[Cite as *State v. Darson*, 2010-Ohio-5713.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-1086 (C.P.C. No. 08CR-11-8279)
Taurus Darson,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 23, 2010

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins IV*, for appellee.

Watson Law Group, LLP, and *Titus G. Donnell*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Taurus Darson ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict convicting appellant of one count of aggravated burglary and two counts of aggravated robbery and sentencing him to a 12-year period of incarceration. For the reasons that follow, we affirm that judgment.

{¶2} On November 12, 2008, Michael Willis ("Willis") was shot and killed during a home invasion that occurred at 450 South Wayne Avenue, Columbus, Ohio. During the home invasion, Willis and Arthur Gore ("Gore") were also held at gunpoint while two men

demanded money, guns, and drugs. As a result of this event, appellant and an alleged accomplice, Andre Brown ("Brown"), were indicted by the Franklin County Grand Jury on charges of aggravated murder, murder, aggravated burglary, and three counts of aggravated robbery. All six offenses were also indicted with three-year firearm specifications.

{¶3} Prior to trial, appellant filed a motion to suppress identification, as well as a motion to suppress his statements made to police. Following a hearing, the trial court overruled both motions. The case was then set for trial on September 21, 2009. However, before the start of trial, the prosecution dismissed Count 6 of the indictment, which alleged appellant had committed the offense of aggravated robbery against Danielle Huddleston ("Huddleston").

{¶4} At trial, the State of Ohio presented the testimony of several witnesses, including that of the coroner, several police witnesses, and three civilian witnesses. For purposes of this appeal, the testimony of Gore, Huddleston, and Brown is most relevant, as well as the testimony introducing the recorded police interview of appellant, which was played in large part for the jury. In addition, appellant testified on his own behalf and his testimony also has a direct bearing on the issues raised in this appeal.

{¶5} Testimony revealed that on November 12, 2008, at approximately 9:49 p.m., Columbus police were dispatched to a shooting at Willis' residence on South Wayne Avenue. Upon arrival, police found Willis on the porch, bleeding and unresponsive as a result of a gunshot wound. Willis later died of his injuries. Also present at the residence were Gore and Huddleston. Gore provided police with a description of the two men who committed the home invasion. Several minutes after these descriptions were aired, an

officer saw two men matching those descriptions walking a couple of blocks north of the shooting. The officer temporarily lost sight of the two men, but eventually apprehended appellant. Police then drove Gore to the location where appellant had been apprehended and Gore identified appellant as one of the two men who had participated in the home invasion.

{¶6} Appellant was arrested and taken to police headquarters. After waiving his Miranda rights, the police conducted a recorded interview, during which they questioned appellant regarding his involvement in the incident. Initially, appellant denied knowing anything about the home invasion or the shooting. However, appellant eventually told police that he had recently met a man he knew as "Breeze" or "Dray" who asked appellant to go with him to the West side of Columbus to "hit a lick," or to commit a robbery. "Breeze" was later identified as Brown.

{¶7} Appellant told detectives Brown planned the lick, but that appellant agreed to be the "lookout" and in return, Brown would "cash me out" a couple hundred dollars. (Tr. 530.) Appellant informed police that Brown took out a handgun as he hit the door and entered Willis' house. Appellant denied having a gun but eventually admitted that he actually went inside the house during the robbery and witnessed Brown shoot Willis.

{¶8} Notably, the day after appellant's arrest, police recovered two firearms in the rear of a residence at 362 South Wayne, just a few houses away from the scene of the home invasion.

{¶9} During trial, Gore testified he drove to Willis' home on the night of the home invasion in order to take Willis to the grocery store. Willis met Gore at the front door and invited him inside. As Gore was entering the home, Willis was talking to his neighbor,

Huddleston, whom Willis also invited inside. While the three of them were inside, Huddleston sent numerous text messages and asked several times to have some marijuana. During that time, Gore testified he and Willis drank a beer and smoked some marijuana. After approximately ten minutes, Huddleston told the two men she had to go to work. Gore walked her to the door and opened it for her. As he was doing so, he turned away for a second and when he turned back, he saw two men with guns.

{¶10} Gore testified Brown had a black and silver gun and had a shirt over his face, while appellant possessed an all black gun and did not have his face covered. Brown pushed Gore back inside the house and ordered Gore to remove his shirt and empty his pockets. Gore threw the money from his pockets onto a nearby stool.

{¶11} At about that same time, appellant ran over to Willis, who was on the couch. The two began tussling and appellant hit Willis with his gun a couple of times. Willis fell back onto the couch. Brown then yelled: "Where is the shit? Give me the shit, give me the shit." (Tr. 82.) The men continued to demand the marijuana.

{¶12} Gore testified that Willis got up from the couch and began walking towards Brown. Appellant, who until that time had kept his gun pointed at Willis, began pointing his gun back and forth between Willis and Gore. Brown warned Willis to stop advancing towards him. When Willis continued to walk towards Brown, Brown shot Willis. Brown then ran out the door, followed by Willis and appellant. Gore called 911 and went outside to be with Willis.

{¶13} On cross-examination, Gore admitted that he had been in a car accident and sustained an injury which also caused him to suffer from memory loss. However, on re-direct, Gore indicated the memory loss was related to events that occurred around the

time period of the accident and further stated he had no memory loss with respect to the events that occurred on November 12, 2008.

{¶14} Huddleston testified Brown had been her boyfriend in November 2008 up through the early part of 2009. Huddleston also knew Willis and had regularly smoked marijuana with him. However, earlier that day, Willis threatened Huddleston's younger brother, Danny. When Huddleston told Brown about the threat, Brown developed a plan to rob Willis. Pursuant to the plan, as it was told to her by Brown, Huddleston's role was to gain access to Willis' house, case things out, and then help Brown and appellant gain entry into the house so they could rob Willis.

{¶15} Huddleston testified Willis and Gore were both at the house when she arrived. She was there for several minutes and talked to them about getting some marijuana. Then, she received a text from her mother and informed Willis and Gore she was leaving. However, before Gore escorted her to the door, she first sent a text message to Brown telling him she was on her way out of the house. When Gore opened the door, Brown and appellant entered.

{¶16} According to Huddleston, Brown was carrying a black and silver gun and appellant had a black gun. Brown ordered her to lie down. Appellant put his gun to Willis' head and ordered Willis to give him everything, but Willis pushed the gun away. Meanwhile, Brown pointed his gun at Gore and gave him some orders. Then, Brown shot Willis and ran outside.

{¶17} Huddleston admitted she had initially lied to the police about her involvement in setting up the robbery. She also acknowledged that she had not been charged with anything, despite her involvement in the incident.

{¶18} On cross-examination, Huddleston further admitted that she never had a personal conversation with appellant about the plan to rob Willis and, in fact, had never talked to appellant. Huddleston's knowledge of the planning of the robbery came only from Brown.

{¶19} Brown testified that he, Huddleston, and Huddleston's brother Danny planned the robbery. Danny knew that Willis had a lot of money and drugs inside the house. He gave this information to Brown, who decided to do the robbery. Huddleston's role was to set up Willis and to get the door opened. Once Huddleston was inside, she was supposed to text Brown when she was leaving so that he could make entry into the house.

{¶20} Prior to the robbery, Brown had obtained two handguns. Brown testified he gave the all black gun to appellant and kept the black and silver gun for himself. Brown and appellant waited on the porch next door to Willis' house to receive the text message from Huddleston that she was leaving. When Huddleston finally sent the text that she was leaving, Brown and appellant went to the side of Willis' house. When the door opened, Brown and appellant both entered. Brown pushed Huddleston, and appellant moved near Willis. Brown denied that there was contact or a "tussle" between Willis and appellant. Brown ordered Gore to take off his shirt and give him any gun he was carrying. Brown also demanded money from the two men.

{¶21} At that time, Willis got off the couch and yelled at the men to leave his house. As Willis walked towards him, Brown shot him. Brown testified he then ran out the door, jumped a fence and ran down an alley, discarding some clothing items and the gun as he ran. A few minutes later, he met up with appellant at Huddleston's house and

the two men continued together on the next street until they spotted a police car. At that point, both appellant and Brown ran in different directions. Brown was not caught by the police that night, but was arrested a few weeks later.

{¶22} Brown admitted that he lied to police about the incident by attempting to pin the crime on appellant and another guy in order to keep himself out of trouble. Once he realized he was caught in his lies, Brown entered into an agreement with the State of Ohio whereby he agreed, among other things, to testify truthfully against appellant and to enter into a plea agreement to plead guilty to the murder of Willis, with a recommended sentence of 18 years to life.

{¶23} On cross-examination, Brown acknowledged that appellant would not have been able to see the content of the texts he exchanged with Huddleston while he and appellant were sitting on the porch next door, and that appellant never asked about the texts.

{¶24} After the State of Ohio rested, appellant testified on his own behalf. During his trial testimony, appellant recanted many of the statements he had previously made to police when he was arrested.

{¶25} Appellant testified that when he was arrested, he essentially told the police things he thought they wanted to hear, in the hopes of being released and going home that night. At trial, appellant admitted that he knew Brown through his girlfriend's brother and had been to Brown's house a few times. However, appellant testified he did not know anything about the robbery Brown had planned and believed Huddleston was going to Willis' house to inform Willis that appellant wanted to buy marijuana from him. Appellant testified there was never any conversation between himself and Brown during

which Brown disclosed the plan to rob Willis or offered appellant any money to assist him. Appellant also testified he did not participate in the discussions held between Brown, Huddleston, and Danny that occurred before Huddleston entered Willis' house.

{¶26} According to appellant, Brown was receiving text messages while he and Brown sat on the porch next door. The content of those texts were unknown to appellant. At some point, Brown informed appellant that Willis was willing to sell appellant some marijuana, so the two left the porch and Brown knocked on Willis' door. The door opened and they casually entered. Appellant approached Willis and informed him he wished to purchase some marijuana. As appellant was handing Willis $15, Brown pulled out a gun for the first time and asked Willis "where is it at?" (Tr. 643.) Brown told Willis not to move. Brown then pointed his gun at Gore and ordered Gore to remove his shirt. After Gore complied, Brown again pointed the gun at Willis. Willis told Brown to get out of his house. Willis got off the couch and began walking towards Brown, at which time Brown shot Willis. Brown then ran out of the house, followed by Willis. After a brief pause, appellant also ran out of the house. Appellant denied ever having a gun or pointing a gun at anyone.

{¶27} On October 1, 2009, the jury returned its verdicts, finding appellant not guilty of the aggravated murder and murder counts, but guilty of the aggravated burglary and two aggravated robbery counts, without any of the firearm specifications. On October 22, 2009, appellant was sentenced to three four-year terms of incarceration, all of which were ordered to run consecutively, for a total sentence of 12 years. Appellant has filed a timely appeal and now asserts two assignments of error for our review:

> I. THE STATE OF OHIO FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO PROVE BEYOND A

> REASONABLE DOUBT THAT DEFENDANT-APPELLANT TAURUS DARSON AIDED OR ABETTED ANDRE BROWN IN THE AGGRAVATED BURGLARY OF MICHAEL WILLIS AND THE AGGRAVATED ROBBERY OF MICHAEL WILLIS AND ARTHUR GORE, THEREBY VIOLATING MR. DARSON'S DUE PROCESS RIGHTS GUARANTEED BY THE *FOURTEEN AMENDMENT TO THE UNITED STATES CONSTITUTION*.
>
> II. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES AND NOT IMPOSING THE MINIMUM SENTENCE WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. 2929.14(E)(4) AND R.C. 2929.14(B)(2).

(Emphasis sic.)

{¶28} In his first assignment of error, appellant asserts the State of Ohio failed to introduce sufficient evidence to prove beyond a reasonable doubt that appellant took affirmative steps to aid and abet Brown in the commission of the aggravated burglary and aggravated robbery offenses that occurred on South Wayne Avenue. Because appellant argues he was "merely present" at the residence, and because the State's civilian witnesses gave inconsistent and conflicting testimony regarding appellant's conduct during the event, appellant submits the evidence is insufficient to prove appellant was complicit in the commission of these crimes. We disagree.

{¶29} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v.*

Yarbrough, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶30} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶31} Appellant argues there is insufficient evidence to demonstrate that he aided or abetted Brown, since Brown testified that he (Brown) was the sole criminal actor during the commission of these offenses, while appellant just simply "had the gun." (Tr. 211.) Additionally, appellant submits Brown's testimony is inconsistent with that of Huddleston and Gore, who both testified appellant did much more than simply possess the handgun, and that there are also inconsistencies between their testimonies as well. Appellant discounts the testimony of Huddleston, since her vantage point was from the floor and on the opposite side of the room. Appellant also challenges Gore's testimony, due to his issues with memory loss, and further claims his testimony is inconsistent with the coroner's testimony regarding Willis' injuries.

{¶32} Moreover, appellant argues that because the jury found appellant guilty of aggravated burglary and aggravated robbery but without the firearm specifications, it must

be inferred the jury conclusively determined that appellant did not have a handgun on the night of the home invasion. Therefore, appellant submits any evidence which suggests that appellant aided and abetted Brown through the possession or use of a handgun should not be considered.

{¶33} As previously stated, in a sufficiency of the evidence challenge, we construe the evidence in favor of the prosecution and determine whether such evidence permits any rational trier of fact to find the essential elements of the crime, beyond a reasonable doubt. *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. Also, see *Jenks*, paragraph two of the syllabus ("The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."); and *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781 (the relevant inquiry does not include how the appellate court might interpret the evidence).

{¶34} Most of appellant's arguments seem to challenge the credibility or believability of the evidence and of the witnesses who testified on behalf of the State of Ohio. However, in considering a challenge to the sufficiency of the evidence, we do not address the credibility of the witnesses. *Yarbrough* at ¶79. Sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶25, citing *Thompkins* at 386. In addressing a sufficiency challenge, we assume that the evidence presented is believed and determine whether it is legally sufficient to support a judgment. We do not address the evidence's effect of inducing belief, as that type of review is conducted when a defendant raises a manifest weight challenge. *Wilson* at ¶25,

citing *Thompkins* at 386-87. Appellant did not raise a manifest weight of the evidence challenge here.

{¶35} Admittedly, there are some discrepancies between the testimonies of the witnesses. For example, Brown's testimony indicates appellant had a less active role in the crimes, while Huddleston testified appellant placed the gun to Willis' head and demanded "everything," and Gore testified appellant struck Willis with the gun and also pointed his gun at Gore. Appellant, on the other hand, testified he never had a gun and thought he and Brown were only there to buy marijuana.

{¶36} However, "the mere existence of conflicting evidence cannot make the evidence insufficient as a matter of law." *State v. Murphy*, 91 Ohio St.3d 516, 543, 2001-Ohio-112. " '[W]hile the [factfinder] may take note of the inconsistencies and resolve or discount them accordingly, see [*State v.*] *DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence.' " *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶113, quoting *State v. Craig* (Mar. 23, 2000), 10th Dist. No. 99AP-739, quoting *Nivens*. Furthermore, a jury may believe or disbelieve all, part, or none of a witness' testimony. *State v. Antill* (1964), 176 Ohio St. 61, 67; *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21.

{¶37} We also reject appellant's contention that the evidence was insufficient to prove that he took affirmative steps to aid and abet Brown in the commission of the offenses.

{¶38} To prove complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the prosecution must show "the defendant supported, assisted, encouraged, cooperated

with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, syllabus; See also *State v. Jackson*, 10th Dist. No. 03AP-273, 2003-Ohio-5946, ¶32; *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶26. Intent may be inferred based upon the circumstances surrounding the crime. *Johnson* at syllabus. In addition, aiding and abetting may also be established through overt acts of assistance, such as by serving as a lookout. *State v. Trocodaro* (1973), 36 Ohio App.2d 1, 6. However, " 'the mere presence of an accused at the scene of a crime is not sufficient to prove, in and of itself, that the accused was an aider and abettor.' " *State v. McWhorter*, 10th Dist. No. 08AP-263, 2008-Ohio-6225, ¶18, quoting *State v. Widner* (1982), 69 Ohio St.2d 267, 269. Furthermore, aiding and abetting requires the accused to have taken some role in causing the offense. *McWhorter* at ¶18, citing *State v. Sims* (1983), 10 Ohio App.3d 56, 59.

{¶39} In the instant case, the evidence presented went well beyond appellant's "mere presence" at the scene. There is evidence demonstrating that appellant took some role in causing the offense. In fact, there was evidence demonstrating that appellant, at a minimum, was a "lookout" during the commission of the offenses and that he expected to be "cashed out." More importantly, however, is that there was evidence presented by three witnesses who testified that appellant had a gun during the commission of the offenses. Two of those witnesses testified that both men forcefully entered the residence and appellant pointed the gun at one or more persons while the crimes were being committed and while money, guns and/or drugs were being demanded by both offenders. Additionally, one of those witnesses testified that appellant got into an altercation with

Willis and used the weapon to strike him. This evidence, if believed, is legally sufficient to support a verdict for complicity to the offenses of aggravated burglary and aggravated robbery.

{¶40} Regarding the remaining alleged inconsistencies, we reiterate that inconsistencies do not render a conviction against the sufficiency of the evidence and also make the following additional observations and determinations: (1) former assistant county coroner Joseph Ohr, M.D., testified that he did not observe abrasions or contusions to Willis' face, yet Gore testified to a "tussle" between appellant and Gore in which Willis was struck with the gun. However, Dr. Ohr also testified it is possible, depending on the amount of force used, that a person could be struck or slapped without a mark resulting from that contact; (2) Brown's statement characterizing appellant's actions as simply "ha[ving] the gun" does not equate to testimony that Brown was the "sole criminal actor," in that Brown testified both of them entered the residence with guns and appellant stood near Willis. Additionally, Huddleston and Brown may have observed different or additional conduct or actions at different times; and (3) despite appellant's assertions regarding Gore's previous bouts with memory loss, the record indicates he testified he remembers the events that occurred on the night in question and there is no evidence to demonstrate he suffered from memory loss at that time.

{¶41} Finally, appellant has argued that because the jury found him not guilty with respect to the firearm specifications attached to the aggravated burglary and aggravated robbery offenses, any evidence suggesting that appellant aided and abetted Brown through the possession or use of a handgun should not be considered. However, we find this argument to be without merit.

{¶42} Appellant's determination that the jury's return of guilty verdicts on the aggravated burglary and aggravated robbery counts without the attendant firearm specifications conclusively constitutes a rejection of the theory that appellant possessed a handgun on the night in question is pure speculation. Given that the primary offenses were indicted and charged in the alternative, it is possible that the jury did reject the allegation that appellant possessed a handgun. However, as there is nothing in the record which indicates the jury's line of thinking here and nothing which indicates which alternative they chose, appellant's assertion is unsupported by the record.

{¶43} Furthermore, determinations made on the respective specifications do not alter findings of guilt on the underlying convictions. *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶38. See also *State v. Perryman* (1976), 49 Ohio St.2d 14, 26 (vacated in part on other grounds) ("one may be convicted of * * * the principal charge, without a specification. Thus, the conviction of [the principal charge] is not dependent upon findings for the specifications thereto."); and *State v. Crabtree*, 10th Dist. No. 09AP-1097, 2010-Ohio-3843, ¶19 ("As long as sufficient evidence supports the jury's verdict at issue, other seemingly inconsistent verdicts do not undermine the otherwise sufficient evidence.").

{¶44} For the foregoing reasons, we find there was more than sufficient evidence introduced which, if believed, proved the elements of aggravated burglary and aggravated robbery. Accordingly, we overrule appellant's first assignment of error.

{¶45} In his second assignment of error, appellant submits the trial court erred by imposing consecutive, non-minimum sentences without making the statutory findings required pursuant to R.C. 2929.14(E)(4) and 2929.14(B)(2). Specifically, appellant

argues the decision of the United States Supreme Court in *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, demonstrates that Ohio's consecutive sentencing statutes did not violate the Sixth Amendment, and therefore, severance of R.C. 2929.14(E)(4), 2929.41(A), 2929.14(B) and 2929.19(B)(2) was unnecessary. In essence, appellant argues the Supreme Court of Ohio's ruling in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, which severed those provisions of the Ohio sentencing statutes, has been effectively overruled by *Ice*. As a result, appellant argues the trial court's failure to engage in judicial factfinding prior to the imposition of consecutive sentences was error. He submits he is entitled to a new sentencing hearing, at which he should receive the presumption of minimum, concurrent sentences, unless said presumption is overcome, pursuant to the required judicial factfinding.

{¶46} Prior to *Foster*, Ohio's statutory sentencing scheme required judicial factfinding to overcome the presumption for concurrent, minimum sentences and to impose consecutive, non-minimum sentences. After the United States Supreme Court handed down decisions in *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348, and *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531, the *Foster* court held that R.C. 2929.14(E)(4) and 2929.41(A), which required the court rather than a jury to make certain findings prior to imposing consecutive sentences, were unconstitutional. The *Foster* court further held that R.C 2929.14(B) and 2929.19(B)(2) were also unconstitutional. In order to remedy this, the Supreme Court of Ohio severed these offending sections from Ohio's statutory sentencing scheme and the previously existing common law presumptions were reinstated. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983. After *Foster*, trial courts possess full discretion to impose a prison sentence

within the statutory range and are not required to make findings or give reasons for imposing maximum, consecutive, or more than the minimum sentences. *Foster* at paragraph seven of the syllabus.

{¶47} A few years later, in *Ice*, the United States Supreme Court held that a state statutory sentencing scheme in Oregon that presumed concurrent sentences but permitted consecutive sentences to be imposed where judicial factfinding justified such an imposition was constitutional. As a result of *Ice*, appellant argues Ohio's pre-*Foster* statutory sentencing scheme was in fact constitutional and should be and/or has been reinstated and therefore, judicial factfinding prior to the imposition of consecutive, non-minimum sentences is required.

{¶48} In response, the State of Ohio argues that appellant failed to raise this issue in the trial court and, as a result, appellant forfeited all but plain error. The State of Ohio further argues appellant cannot show any error, let alone plain error. We agree.

{¶49} This court has repeatedly rejected the contention that, without a determination by the Supreme Court of Ohio, *Ice* has rendered *Foster*'s severance void ab initio and resurrected the pre-*Foster* statutory sentencing scheme. "The Supreme Court of Ohio has not reconsidered *Foster* * * * and the case remains binding on this court." *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶18. See also *State v. Mickens*, 10th Dist. No. 08AP-743, 2009-Ohio-2554; *State v. Russell*, 10th Dist. No. 09AP-428, 2009-Ohio-6420; *State v. Nuh*, 10th Dist. No. 10AP-31, 2010-Ohio-4740; *State v. Stevens*, 10th Dist. No. 10AP-207, 2010-Ohio-4747; *State v. Potter*, 10th Dist. No. 09AP-580, 2010-Ohio-372; *State v. Carse*, 10th Dist. No. 09AP-932, 2010-Ohio-

4513; *State v. Busby*, 10th Dist. No. 09AP-1119, 2010-Ohio-4516; and *State v. Smith*, 10th Dist. No. 09AP-981, 2010-Ohio-5077.

{¶50} Furthermore, in *State v. Crosky*, 10th Dist. No. 09AP-57, 2009-Ohio-4216, we acknowledged that in *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the Supreme Court of Ohio refused to fully address all of the ramifications of *Ice* because neither party sought the opportunity to brief the issue prior to oral argument. Despite this, the Supreme Court of Ohio appeared to continue to adhere to the principles of *Foster* in finding the trial court had the authority to impose consecutive sentences. *Crosky* at ¶8.

{¶51} Although there is currently a case pending before the Supreme Court of Ohio on this issue,[1] that court has not yet issued a decision reconsidering *Foster* in light of the United States Supreme Court's opinion in *Ice*. Thus, *Foster* remains binding upon us.

{¶52} Accordingly, we overrule appellant's second assignment of error.

{¶53} In conclusion, we overrule appellant's first and second assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and McGRATH, JJ., concur.

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[1] *State v. Hodge*, 124 Ohio St.3d 1472, 2010-Ohio-354, 2/10/2010 Case Announcements.