶ 7} The suspects eventually pulled out of the parking lot and drove away. The Moores continued following them, but Tonya testified that the man who had been in the bed of the truck was no longer there. Tonya testified that she assumed that the man had jumped

out when the truck was stopped at the woodworking store. Just before the remaining suspects were about to turn onto Salem Avenue, the Moores observed a police cruiser driven by Officer Ronald Smith of the Trotwood Police Department across the street apparently waiting to intercept the red truck and its occupants. The Moores abandoned the chase, and Officer Smith activated his overhead lights and pulled the red truck over shortly thereafter. The truck's license plate number matched the number provided by dispatch. Upon approaching the vehicle, Officer Smith observed a third individual sit up in between the driver and the man in the passenger seat. After backup arrived, Officer Smith and the other police officers removed the men from the truck, handcuffed them, and took them into custody. The driver of the red truck was identified as co-defendant Charlie Cooper. The man in the passenger seat was identified as co-defendant Harold Hubbard. The man who sat up in the middle of the seat after the truck had been stopped was identified as the defendant, McCrary. The police recovered \$176.00 from Hubbard's pocket. Hubbard stated that he had won the money playing dice or craps.

{¶ 8} After the suspects were arrested, deputies brought Husein and the Moores back to the scene and asked them if they could identify the men. Husein identified McCrary and Hubbard as the two men who robbed him at gunpoint, but he stated that he had never seen Cooper before. The Moores identified McCrary as the man they observed who jumped into the bed of the truck. Tonya testified that McCrary had changed his shirt after the robbery and before being pulled over. Neither Keith nor Tonya, however, could identify Cooper or Hubbard. A subsequent search of the red truck revealed pieces of black nylon pantyhose which had been cut at both ends. The gun allegedly used in the robbery was not

recovered. We note that Detective Robert Schumacher testified that he noticed a foul odor emanating from McCrary when he was interviewed at the police station. This is significant for identification purposes since Husein noted that the armed suspect smelled badly.

{¶ 9} McCrary, Cooper, and Hubbard were subsequently charged by indictment with one count of aggravated robbery on October 7, 2008. On October 17, 2008, the State filed a second indictment, adding a firearm specification. On October 14, 2008 McCrary filed a motion to suppress the identifications made by Husein and the Moores. After a hearing held on November 21, 2008, December 1, 2008, and December 5, 2008, the trial court issued a written decision in which it overruled McCrary's suppression motion.

{¶ 10} On January 15, 2009, McCrary filed a motion to sever his case from that of his co-defendants for trial purposes. It is apparent from the record that the court never ruled on the motion to sever, and McCrary was tried before a jury along with his co-defendants, Hubbard and Cooper. On March 20, 2009, McCrary and Hubbard were both found guilty of aggravated robbery with the firearm specification. As to Cooper, the jury was unable to reach a verdict, and the court granted him a mistrial. On March 25, 2009, the court sentenced McCrary to ten years for aggravated robbery, as well as three years for the firearm specification. The court ordered that the sentences be served consecutively for an aggregate sentence of thirteen years.

{¶ 11} It is from this judgment that McCrary now appeals.

II

{¶ 12} McCrary's first assignment of error is as follows:

{¶ 13} "THE COURT ERRED BY IMPROPERLY JOINING MR. MCCRARY'S

CASE WITH TWO CO-DEFENDANTS.”

{¶ 14} In his first assignment, McCrary contends that the trial court erred when it failed to decide his motion to sever prior to the trial in which all three co-defendants were tried together. Additionally, McCrary argues that the trial court abused its discretion when it impliedly overruled his motion to sever filed on January 15, 2009, by failing to rule on the motion prior to trial.

{¶ 15} Initially, we note that it is generally well-settled that “when a trial court does not specifically rule upon a [pretrial] motion, that motion is deemed to have been overruled.” *Rieger v. Rieger*, Montgomery App. No. 21784, 2007-Ohio-2366, citing *Schultz v. Schultz*, Greene App. No. 2002CA122, 2003-Ohio-3061. Thus, it follows that the trial court impliedly overruled McCrary’s motion to sever when it did not rule on the motion prior to the beginning of the trial in which all three co-defendants were tried together. See *State ex rel. Forsyth v. Brigner* (1999), 86 Ohio St.3d 299, 300; *State v. Adams*, Clark App. No. 2003CA 32, 2004-Ohio-2958.

{¶ 16} In *State v. Humphrey*, Clark App. No. 2002CA30, 2003-Ohio-3401, we held as follows:

{¶ 17} “The law favors the joinder of co-defendants and the avoidance of multiple trials because it, ‘conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.’ *State v. Daniels* (1993), 92 Ohio App.3d 473. As a result, a defendant claiming relief from joinder bears the initial burden of demonstrating that

he will be materially prejudiced by the joinder. *State v. Torres* (1981), 66 Ohio St.2d 340; *State v. Brooks* (1989), 44 Ohio St.3d 185. Absent a clear showing of abuse of discretion, a trial court's decision regarding severance will not be disturbed. *Torres* at 340.”

{¶ 18} “Abuse of discretion” has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 19} A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

{¶ 20} It is undisputed, however, that defense counsel failed to object at any point during the trial to the court's implicit denial of McCrary's motion to sever. Failure to object waives all but plain error. *McBride v. Quebe*, Montgomery App. No. 21310, 2006-Ohio-5128. Plain error exists “if the trial outcome would clearly have been different, absent the alleged error in the trial court proceedings.” *State v. Rollins*, Clark App. No. 2005-CA-10, 2006-Ohio-5399. “[T]o successfully prevail under plain error the substantial rights of the accused must be so adversely affected that the error undermines the ‘fairness of the guilt determining process.’” *State v. Ohl* (Nov. 27, 1991), Ashland App. No. CA-976.

{¶ 21} McCrary argues that the court erred by denying the severance motion because he and Cooper presented mutually antagonistic defenses. Specifically, McCrary argued that Cooper made statements to the police that McCrary was present at the scene of the alleged crime and was chased from the BP Station by a dog. Additionally, McCrary argued that he was prejudiced by the joinder because he was denied the opportunity to call his co-defendants as witnesses.

{¶ 22} In the instant case, McCrary and Hubbard argued that the charge of aggravated robbery was based on mistake and faulty assumption and that no robbery occurred. Specifically, McCrary's defense was that Husein was lying regarding what happened in the gas station. Cooper's defense was centered around his assertion that he was unaware of what transpired in the gas station after Hubbard and McCrary went inside. In fact, Cooper's counsel argued that if there was a robbery in the store, he did not know anything about it. We also note that the State did not introduce any of Cooper's prior statements at trial.

{¶ 23} Antagonistic defenses exist when each defendant is trying to exculpate himself and inculpate his co-defendant. *State v. Humphrey*, Clark App. No. 2002CA30, 2003-Ohio-3401. The defenses presented by McCrary and his co-defendants were clearly not antagonistic to each other. Cooper's defense did not inculpate McCrary in any crime. After a thorough review of the record, we find no evidence suggesting that McCrary and Cooper intended to present, or did present antagonistic defenses at trial.

{¶ 24} Additionally, McCrary's claim that he was prejudiced because he was denied the opportunity to call his co-defendants to testify as a result of the joinder is

also without merit. McCrary has neither established nor asserted that Cooper or Hubbard's alleged testimony would have any exculpatory effect on his case. McCrary's argument in this regard is completely speculative and presupposes that had their cases been severed, Cooper and Hubbard would not have offered testimony that incriminated McCrary or asserted their Fifth Amendment rights. Thus, the trial court did not err, plainly or otherwise, when it failed to grant McCrary's motion to sever.

{¶ 25} McCrary's first assignment of error is overruled.

III

{¶ 26} McCrary's second assignment of error is as follows:

{¶ 27} "MR. MCCRARY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS."

{¶ 28} In his second assignment, McCrary argues that his trial counsel was deficient for failing to remind the court about his pending motion to sever and for failing to renew said motion at the close of the State's case.

{¶ 29} "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, citing *State v. Lytle* (1976), 48 Ohio St.2d 391,

396-397, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶ 30} The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, supra, at 687-688. “Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* Thus, counsel’s performance will not be deemed ineffective unless and until counsel’s performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel’s performance. *Id.*

{¶ 31} For a defendant to demonstrate that he has been prejudiced by counsel’s deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel’s errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694.

{¶ 32} In our analysis of the previous assignment, we held that McCrary failed to establish any prejudice resulting from the trial court’s failure to grant his motion to sever. McCrary argues that no tactical reason existed which would

support his trial counsel's failure to renew the motion to sever at the close of the State's case. McCrary, however, provides no evidence from the record to support his assertion in this regard. Given the strong presumption that counsel's performance constituted reasonable assistance, McCrary's counsel was not required to perform a futile act. *State v. Lodge*, Montgomery App. No. 2004CA43, 2005-Ohio-1908. Moreover, McCrary has failed to demonstrate that there is a reasonable probability that but for his counsel's failure to renew the severance motion, the result of the case would have been different.

{¶ 33} McCrary's second assignment of error is overruled.

IV

{¶ 34} McCrary's third assignment of error is as follows:

{¶ 35} "THE COURT ERRED BY NOT SUPPRESSING THE ON-SCENE IDENTIFICATION OF MR. MCCRARY BECAUSE IT WAS UNNECESSARILY SUGGESTIVE OF HIS GUILT AND MADE THE IDENTIFICATION UNRELIABLE."

{¶ 36} In his third assignment, McCrary contends that the trial court erred when it overruled his motion to suppress as it related to his on-scene identification by Husein and Tonya Moore. Specifically, McCrary argues that the on-scene identifications were inadmissible because they were the result of an "inherently suggestive" procedure and were, therefore, unreliable.

{¶ 37} With respect to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653. The court of appeals

must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac* (July 15, 2005), Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586.

Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. *Id.*

{¶ 38} Show-ups at or near the scene of a crime, that occur shortly after the crime, are not only permissible, but useful, since they can lead to an identification or non-identification while the characteristics of the perpetrator are still fresh in the witness's memory. *Neil v. Bigger* (1972), 409 U.S.188, 93 S.Ct. 375, 34 L.Ed.2d 401. However, the show-up must not be unduly suggestive. *Id.* The defendant bears the burden to prove that a show-up procedure was so suggestive of guilt that it requires suppression. *Id.*, at 199; *State v. Murphy* (2000), 91 Ohio St.3d 516, 534, 2001-Ohio-112. Because McCrary failed to meet that burden, we affirm the trial court's denial of his motion to suppress Husein and Tonya Moore's on-scene identification testimony.

{¶ 39} Husein and the Moores were separately brought to the area where the suspects had been stopped and arrested within ninety minutes of the robbery at the BP Station. Deputy Kyle Baranyi testified that he informed Husein that he was bringing him to the scene where the police had three individuals detained in order to determine whether Husein recognized any of them. Nothing more was said or disclosed to Husein prior to the on-scene identification. Once at the scene, Husein immediately recognized the red truck used in the robbery. Husein also

immediately identified McCrary and Hubbard as the two men who came into the store and robbed him at gunpoint. Husein was very confident in his identification of McCrary and Hubbard because he had the opportunity to view both men during the course of the robbery which lasted approximately sixty to ninety seconds. Additionally, the store was well lit, the robbery occurred during mid-afternoon on a bright, sunny day. We note that when the police asked Husein if he recognized Cooper, he stated that he had not seen him before.

{¶ 40} Upon being brought to the scene, Tonya Moore was only able to identify McCrary as the man she had seen jump in the bed of the red truck immediately after the robbery. Although Tonya only observed McCrary for few seconds, she was within only a few feet of him, he was not wearing a mask at that point, and her view was entirely unobstructed. Moreover, Tonya testified that she observed two men in the cab of the red truck as it drove away, and she could identify neither of them. The only individual that she recognized was McCrary.

{¶ 41} There is no indication from the record that the on-scene identification was improperly conducted. Husein and Tonya Moore were simply asked to look at the three individuals to see if they recognized any of them. Such a neutral statement to explain the procedure is not impermissibly suggestive of guilt. See, e.g., *State v. Carruth*, Montgomery App. No. 19997, 2004-Ohio-2317, ¶16. There is no evidence that either Husein or Tonya felt forced to identify anyone or that the police officers were asking them to corroborate the officer's suspicion of guilt, either of which may make the process impermissibly suggestive. *Id.* Most importantly, both Husein and Tonya were able to distinguish between the men they could

recognize from the robbery and those they could not. Thus the on-scene identifications of McCrary were not inherently suggestive, and the trial court did not err in denying McCrary's motion to suppress Husein and Tonya's identification testimony.

{¶ 42} McCrary's third assignment of error is overruled.

V

{¶ 43} McCrary's fourth assignment of error is as follows:

{¶ 44} "THE COURT ERRED IN UPHOLDING A VERDICT THAT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 45} In his fourth assignment, McCrary argues that the verdict was against the manifest weight of the evidence.

{¶ 46} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 47} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231, * * * . "Because the factfinder * * * has the opportunity to see

and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 48} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 49} In the instant case, we find that McCrary's conviction for aggravated robbery and the firearm specification is not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve. McCrary presented no evidence at trial. McCrary's defense was premised on the assertion that although he was, in fact, present at the gas station, no robbery was committed, and Husein's testimony to the contrary lacked credibility. McCrary also points out that no gun was ever recovered. The jury, however, was free to believe Husein's testimony that McCrary pointed a gun at his head in order to effectuate the robbery. Moreover, the jury did not lose its way simply because it chose to believe the State's witnesses, namely Husein and Tonya Moore regarding their eyewitness testimony and identification of McCrary as one of the perpetrators of the robbery. Having reviewed the entire

record, we cannot clearly find that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 50} McCrary's fourth assignment of error is overruled.

VI

{¶ 51} McCrary's fifth and final assignment of error is as follows:

{¶ 52} "THE TRIAL COURT FAILED TO PROPERLY CONSIDER THE PRINCIPLES OF SENTENCING AND RECIDIVISM OF THE OFFENDER IN SENTENCING MR. MCCRARY TO 13 YEARS IN PRISON."

{¶ 53} In his final assignment, McCrary contends that the sentence imposed by the trial court was unreasonable and an abuse of discretion. In support of this assertion, McCrary points out that the record establishes that the court was confused about his prior record. McCrary also argues that no one was injured during the robbery, and only \$176.00 was stolen from the gas station.

{¶ 54} Initially, it should be noted that pursuant to the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court was not required to make any findings on the record in order to support the imposition of McCrary's sentence. Post *Foster*, trial courts have full discretion to impose any sentence within the statutory range and are no longer required to make findings or give their reasons for imposing more than the minimum sentences.

{¶ 55} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4,14, the Supreme Court of Ohio held that, "[i]n applying *Foster* to the existing statutes, appellate courts must apply 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,” the standard found in R.C. 2953.08(G).

{¶ 56} “If this first prong is satisfied, the trial court’s decision shall be reviewed under an abuse-of-discretion standard.” *Id.*, ¶4. The *Kalish* Court noted, trial courts still must consider R.C. 2929.11 and 2929.12 in sentencing, “and be mindful of imposing the correct term of postrelease control.” *Id.*, ¶13. “R.C. 2929.11 and 2929.12 * * * are not fact-finding statutes like R.C. 2929.14. Instead, they serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio’s sentencing structure. Moreover, R.C. 2929.12 explicitly permits trial courts to exercise their discretion in considering whether its sentence complies with the purposes of sentencing. It naturally follows, then, to review the actual term of imprisonment for an abuse of discretion.” *Id.*, ¶ 17.

{¶ 57} Here, the trial court’s decision was not contrary to law. R.C. 2929.14(A)(1) authorizes a prison term of “three, four, five, six, seven, eight, nine, or ten years” for a felony of the first degree. In addition, McCrary was convicted of the attendant firearm specification that carries a mandatory prison term of three years which must be served consecutively to the prison term for the primary offense. The trial court expressly stated that it considered the purposes and principles of sentencing, as well as the seriousness and recidivism factors before it sentenced McCrary. The trial court also properly applied a term of postrelease control for up to three years.

{¶ 58} We also conclude that the trial court did not abuse its discretion when it sentenced McCrary to a prison term of thirteen years. During the sentencing hearing, the court stated the following:

{¶ 59} “Trial Court: Okay. Sir, I also note that you have, as I said, [a] fairly extensive felony record, that you’re serving a sentence currently. *You have a prior conviction for rape, gross sexual imposition, and aggravated burglary, at least that’s what you were arrested for. At least your conviction was [for] gross sexual imposition and aggravated burglary.* That’s you’ve served a sentence on those offenses and were only recently in 19– or 2007 released from prison. You’re serving another sentence as a result of a jury trial. I, again, don’t disagree with Mr. Rezabek [defense counsel]. From what I’ve seen[,] you have been polite and respectful during all these proceedings, but again, sir, I cannot ignore the seriousness of not only these events that occurred at that gas station, sir, but also your continued criminal conduct despite previously having been sentenced.”

{¶ 60} Clearly, the trial court was not confused regarding McCrary’s prior criminal conduct. We also note that although no one was injured during the robbery of the BP station, McCrary pointed a gun at Husein’s head during the robbery, which elevated the potential for serious injury or death to have occurred. Thus, McCrary’s sentence is not contrary to law, and there is nothing in this record to suggest that the trial court abused its discretion.

{¶ 61} McCrary’s fifth and final assignment of error is overruled.

VII

{¶ 62} All of McCrary’s assignments of error having been overruled, the

judgment of the trial court is affirmed.

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BROGAN, J. and FAIN, J., concur.

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