[Cite as *State v. Daniel*, 2023-Ohio-2800.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-22-1231

Appellee — Trial Court No. CR0202102954

v.

Malik Daniel — **DECISION AND JUDGMENT**

Appellant — Decided: August 11, 2023

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Lauren Carpenter, Assistant Prosecuting Attorney, for appellee.

Laurel A. Kendall, for appellant.

* * * * *

DUHART, J.

{¶ 1} Appellant, Malik Daniel, appeals from the judgment of the Lucas County Court of Common Pleas, entered upon a jury verdict convicting him of attempt to commit murder, felonious assault, aggravated robbery, and grand theft of a motor vehicle. For the reasons that follow, the trial court's judgment is affirmed.

Statement of the Case

{¶ 2} On the morning of March 27, 2021, the victim, while at his home, was stabbed multiple times and his car was stolen. A criminal investigation ensued, and on March 28, 2021, police presented to the victim a photo array that included Daniel's photo. Upon reviewing the array, the victim immediately identified Daniel as the person who had caused his injuries.

{¶ 3} On December 6, 2021, Daniel was charged by indictment with four offenses: attempt to commit murder (Count 1); felonious assault (Count 2); aggravated robbery (Count 3); and grand theft of a motor vehicle (Count 4).

{¶ 4} On March 3, 2022, Daniel filed a motion to suppress evidence of the photo array identification. Following a hearing on April 8, 2022, the trial court denied Daniel's motion.

{¶ 5} The case proceeded to a jury trial on August 16, 2022. At the conclusion of the state's case-in-chief, defense counsel made a motion for acquittal pursuant to Crim.R. 29. The trial court denied the motion. At the end of the trial, the trial court gave the jury an instruction on self-defense. On August 19, the jury found Daniel guilty of all charges.

{¶ 6} At sentencing, the trial court -- having reviewed the presentence report and having heard statements from defense counsel, the prosecutor, the victim, and Daniels -- merged Counts 1 and 2 for purposes of sentencing, and then imposed the following consecutive terms of imprisonment: (1) a minimum of ten and a maximum of 15 years on

Count 1, attempt to commit murder; (2) ten years on Count 3, aggravated robbery; and (3) 17 months on Count 4, grand theft of a motor vehicle.

{¶ 7} Appellant timely filed his appeal from this conviction.

Statement of Facts

April 8, 2022 Suppression Hearing on Photo Array

{¶ 8} Detective Mooney testified that while investigating the March 27, 2021 incident, she obtained information that led her to identify Daniel as a suspect. She constructed a photo array that included a photo of Daniel, and she used a blind administrator, Sergeant Shaner, to administer the array to the victim. An audio recording made on March 28, 2021, at the hospital where the victim was being treated for his injuries, captures Mooney telling the victim, "We found your car." and "I think I know who did it." Referring to the upcoming photo array procedure, Mooney told the victim "I'm gonna let [Sgt. Shaner] do this part, because I know who the person is."

{¶ 9} While Shaner was presenting the array to the victim, Mooney was in the room waiting behind a closed curtain. Shaner told the victim that he was under no obligation to pick out any photo, and that the suspect may or may not appear in the array. Within seconds of viewing the array, the victim identified Daniel. He stated that he was "100 percent" sure about the identification. Mooney, overhearing the identification, then directed that the victim circle, initial, and date the photo he identified.

{¶ 10} The trial court asked Mooney if she ever failed to include a suspect when preparing a photo array, and Mooney indicated that she did not. The court then clarified with Mooney that the purpose of a photo array is to try and identify a perpetrator. After taking the matter under advisement, the trial court issued its decision, denying the motion to suppress the photo array.

State's Case-In-Chief

Victim Testimony

{¶ 11} At trial, the victim testified that he rented his residence at 408 Kenilworth, and that the property had a security system in place. He stated that he met his houseguest, Daniel, through a mutual acquaintance named "Scooby," with whom Daniel had been staying. After Daniel and Scooby got into a fight, the victim offered to let Daniel stay at his home for a few days, starting on March 25, 2021. Upon coming to stay with the victim, Daniel and the victim slept in the same bed, although both testified that nothing sexual took place.

{¶ 12} Late in the evening of March 26, 2021, defendant began performing tarot card readings for individuals online. The victim testified that this "spooked" him and that the readings, coupled with Daniel's lack of sexual interest in him, led the victim in the early morning hours of March 27, 2021 to ask Daniel to leave the residence -- first by text, and then, later, in person.

{¶ 13} The victim testified that he began getting ready for work around 5:00 or 6:00 a.m., and noticed that Daniel was still awake. Having already texted Daniel that he needed to leave the residence, the victim then verbally instructed Daniel to go, and he placed Daniel's belongings near the residence door. The victim testified that Daniel refused to leave, prompting the victim, who had his cell phone in his hand, to tell Daniel that he was going to call the police. According to the victim, Daniel then slapped the phone out of the victim's hand, and a physical altercation commenced between the two.

{¶ 14} The victim testified that he did not realize Daniel had a knife until he saw that he had been stabbed multiple times, in multiple areas of his body, and that his bowels were protruding from a cut to his abdomen. The victim stated that his fingers were also cut when, during the fight, he had attempted to grab the knife away from Daniel. The victim testified that neither the knife, which was a fixed-blade hunting knife, nor its sheath belonged to him.

{¶ 15} According to the victim, the fight started in the living room/dining room area and proceeded through the house. At one point, he and Daniel crashed through the glass front door. The victim stated that once he realized how badly he had been injured, he retreated to the bathroom and barricaded himself inside. He testified that Daniel approached the bathroom door numerous times to try to push the door open, but, failing in that effort, eventually left.

{¶ 16} After waiting for a period of time and no longer hearing Daniel outside the door, the victim -- unaware of the location of his cell phone -- crawled out from the bathroom and pushed the alarm button that was in his house. The alarm, which the victim testified saved his life, alerted the victim's landlord, who in turn called police. The victim was transported to the hospital, where he remained for four or five days.

{¶ 17} The injuries on the victim's body were discovered to include eviscerated bowel, numerous puncture wounds, eight stab wounds, and lacerations on his extremities.

{¶ 18} Regarding access into and out of the house, the victim testified that the front exit consisted of two doors and that one of the doors required a key to open. He testified that the back door did not have a lock, and that the house itself had 15 windows. He explained that some of the house windows had knives stuck into the wood to secure them, and that this was a common practice in Detroit, where he was originally from.

{¶ 19} When asked about a sexual relationship with Daniel, the victim testified that his understanding was that Daniel would sometimes exchange sexual favors for a place to stay. The victim testified that he did ask Daniel if he was interested in engaging in sexual relations with him, but when Daniel told him no, he respected that and never attempted to sexually assault or rape Daniel.

Lt. Davis

{¶ 20} Toledo Police Lieutenant Davis responded to 408 Kenilworth, and there he found blood on the sidewalk, glass on the front porch from a broken door, and the victim

inside the residence, covered in blood. He testified that the victim was in distress and told Davis that he had been stabbed and that the suspect was a light-skinned 26-year-old black male who also stole the victim's car. Davis observed that there was a lot of blood in the area of the house between the victim and the bathroom. He stated that when the victim's shirt was lifted, he could see that the victim's intestines "were out of his stomach."

Det. Jackson

{¶ 21} Toledo Police Detective Jackson also responded to the location and, as part of processing the scene, took photographs. Jackson testified that having knives on windows as the locking mechanism -- in this case all kitchen knives -- was common in certain areas.

Off. Eister/EMT

{¶ 22} Georgia Marietta police officer Eister testified that he pulled Daniel over when his police system alerted him that the vehicle Daniel was driving was stolen. Daniel had "several lacerations to his lips as well as his face and a few lacerations to his arms and on his feet." The EMT on scene noted that the lacerations on his lip looked like they had been caused by Daniel's own teeth, as the pattern of the injury and the pattern of his teeth matched. The EMT also noted that Daniel did not stop at a trauma center, such as the one visible from the highway that he would have passed eight to ten minutes before getting to the gas station where he was ultimately apprehended by Georgia police.

Det. Henderson

{¶ 23} Georgia Marietta police Detective Henderson testified that he searched Daniel's blood-stained stolen vehicle and took pictures of both the vehicle and its contents, which included clothing, a television, a backpack, an X-Box, a towel, a knife, and a paystub that belonged to the victim.

Forensic Scientist Wanken

{¶ 24} Forensic scientist Wanken testified that no DNA was found on the blade of the knife used in the stabbing and that the most likely reason for this was that the blade had been cleaned.

Defense Case-In-Chief

Daniel

{¶ 25} After the state rested, Daniel took the stand and presented his version of events. According to Daniel, the altercation occurred after the tarot card reading and after the victim had sent him several suggestive texts, when the victim emerged from the bedroom and said to Daniel, who was sitting on the sofa, "[B]ruh either you give me what I want or I'm going to call the police and tell them that you have a warrant out for your arrest." Daniel testified that he initially thought that the victim had a cell phone in his hand, but, instead, the object turned out to be a knife. Daniel stated that he told the victim that his messages made him uncomfortable and that he should stop, but then the victim became angry -- telling Daniel that he didn't "give a f*** about none of that sh**"

-- and walked towards Daniel in a threatening manner. Daniel testified that he stood up, "pushed [the victim] back" and went towards the door." Daniel said he merely intended to leave, but seeing there was no door knob, he turned around to ask the victim to unlock the door. According to Daniel, as soon as he turned toward the victim, the victim cut him in the face with the knife.

{¶ 26} Daniel testified that he wrested the knife away from the victim, and that the two swung at each other with their fists, with the victim swinging and missing, but with Daniel connecting. Daniel also said he recalled stabbing the victim, and then running to the bathroom, with the victim chasing him, threatening to kill him, and ultimately tackling him, causing the two to fall into the bathtub. According to Daniel, he stabbed the victim again, and, still fighting with the victim, was able to exit the bathroom and make his way back to the front door, where, again punching and stabbing the victim, he dropped his shoulder and threw himself and the victim through the glass panel and out of the residence. Daniel testified that, even at this point, the victim was attempting to lift him up to slam him, but then "everything is like blank for a moment," and then the victim was "nowhere," he was "gone."

{¶ 27} Once the fight was over, Daniel said he realized he did not have any of his (three) cell phones. He looked around and found them, along with his headphones, and the victim's car keys, which were "right there' on "the bottom porch step." He testified that he screamed for help from the neighbors, but no one heard him. He said he was

afraid that if he called the police, the victim might re-appear and harm him, so he decided just to go.

{¶ 28} Daniel testified that he loaded the vehicle with his personal belongings and took the knife that was used in the fight. He testified that he took the victim's vehicle, as well, but solely to effectuate his escape and with no intent to keep it. He denied taking the victim's cell phone.

{¶ 29} Daniel testified he was panicked after the fight, and so he headed to Georgia, where he was originally from. Approximately 20 hours after the stabbing, Daniel was pulled over by the Georgia Marietta Police. Daniel testified he had planned to go to the hospital for treatment and the opportunity to talk to police personnel, who would "get the car back" to the victim. He also testified that he had acted in self-defense and could not retreat from the victim.

Sentencing

{¶ 30} At sentencing, the trial court, after stating that it had read and reviewed the presentence report, heard from defense counsel, the state, the victim, and Daniels. Defense counsel stated in mitigation that Daniels had a "rather limited prior criminal record," which included one prior felony conviction and four misdemeanor convictions. Defense counsel also pointed out that the victim "did recover" from his injuries and that Daniels was currently maintaining sobriety. Next, the trial court heard from the victim, who described certain financial losses to himself and to his family that were attributable

to the incident. He also described continuing effects from his injuries, including nerve damage to both hands, pain in his shoulder, and scarring. Finally, the victim described lasting emotional effects from the incident, including fear, anger, shame, and guilt. The state, in its comments, simply noted that as long as Daniels was unwilling to accept responsibility for his actions, it would be difficult for him to engage in any rehabilitative efforts.

{¶ 31} After hearing from the state, the trial court inquired of counsel about the possibility of imposing part of the sentence consecutively and part of the sentence concurrently. The state indicated that it was, in fact, something that the trial court would be authorized to do.

{¶ 32} Finally, the court heard from Daniels, who spoke at length. Daniels told of how he had no intention to steal the victim's vehicle or to hurt him in any way. He explained that he had been a good houseguest and that the victim had tried to take advantage of him sexually and, further, had attacked him. He described himself as a survivor of the incident and stated that "[t]he wrong person is being sentenced here today." He further stated that he did not deserve any sentencing and that he would never apologize for surviving the situation. He then went on to present his own victim impact statement, wherein he described the shock of being wrongfully convicted, the stress of reliving the day of the incident, and the stress of "being in jail surrounded as I was with

real criminals." In taking his "last opportunity to apologize," Daniels stated, "I'm sorry that I trusted [the victim]."

{¶ 33} Following Daniel's statement, the trial courts stated:

> That was the worst allocution I have ever heard in my time on the Bench. You are here today because you were convicted of [sic] a jury of your peers. They did not believe that you were acting in self-defense, and your story does not make sense because even if elements of what you claim happened happened, the fact is you knifed a man and let him bleed out to die alone in his apartment and then drove to Georgia, which is at least a nine hour drive. Your story might have made sense if you had stopped somewhere to get help for yourself or the police or an ambulance for him, but you stabbed him and let him bleed out and almost die.
>
> You've shown – even if any part of your story is true, you seem to be completely incapable of showing any empathy for your victim. In fact you just re-victimized him today by claiming that this is his fault in [sic] showing no remorse. So, I'm actually inclined given the fact that you seem to have a complete lack of understanding or empathy for other people to do a harsh prison sentence. So I'm giving you 10 years on Count 1, 10 years on Count 3, and 17 months on Count 4. And these are all going to be run consecutively.

Assignments of Error

{¶ 34} Daniel asserts the following assignments of error on appeal:

I. The trial court abused its discretion by denying Appellant's Motion to Suppress Evidence, pursuant to Crim.R. 12(C)(3).

II. The convictions herein were not supported by sufficient evidence to submit to the jury, and/or the trial court abused its discretion by denying Appellant's motion for acquittal pursuant to Crim.R. 29, because Appellant's convictions were not supported by sufficient evidence of intent.

III. Appellant's convictions were not supported by the manifest weight of the evidence because the State of Ohio did not prove that appellant did not act in self-defense.

IV. The trial court abused its discretion by failing to merge all appropriate sentences on the basis of allied offenses of similar import.

V. The trial court abused its use of consecutive sentences such that the sentence imposed here is disproportionate to the harm caused in this matter.

Analysis

Motion to Suppress

{¶ 35} In his first assignment of error, Daniel argues that the trial court erred in overruling his motion to suppress identification, asserting that the pretrial identification

was impermissibly suggestive and the resulting identification was unreliable, based upon the methods employed when presenting the photo array.

{¶ 36} Appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St,3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. When the trial court considers a motion to suppress, it acts as the factfinder and is in the best position to resolve factual questions and to evaluate the credibility of witnesses. *Id.* Thus, an appellate court must accept the trial courts findings of fact if they are supported by competent, credible evidence. *Id.* This court must then determine, without deference to the trial court's conclusion, whether the facts satisfy the applicable legal standard. *Id.* The trial court's application of law is reviewed de novo. *State v. Williams*, 6th Dist. Erie No. E-18-024, 2019-Ohio-5144, ¶ 11.

{¶ 37} "Photo array evidence is suppressed only if the identification, or method of identification, is unduly suggestive and unreliable." *State v. Heflin*, 6th Dist. Lucas No. L-10-1268, 2011-Ohio-4134, ¶ 17, citing *State v. Waddy*, 63 Ohio St.3d 424, 438, 588 N.E.2d 819 (1992), citing *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The burden of suggesting that the identification procedure was unduly suggestive lies with the defendant. *State v. Williams*, 6th Dist. Lucas No. L-21-1111, 2022-Ohio-2439, ¶ 32. "'If the defendant meets his or her burden, the court must then consider whether the identification, viewed under the totality of the circumstances, is reliable

despite its suggestive character.'" *Id.*, citing *State v. Harris*, 2d Dist. Montgomery No. 19796, 2004-Ohio-3570, ¶ 19.

{¶ 38} Factors to be considered in determining the reliability and suggestiveness of a challenged identification include: (1) the victim's opportunity to view the defendant during the crime; (2) the victim's degree of attention; (3) the accuracy of the victim's prior description, if any, of the defendant; (4) the victim's certainty; and (5) the amount of time that has elapsed between the offense and the identification. *State v. Williams*, 6th Dist. Erie No. E-18-024, 2019-Ohio-5144, ¶ 11. Regarding the suggestiveness of the photo array, in particular, the law is clear that where others depicted in the photo array with the defendant all appear relatively similar in age, features, skin tone, facial hair, dress, and photo background, the photo array is not impermissibly suggestive. *State v. Williams*, 6th Dist. Lucas No. L-21-1111, 2022-Ohio-2439 at ¶ 33.

{¶ 39} In the instant case, Daniel does not challenge the suggestiveness of the photo array itself, which consists of pictures of six black males who appear to be about the same age, appear to have the same build, and are all similar in appearance.

{¶ 40} Instead, Daniel takes issue with statements made by Detective Mooney to the victim, wherein Mooney indicated that she knew the identity of the perpetrator. Daniel argues that these statements strongly suggested that his photo was included in the array. Reviewing the recording of Mooney's interactions with the victim, we find that none of Mooney's statements were suggestive as to whether Daniel's photo was included

in the array. In addition, Sergeant Shaner gave proper instructions prior to administering the array, including a statement that the suspect may or may not appear in the array.

{¶ 41} Daniel also argues, without elaboration or explanation, that (1) Shaner's alleged "participation in the interview" of the victim; and (2) Mooney's instruction as to the preferred method of marking Daniel's photo each rendered the entire identification procedure unduly suggestive. We disagree. Neither of these circumstances suggest that the victim was influenced in any way about which, if any, photo he should select. In fact, there is no evidence that either Mooney or Shaner said or did anything that would have suggested that the victim should choose Daniel from the photo array.

{¶ 42} Even if the method of identification had been found to be unduly suggestive – which it clearly was not – the victim's identification was sufficiently reliable. At the time of the attack, Daniel had been living in the victim's house for several days -- and had even spent a night in the victim's bed -- so, clearly, the victim was very familiar with him. In addition, the victim had considerable opportunity to view his attacker during the protracted and brutal altercation. Finally, just one day after the incident, the victim identified Daniel with "100 percent" certainty. Thus, the totality of the circumstances, including consideration of *Williams* factors, strongly suggest that the identification was reliable.

{¶ 43} The trial court's decision refusing to suppress the identification was not improper. Accordingly, Daniel's first assignment of error is found not well-taken.

Sufficiency of the Evidence

{¶ 44} Daniel argues in his second assignment of error that the trial court abused its discretion in denying Daniel's motion for acquittal pursuant to Crim.R. 29 and that his convictions were not supported by the sufficiency of the evidence.

{¶ 45} Crim R. 29(A) provides:

> The court on a motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

{¶ 46} This court has held that "[a] motion for acquittal under Crim.R. 29(A) is a challenge to the sufficiency of the evidence." *See State v. Messer*, 6th Dist. Lucas No. L-16-1109, 2017-Ohio-1223, ¶ 16, citing *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39. A trial court's denial of a motion for acquittal under Crim.R. 29(A) "'is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence.'" *Messer* at ¶ 16, quoting *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. In reviewing a challenge to the sufficiency of the evidence, an appellate court views the evidence in a light most favorable to the prosecution and determine whether "'any rational trier of fact could have

found the essential elements of the crime proven beyond a reasonable doubt.'" *Id.*, quoting *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court does not weigh the evidence or assess the credibility of the witnesses. *Id.*, citing *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 132. The question of whether the evidence is sufficient to support a conviction is a question of law. *Id.*, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 47} Daniel's only assertions are that there was not sufficient evidence to convict him of the offenses of attempted murder and grand theft of a motor vehicle.

{¶ 48} R.C. 2903.02(A) sets forth the offense of murder as follows:

> No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

{¶ 49} Regarding the offense of attempt, R.C. 2923.02 provides:

> No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute the offense.

{¶ 50} According to Daniel, the evidence was insufficient to prove that he intended to murder the victim, because the altercation between the parties "arguably started" when Daniel rebuffed the victim's sexual advances. Here, however, the testimony of the victim, if believed, was clearly sufficient to establish the offense of

attempted murder. Specifically, the victim testified that when he told Daniel to leave his residence, Daniel slapped the phone out of the victim's hand, starting the altercation. He testified that Daniel had a knife and stabbed him multiple times, causing extensive bleeding and disembowelment. While at the hospital, the victim was found to have suffered in addition to eviscerated bowel, numerous puncture wounds, eight stab wounds, and various lacerations to his extremities. The victim testified that once he believed that Daniel had gone away for good, he crawled across the floor to activate the alarm system that saved his life. The victim's testimony, coupled with the other testimony from the state, was clearly sufficient to support Daniel's conviction for attempted murder.

{¶ 51} In regard to the offense of grand theft of a motor vehicle, R.C. 2913.02(A)(1) provides that "[n]o person, with purpose to deprive the owner of [a motor vehicle], shall knowingly obtain or exert control over [a motor vehicle] * * * [w]ithout the consent of the owner * * *." Daniel argues that the evidence was insufficient to establish intent on his part to permanently deprive the victim of his vehicle. We disagree. In the instant case, where the victim testified that he did not give Daniel permission to take his motor vehicle, where Georgia police officers testified that they apprehended the vehicle in Georgia, having been alerted that the vehicle was stolen, and where Daniel admitted to taking the victim's vehicle without permission, such evidence, if believed, amply supports a finding by the jury that Daniel stole the victim's motor vehicle.

{¶ 52} Because the evidence is sufficient to support the jury's findings that Daniel committed the offenses of attempted murder and grand theft of a motor vehicle, his second assignment of error is found not well-taken.

Manifest Weight of the Evidence

{¶ 53} Appellant challenges his convictions for attempted murder and felonious assault as against the manifest weight the evidence based upon his own testimony that he acted in self-defense. When reviewing a manifest weight argument, an appellate court's function is to determine whether the greater amount of credible evidence supports the verdict. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12; *Thompkins* at 387. Essentially, "[a] manifest weight of the evidence challenge contests the believability of the evidence presented." *State v. Wynder,* 11th Dist. Ashtabula No. 2001-A-0063, 2003-Ohio-5978, ¶ 23. When determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the record, weigh the evidence and all reasonable inferences drawn from that evidence, consider the credibility of the witnesses and decide, in resolving any conflicts in the evidence, whether the trier of fact "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. Prescott*, 190 Ohio App.3d 702, 2010-Ohio-6048, 943 N.E.2d 1092, ¶ 48 (6th Dist.), citing *Thompkins* at 387.

{¶ 54} It is well established that the weight to be given to the evidence and to the credibility of witnesses is primarily for the trier of fact to decide. *State v. Thomas*, 70

Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982). In reviewing a manifest weight of the evidence challenge, an appellate court acts as a "thirteenth juror." *State v. Moore*, 6th Dist. Wood No. WD-18-030, 2019-Ohio-3705, ¶ 99-100. "Fundamental to the analysis is that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *State v. Gist*, 6th Dist. Lucas No. L-12-1355, 2014-Ohio-3274, ¶ 26, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 55} In this case, the trial court instructed the jury on the affirmative defense of self-defense using deadly force. "Deadly force" is defined as "any force that carries a substantial risk that it will proximately result in the death of any person." R.C. 2901.01(A)(2). A "substantial risk" is "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." R.C. 2901.01(A)(8).

{¶ 56} A defendant uses deadly force in self-defense when: he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of deadly force; and (3) he did not violate any duty to retreat or avoid the danger. *State v. Allen*, 6th Dist. Lucas No. L-18-1191, 2020-Ohio-4493, ¶ 92,

citing *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus.

{¶ 57} The law is clear that "[t]he state is required to disprove only one of the elements of self-defense beyond a reasonable doubt in order to sufficiently disprove a defendant's claim of self-defense." *State v. Messenger*, 2021-Ohio-2044, 174 N.E.3d 425, ¶ 50 (10th Dist.); *see also State v. Carney*, 10th Dist. Franklin No. 19AP-402, 2020-Ohio-2691, ¶ 31.

{¶ 58} In addition, this court, in *State v. Johnson*, 6th Dist. No. L-08-1325, 2009-Ohio-3500, has articulated limitations to the application of self-defense, as follows:

> The defense is not available unless the defendant shows that the force used to repel the danger was not more than the situation reasonably demanded. *Close v. Cooper* (1877), 34 Ohio St. 98, 100. 'One may use such force as the circumstances require.' *Chillicothe v. Knight* (1992), 75 OhioApp.3d 544, 550, 599 N.E.2d 871. The defense is not applicable 'if the force is so grossly disproportionate to [the] apparent danger as to show revenge or an evil purpose to injure.' *State v. Weston* (July 16, 1999), 4th Dist. No. 97CA31 [1999 WL 552732]. 'The force used to defend must be objectively necessary and reasonable under the facts and circumstances of the case and in view of the danger apprehended.' *Martin v. Cent. Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 93, 590 N.E.2d 411. When one uses a greater

> degree of force than is necessary under all the circumstances, it is not justifiable on the ground of self-defense. *State v. McLeod* (1948), 82 Ohio App. 155, 157, 80 N.E.2d 699.

Id. at ¶ 12.

{¶ 59} The state's burden of disproving a defendant's self-defense claim beyond a reasonable doubt is subject to a manifest weight review on appeal. *State v. Messenger*, -- Ohio St.3d --, 2022-Ohio-4562, -- N.E.3d --, at ¶ 27.

{¶ 60} Daniel challenges his convictions as against the manifest weight of the evidence on the theory that he was acting in self-defense. However, his convictions for attempted murder and felonious assault are not against the manifest weight of the evidence simply because the jury chose to believe the prosecution testimony over the testimony of the defendant. The victim testified that Daniel refused to leave the residence when asked to do so, that Daniel began the altercation, that Daniel introduced the knife into the altercation, and that Daniel attempted to kill the victim, leaving the victim to bleed out and die while he took flight from the residence in the victim's car. The jury simply did not believe Daniel's recounting of the events or that he acted in self-defense.

{¶ 61} Based on our review of the record, we conclude that competent, credible evidence supports, beyond a reasonable doubt, a finding that Daniel did not act in self-

defense and, further, that his use of force was more than the situation reasonably demanded. Daniel's third assignment of error is, therefore, found not well-taken.

Merger

{¶ 62} In his fourth assignment of error, Daniel argues that the trial court erred by failing find that his convictions for aggravated robbery and grand theft of a motor vehicle were allied offenses of similar import that should have been merged at sentencing.

{¶ 63} R.C. 2941.25, "Multiple counts," states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 64} When considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A), a court must consider the defendant's conduct and how the offenses were committed. *State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, ¶ 25. "If any of the following is true, the offenses cannot merge and the defendant may be

convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance – in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, or (3) the offenses were committed with separate animus or motivation." *Id.*

{¶ 65} "As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of R.C. 2941.25, courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? And (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered." *Id.* at ¶ 31.

{¶ 66} Aggravated robbery, in violation of R.C. 2911.01(A)(1) provides that "[n]o person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * [h]ave a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it[.]"

{¶ 67} As indicated above, grand theft of a motor vehicle, in violation of R.C. 2913.02(A)(1) provides that "[n]o person, with purpose to deprive the owner of [a motor vehicle], shall knowingly obtain or exert control over [a motor vehicle] * * * [w]ithout the consent of the owner * * *."

{¶ 68} Daniel argues that his convictions are allied offenses because the aggravated robbery was "part and parcel" of the grand theft of the automobile. We disagree. Testimony at trial indicated that Daniel slapped the victim's phone out of his hand and that the phone went missing either during the time that Daniel had attempted to kill the victim with a knife or while the victim was barricaded in the bathroom, trying to avoid further attack and injury. These facts indicate that Daniel took the victim's phone to prevent him from calling for help after he was severely injured. Thus, the theft offense of taking the victim's phone was committed separately from the theft of the victim's vehicle and with a wholly different purpose. Daniel's argument that these convictions are allied offenses of similar import is clearly without merit. Therefore, Daniel's fourth assignment of error is found not well-taken.

Consecutive Sentences

{¶ 69} The trial court imposed consecutive sentences in this case. Under R.C. 2929.14(C)(4), a trial court may impose consecutive sentences on an offender if it finds "that the consecutive service is necessary to protect the public from future crime or to punish the offender," "that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," and that one of the following circumstances exists:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed

pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶ 70} A trial court imposing consecutive sentences "must engage in the correct analysis, state its statutory findings during the sentencing hearing, and incorporate those findings into its sentencing entry." *State v. Gregory*, 6th Dist. Lucas Nos. L-21-1106, L-21-1107, 2023-Ohio-331, ¶ 110, citing *State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio493, 108 N.E.3d 1028, ¶ 253; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. "[W]hen a sentencing court makes the statutory findings under R.C. 2929.14(C)(4) for consecutive sentences, it must consider the number of sentences that it will impose consecutively along with the defendant's aggregate sentence that will result." *State v. Gwynne*, --- Ohio St.3d ---, 2022-Ohio-4607, --- N.E.3d ---, ¶ 12.

{¶ 71} "[U]pon a de novo review of the record, an appellate court may reverse or modify a defendant's consecutive sentences – including the number of consecutive sentences imposed – when it clearly and convincingly finds that the record does not support the trial court's findings." *Id.*; R.C. 2953.08(G)(2)(a). "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." *Id.* at ¶ 19, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶ 72} Here, the trial court engaged in the correct analysis, stated its statutory findings during the sentencing hearing, and incorporated those findings in its sentencing entry. It found that consecutive sentences were "necessary to protect the public from future crime or to punish the offender and are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." The trial court also found under R.C. 2929.14(C)(4)(b) that the harm caused was so great or unusual that no single prison term is adequate.

{¶ 73} Daniel makes no claim that the trial court failed to make the necessary statutory findings to impose consecutive sentences. Instead, he states, without further argument, that this court should review the aggregate sentence and find that it is disproportionate to the crimes he committed.

{¶ 74} Upon our de novo review, we cannot clearly and convincingly find that the record does not support the trial court's findings. Daniel nearly murdered the victim in a brutal and gruesome attack and then stole the victim's car and phone, leaving the victim to die alone and helpless. Daniel exhibited no remorse for his actions, instead blaming the victim for the pain, suffering, and inconvenience that the victim caused to Daniel. Daniel is a young man who received a prison sentence of approximately 21 years and five months to a maximum of 25 years for the serious crimes he committed. As we do not have a firm belief that the record does not support the trial court's findings, we must affirm the trial court's imposition of consecutive sentences. Accordingly, Daniel's fifth assignment of error is found not well-taken.

Conclusion

{¶ 75} The judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is to pay the costs of appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Christine E. Mayle, J. _____
JUDGE

Myron C. Duhart, P.J. _____
JUDGE

Charles E. Sulek, J. _____
CONCUR.
JUDGE