[Cite as *State v. Kendricks,* 2010-Ohio-6041.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 10AP-114 (C.P.C. No. 08CR-7701)
v.	:	No. 10AP-115 (C.P.C. No. 09CR-298)
Mandrell L. Kendricks,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 9, 2010

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon,* for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair,* for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Mandrell L. Kendricks, appeals from judgments of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of felonious assault, a felony of the second degree, and two counts of aggravated robbery, felonies of the first degree, all with gun specifications. Because (1) sufficient evidence supports the jury's verdict finding defendant guilty of the aggravated robberies,

(2) the manifest weight of the evidence supports the jury's verdict finding defendant guilty both of the aggravated robberies and of felonious assault, and (3) the trial court did not err in imposing consecutive sentences without making the statutory findings contained in R.C. 2929.14(E)(4), severed under the Supreme Court of Ohio's opinion in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, we affirm the judgments of the trial court.

I. Facts and Procedural History

{¶2} On October 24, 2008, under case No. 08CR-7701, the state indicted defendant on one count of felonious assault in violation of R.C. 2903.11, with a firearm specification in accordance with R.C. 2941.145. The charge arose from an October 9, 2008 shooting incident in an alley behind 1988 Fairmont Avenue on the west side of Columbus, Ohio in an area known as the "Hilltop." As police were investigating a triple homicide-robbery at that address, the victim of the felonious assault saw defendant wearing sunglasses he thought were similar to those of his close friend, whom police found dead at the homicide scene. The victim and a group of ten others approached defendant, the men exchanged words, and the victim punched defendant in the face. Defendant went down from the punch and immediately came up shooting, hitting the victim's right hand. An officer at the homicide scene, who ran into the alley when he heard the gunshots, found seven fresh spent shell casings next to the dumpster in the alley.

{¶3} On January 15, 2009, under case No. 09CR-298, the state indicted defendant on three counts of aggravated murder, in violation of R.C. 2903.01, three counts of aggravated robbery, in violation of R.C. 2911.01, one count of aggravated burglary, in violation of R.C. 2911.11, and three counts of kidnapping, in violation of R.C.

2905.01, all carrying firearm specifications. The charges accused defendant of being involved in the triple homicide-robbery which occurred at 1988 Fairmont Avenue during the nighttime on October 8, 2008.

{¶4} Defendant admittedly was in the business of buying and selling marijuana and crack-cocaine. His many guns, kept at his girlfriend's house, were available for any of his friends to use at their discretion. On October 8, 2008, a neighbor informed a new-to-the-area woman she could walk across the alley from her apartment complex to 1988 Fairmont Avenue, where Markell Peaks and Franklin Walker lived, and purchase marijuana. She did so, and inside the neat and clean apartment she noticed a small chrome two-shooter gun with a pearl handle on the kitchen table, a pair of brown, gold trimmed sunglasses on the counter, and Walker wearing a platinum chain with a diamond cross. She gave the men $10, and they gave her about $20 worth of marijuana. She walked back through the alley to her apartment and showed the bag of marijuana to her boyfriend and one of defendant's friends, J. Bear. The quantity of marijuana Peaks and Walker sold her upset J. Bear. He called Peaks and Walker to see if he could buy some marijuana and became upset because they would not sell to him.

{¶5} A group of men that included defendant and J. Bear were standing on the balcony of the new neighbor's apartment and began planning to rob Peaks and Walker. At some point, the group moved to the house of defendant's girlfriend, where the men continued to discuss committing a robbery. One of the men in the group, Tone, asked defendant's girlfriend if he could have some of the latex gloves she used in her profession as a home health aid, and she gave him the gloves.

{¶6} In the morning on October 9, 2008, the woman who purchased the marijuana from Walker and Peaks walked back to 1988 Fairmont Avenue where she found the door open and the apartment in disarray. Police called to the scene found the bodies of Carol Welch, Peaks, and Walker in the house, dead from multiple gunshot wounds. An expert in firearms analysis concluded three guns were used at the homicide scene: two different 9mm Glock pistols and a .38 caliber pistol. The expert determined one of the 9mm Glocks used at the homicide scene also fired the seven casings found in the alley where the defendant fired the gun at the man who punched him.

{¶7} Defendant pled not guilty to all the charges in both cases. The court granted the state's motion to join the cases, and a jury trial began November 30, 2009. Defendant moved under Crim.R. 29 for acquittal at the close of the state's case-in-chief and again after all the evidence was presented. The trial court denied both motions.

{¶8} The jury returned verdicts on December 14, 2009, finding defendant guilty of felonious assault and the firearm specification alleging he had and used a firearm to facilitate the offense. The jury also found defendant guilty of the aggravated robberies of Walker and Peaks, concluding he had a firearm on his person while committing the offense but did not use the firearm to facilitate the offense. The jury found defendant not guilty of aggravated robbery of Welch and not guilty of aggravated burglary. The jury could not reach a unanimous decision on the aggravated murder or kidnapping charges.

{¶9} On January 12, 2010, the court held a sentencing hearing, sentencing defendant to (1) seven years for felonious assault with an additional three consecutive years for the gun specification, (2) nine years for the aggravated robbery of Peaks with an

additional one consecutive year for the gun specification, and (3) nine years for the aggravated robbery of Walker with an additional one consecutive year for the gun specification. The court ordered all of the sentences in both cases to be served consecutively.

II. Assignments of Error

{¶10} Defendant appeals, assigning the following errors:

> First Assignment of Error: The evidence was insufficient as a matter of law to sustain appellant's convictions for the aggravated robberies of Franklin Walker and Markell Peak[]s.
>
> Second Assignment of Error: The trial court erred in overruling appellant's motions for acquittal pursuant to Criminal Rule 29.
>
> Third Assignment of Error: Appellant's convictions for the aggravated robberies of Franklin Walker and Markell Peak[]s were against the manifest weight of the evidence.
>
> Fourth Assignment of Error: Appellant's conviction for felonious assault was against the manifest weight of the evidence.
>
> Fifth Assignment of Error: The trial court erred by imposing consecutive sentences for two counts of aggravated robbery and one count of felonious assault without making statutorily required findings in accordance with R.C. 2929.14(E)(4).

III. First and Second Assignments of Error – Sufficiency of the Evidence

{¶11} Defendant's first and second assignments of error contend not only that the state failed to present sufficient evidence to support defendant's aggravated robbery convictions but that the trial court erred in denying defendant's Crim.R. 29 motions for acquittal.

{¶12} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶6; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶13} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶14} To prove aggravated robbery, the state had the burden to establish, beyond a reasonable doubt, that defendant, in attempting to commit or committing a theft offense, had a deadly weapon on or about his person or under his control and either used the weapon or inflicted, or attempted to inflict, serious physical harm, or both, upon Walker and Peaks. R.C. 2911.01(A)(1) and (3). The "theft offense" portion of aggravated robbery requires the state to prove beyond a reasonable doubt that defendant, with the purpose to

deprive the owner of property, knowingly obtained control over the property without the consent of the owner. R.C. 2913.02.

{¶15} The trial court instructed the jury that "[a]n indictment charging a defendant as a principal offender also charges the defendant with aiding and abetting that crime." (Jury Instructions, page 5.) Consistent with the court's instruction, Ohio's complicity statute, R.C. 2923.03, provides that if one is guilty of complicity to commit an offense, the state may prosecute and punish the individual as if he or she were a principal offender and may state the charge in terms of the principal offense. R.C. 2923.03(F). The jury's verdict here does not indicate whether it found defendant guilty of aggravated robbery as a principal offender or of complicity to commit aggravated robbery. Because the evidence arguably is insufficient to prove defendant acted as a principal offender, we conduct a sufficiency analysis under the complicity charge.

{¶16} R.C. 2923.03(A) states that "[n]o person, acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." "To support a conviction for complicity by aiding and abetting * * * the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime." *State v. Johnson* (2001), 93 Ohio St.3d 240, syllabus. An aider or abettor must also "share[] the criminal intent of the principal," but "[s]uch intent may be inferred from the circumstances surrounding the crime" such as "presence, companionship and conduct before and after the offense is committed." Id.; *State v. Pruett* (1971), 28 Ohio App.2d 29, 34.

{¶17} Aggravated robbery under R.C. 2911.01(A)(1), addressing the offender's having a deadly weapon on or about their person while committing a theft offense, is a strict liability offense. *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225. Aggravated robbery under R.C. 2911.01(A)(3), involving an offender who inflicts or attempts to inflict serious physical harm on another while committing a theft offense, is also a strict liability offense. *State v. Horner,* 126 Ohio St.3d 466, 2010-Ohio-3830, ¶53. Aggravated robbery incorporates the "knowingly" standard only in relation to the theft aspect of the offense. Id. at ¶49. A defendant acts knowingly when he is "aware that his conduct will probably cause a certain result or will probably be of a certain nature." A "person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶18} Someone undisputedly inflicted serious physical harm upon Walker and Peaks, as they died from multiple gunshot wounds. Evidence also indicated someone deprived Walker and Peaks of their property, as one of the police officers testified "neither of the two males" from the homicide scene "had a wallet or any identification on them or in the area." (Tr. 128.) Shortly after seeing J. Bear walk up the alley behind 1988 Fairmont Avenue carrying a TV during the early morning hours on October 9, 2008, defendant walked to the apartment of one of the neighborhood women and saw his friends in the bathroom dividing marijuana and crack-cocaine among themselves. As a result of that process, defendant received a pearl-handled derringer from his friends who told defendant they "had just hit a lick." (Tr. 595, 598.) Given the appearance of the homicide scene and the presence of the pearl-handled gun, previously seen at the apartment of

Marshall and Peaks, sufficient evidence allowed the jury to conclude defendant's friends deprived Walker and Peaks of their property without either victim's consent.

{¶19} In terms of defendant's aiding and abetting the robbery, the state presented multi-faceted evidence of defendant's complicity. One aspect of the evidence revealed defendant's involvement in planning the robbery. The new neighbor, the state's key witness, testified that after she returned from purchasing marijuana at 1988 Fairmont Avenue on October 8, she heard a group, including defendant and his friends, outside on the balcony planning to rob Walker's and Peaks' residence. She heard J. Bear ask her boyfriend if he wanted to be in on the robbery; when he said he did not, defendant "stated we don't need him anyway." (Tr. 412.) Her boyfriend confirmed her testimony by testifying that while J. Bear was on the balcony, J. Bear stated he was going to go to Walker's and Peaks' apartment and "basically rob" them; defendant and J. Bear "were like making plans." (Tr. 474, 475.) Further supporting the state's evidence, defendant's girlfriend testified that when she arrived home on the evening of October 8, defendant and his friends all were in her house. As she was lying down in her room, she overheard one of the men talking about robbing somebody that night.

{¶20} The state thus presented both direct and circumstantial evidence defendant aided his friends by supporting and advising them in their plan to engage in conduct which probably would result in depriving Walker and Peaks of their property without their consent. Accordingly, the evidence, if believed, allowed the jury to conclude defendant participated in planning the robbery.

{¶21} In addition, the state presented sufficient evidence to demonstrate defendant assisted the others when he provided them with the guns to commit the robbery. Defendant admitted he owned many guns, he kept them in a variety of places, and any of his friends could use his guns at their discretion. The mother of defendant's children purchased a 9mm Glock pistol in her name on September 1, 2008, and defendant purchased a 9mm Glock pistol in his name on September 17, 2008. Defendant took both guns with him when he moved out of her apartment and generally kept about six or seven guns, plus the two 9mm Glocks, at his girlfriend's house where planning the robbery continued.

{¶22} The state's key witness and her boyfriend both testified that when defendant and his friends were out on the balcony on October 8 discussing the robbery, they saw defendant with two 9mm guns and a .38 revolver. A firearms expert witness for the state was able to identify, from spent casings and bullet fragments found at the scene of the robberies, that the assailants used two 9mm Glock pistols and a .38 caliber pistol in the homicide-robbery. (Tr. 252, 262.)

{¶23} When evidence is construed in the light most favorable to the prosecution, sufficient circumstantial evidence allowed the jury to conclude defendant assisted the others by providing them with the guns to commit the robbery and to deprive Walker and Peaks of their property, to inflict serious physical harm on them, or both.

{¶24} Finally, the state presented evidence that, not only did defendant's involvement with his friends as they planned the robbery demonstrate he shared in their criminal intent, his conduct after the robberies reflected his participation in his friends'

criminal activities. During the day of October 9, four individuals saw defendant wearing sunglasses, and the state's key witness testified the sunglasses were those she saw on the counter at Walker's and Peaks' residence the previous day. She further testified she observed J. Bear wearing the platinum chain with the diamond cross she saw Walker wearing on October 8. She and her boyfriend also noted defendant displayed the chrome two-shooter with the pearl handle she saw not only at Walker's and Peaks' residence but when defendant threatened to shoot a neighborhood woman if she "ran her mouth" to the police. (Tr. 428, 481.) The evidence that defendant wore the sunglasses and carried the gun that belonged to Walker or Peaks, if believed, allowed the jury to conclude defendant shared in his friends' criminal intent to knowingly deprive Walker and Peaks of their property while having a gun on their person, using the gun to inflict serious physical harm, or both. R.C. 2911.01(A).

{¶25} Finally, the mother of defendant's children testified that, after the robberies and the felonious assault, she received a call from defendant asking her to report as stolen the 9mm Glock purchased in her name; she did so. Defendant similarly called police and reported the gun purchased in his name was stolen. Defendant also called his girlfriend on October 10 and asked her to say he stayed at her house the previous night. She testified he did not and instead he was asking her to lie for him. Two or three days after the events at issue, defendant left the state and went to West Virginia. Defendant's actions in attempting to create an alibi, attempting to disassociate himself from the guns used in the crimes, and then fleeing the state also are factors the jury could consider as evidence of defendant's participation in the criminal conduct of his friends.

{¶26} Construing the evidence in the light most favorable to the prosecution, the state presented sufficient evidence allowing a rational trier of fact to find, beyond a reasonable doubt, that defendant assisted and advised his friends in their efforts to forcibly deprive Walker and Peaks of their property without their consent when he counseled his friends about who should be part of the robbery and provided them with firearms to commit the robberies. Accordingly, the trial court did not err in denying defendant's Crim.R. 29(A) motions for acquittal. Defendant's first and second assignments of error are overruled.

IV. Third and Fourth Assignments of Error - Manifest Weight of the Evidence

{¶27} Defendant's third assignment of error contends his aggravated robbery convictions are against the manifest weight of the evidence; his fourth assignment of error contends his felonious assault conviction is against the manifest weight of the evidence.

{¶28} Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether the jury "clearly lost its way and created such a manifest miscarriage

of justice that the conviction must be reversed and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

A. Third Assignment of Error – Aggravated Robberies

{¶29} In response to the state's evidence, set forth above, defendant stated he never went to 1988 Fairmont Avenue, and he provided an alibi, corroborated by his mother, that he was asleep on his girlfriend's couch when the robberies took place. Defendant, however, did not need to be physically present during the robberies of Walker and Peaks for the jury to convict him of complicity to commit aggravated robbery. Rather, the jury had only to find that he aided or abetted the others in committing the offense. Defendant's testimony thus did not undermine the state's testimony allowing the jury to conclude defendant aided and abetted the robberies.

{¶30} Although acknowledging he overheard and gave his attention to the conversation on the balcony directed to planning the robbery, defendant maintained at trial he was not a part of that conversation. Defendant further denied he said that "we don't need him" in reference to whether the boyfriend of the state's key witness would participate in the robbery. Instead, defendant explained that some animosity existed between him and her boyfriend, so that when the boyfriend tried to hand defendant some

marijuana, defendant said, "I don't mess with him." (Tr. 622.) While defendant's testimony contradicted the state's evidence, the jury was charged with the responsibility of ascertaining the credibility of the witnesses, and we cannot say it lost its way in this instance.

{¶31} Defendant similarly offered explanations for evidence the state presented regarding the various guns and the sunglasses implicated in the activities of October 8 and 9. For example, defendant admitted the robbers used his guns, since the firearms expert testified one of the guns used at the homicide scene was the same gun fired during the felonious assault the next day. Defendant, however, stated he never intentionally provided the guns to his friends to commit the robberies, though he also acknowledged his guns were in his girlfriend's house "for whoever to take and whoever to use." (Tr. 635.) Defendant further claimed he reported his gun as stolen, and asked the mother of his children to do the same, only because J. Bear told him his gun was involved in the homicide-robbery the previous night. Defendant also explained to the jury that, even though he did not participate in the robbery, he obtained the chrome derringer with the pearl handle because he had bullets for the gun. Although he also stated he did not remember wearing any sunglasses on October 9, he later clarified that, even if he had the sunglasses, they were not the ones the state's key witness saw at 1988 Fairmont Avenue the previous day. Again, defendant's testimony, at best, presented credibility issues for the jury's resolution. Defendant does not explain how the jury lost its way in doing so.

{¶32} In the end, defendant primarily argued he was merely present while the others were planning the robbery. See *State v. Widner,* 69 Ohio St.2d 267, 269 (stating

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. Starr* (1970), 24 Ohio App.2d 56 (noting that for an individual to be convicted as an aider or abettor, they need some connection with the transaction before it occurs other than seeing the crime committed). Charged with the responsibility to resolve the contradictory testimony, the jury found the state's key witness and her boyfriend to be more credible than defendant, and, as noted in the analysis of the sufficiency of the evidence, the evidence the state presented provided the jury a basis to conclude defendant was more than merely present during the conversation about robbing Walker and Peaks. Accordingly, we cannot say the jury clearly lost its way when it concluded that defendant advised and assisted his friends in committing the aggravated robberies of Walker and Peaks. Defendant's third assignment of error is overruled.

B. Fourth Assignment of Error – Felonious Assault

{¶33} Defendant does not challenge that he knowingly caused serious physical harm to the victim by use of a deadly weapon, a gun, in violation of R.C. 2903.11(A)(2). Rather, defendant asserts his felonious assault conviction is against the manifest weight of the evidence because he proved all the elements of self-defense by a preponderance of the evidence.

{¶34} To establish self-defense, defendant had to prove by a preponderance of the evidence (1) 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 his only means of escape from such danger was to use such force, and (3) he must not have

violated any duty to retreat or avoid the danger. *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus; R.C. 2901.05(A). A defendant may only use as much force as is reasonably necessary to repel the attack. *State v. Harrison*, 10th Dist. No. 06AP-827, 2007-Ohio-2872, ¶25, citing *State v. Jackson* (1986), 22 Ohio St.3d 281. Because the elements of self-defense are cumulative, "[i]f the defendant fails to prove *any one* of these elements * * * he has failed to demonstrate that he acted in self-defense." (Emphasis sic.) *Jackson* at 284. Here, the jury could have concluded defendant either violated a duty to retreat or otherwise avoid the danger or exceeded the force necessary to repel the attack.

1. Duty to retreat or avoid the danger

{¶35} Under the third element of the *Robbins* test, a defendant is not privileged to use deadly force if he violated a duty to retreat or avoid the danger. While exceptions to the duty to retreat apply if the defendant is in his home or business when attacked, he has a duty to retreat before using deadly force when he simply is in a place where he has a right to be. *Jackson* at 283-84, citing *State v. Peacock* (1883), 40 Ohio St. 333, 334; *Graham v. State* (1918), 98 Ohio St. 77, 79. Here, the altercation took place in the alley in front of the apartment building where the state's key witness lived, so defendant had a duty to retreat or avoid the danger, if possible. The jury was presented conflicting evidence as to that element of self-defense, as a number of witnesses testified about the incident.

{¶36} One of the witnesses who lived in the apartment building testified that when the altercation began, he saw defendant walking up the alley and appear by the dumpster

as if he were coming towards the apartments. The victim of the felonious assault stated that after he and his friends "came down from the apartment complex, [defendant and his friends] was [sic] walking up" towards the apartment complex. (Tr. 190.) The state's key witness testified she saw defendant and J. Bear come "from the back apartments over around the dumpster" when the other men came over and defendant was hit. (Tr. 442.)

{¶37} Defendant, in contrast, stated he had just walked down the steps of the apartment complex and was standing at the platform at the bottom of the steps when the altercation occurred there, not by the dumpster. With that backdrop, defendant explained he could not go back up the stairs after the victim of the felonious assault hit him, because other people were coming down and the victim and his group had backed defendant "into a corner." (Tr. 577-78, 646.) Other testimony, however, undermined defendant's suggested scenario. The victim and one witness testified defendant, after being hit, came up shooting a 9mm semi-automatic black gun; defendant claimed he was shooting the pearl-handled chrome two-shooter. Police found seven shell casings from a 9mm Glock pistol immediately after the altercation near the dumpster, not near the bottom of the steps.

{¶38} In resolving the conflicting testimony, the jury believed the other witnesses, not defendant, and thus could conclude defendant was in the alley near the dumpster and had an opportunity to retreat or avoid the danger. Other testimony supports such a conclusion, indicating that once the victim punched defendant, defendant immediately fired his gun and then ran down the street. Both pieces of evidence, if believed, combine to suggest defendant did not attempt to retreat or otherwise avoid the danger. Rather, he

immediately fired despite the opportunity to run which he eventually took. Given that evidence, the jury reasonably could conclude defendant violated a duty to retreat or avoid the danger.

2. Defendant exceeded the amount of force necessary

{¶39} The jury also could have determined defendant used more force than was reasonably necessary. "One may use such force as the circumstances require in order to defend against danger which one has good reason to apprehend." *State v. Fox* (1987), 36 Ohio App.3d 78, 79, citing *State v. McLeod* (1948), 82 Ohio App. 155, 157. Whether the force used "was excessive or not is a question of fact for the trier of facts." *McLeod* at 157.

{¶40} Here, the testimony indicated ten men surrounded defendant, one of them punched defendant, and defendant immediately came up shooting. The witnesses saw no one shooting except defendant. A Columbus police officer near the scene testified, based on his training and experience, that only one gun was fired. Similarly, the victim stated neither he nor anyone in his group had a gun and no one other than defendant fired any shots that afternoon. Defendant, in contrast, stated he was certain he saw someone with a gun in the group that approached him so that, after the victim punched him, he heard gunshots coming from another gun, he pulled the gun he had, and shot it to protect his life.

{¶41} Although the law does not quantify specifically the amount of force a defendant is entitled to use in self-defense, the jury in weighing the credibility of the various witnesses reasonably could conclude defendant was the only one firing a gun and

in effect escalated a fist fight into a shoot out. As a result, even if defendant were privileged to act in self-defense, the jury could decide he exceeded the force he was entitled to use. Although the victim approached defendant with a group of ten men, evidence indicated defendant's friends were also nearby, plausibly eliminating the need to use deadly force.

{¶42} The evidence presented thus allowed the jury to find defendant either violated a duty to retreat or otherwise avoid the danger or exceeded the amount of force he was privileged to use to defend himself, or both. Accordingly, defendant's fourth assignment of error is is overruled.

V. Fifth Assignment of Error – Consecutive sentences

{¶43} Defendant's fifth assignment of error claims the trial court erred in imposing consecutive sentences without making the statutory findings found in R.C. 2929.14(E)(4). The judge did not state any findings or supporting reasons for imposing consecutive sentences.

{¶44} As enacted pursuant to S.B. 2 in 1996, R.C. 2929.14(E) directed trial courts to make specified findings of fact before imposing consecutive sentences. Due to United States Supreme Court decisions which called into question the constitutionality of provisions like R.C. 2929.14(E), the Supreme Court of Ohio considered the requirements of the statute in *Foster*, supra. See *Blakely v. Washington* (2004), 542 U.S. 296, 303, 124 S.Ct. 2531, 2537 (determining judicial fact finding which not only increased a defendant's sentence beyond the statutory maximum for the standard range of sentences but was not based on "the facts reflected in the jury verdict or admitted by the defendant" violated the

defendant's Sixth Amendment right to trial by jury); see also *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348.

{¶45} *Foster* found R.C. 2929.14(E)(4) unconstitutional. Id. at paragraph three of the syllabus. It concluded R.C. 2929.14(E) violated the principles announced in *Blakely* because "the total punishment increase[d] through consecutive sentences only after judicial findings beyond those determined by a jury or stipulated to by a defendant." *Foster* at ¶67. The Supreme Court of Ohio accordingly severed R.C. 2929.14(E) and 2929.41(A). Id. at paragraph four of the syllabus. After *Foster*, Ohio trial courts could impose consecutive sentences without making any findings of fact. *State v. Houston*, 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904.

{¶46} Defendant argues the United States Supreme Court's recent decision in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711, nullifies the Supreme Court of Ohio's reasoning in *Foster*. In *Ice* the United States Supreme Court held, "in light of historical practice and the authority of the States over administration of their criminal justice systems, that the Sixth Amendment does not exclude" a state law requiring a judge to make certain factual findings before imposing consecutive instead of concurrent sentences. Id. at 714-15. Defendant argues that because the statute at issue in *Ice* was functionally the same as R.C. 2929.14(E)(4), and because the language in R.C. 2929.14(E)(4) severed by *Foster* has continued to appear in versions of the statute reenacted since the *Ice* decision, *Ice* is controlling as to the constitutionality of the Ohio

provisions. Accordingly, defendant argues we should remand for a new sentencing hearing which complies with the requirements under severed R.C. 2929.14(E)(4).

{¶47} Although this court acknowledged *Ice*, we concluded that because the "Supreme Court of Ohio has not reconsidered *Foster* * * * the case remains binding on this court." *State v. Franklin,* 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8. Indeed, this court recognized on several occasions we are bound to follow *Foster* until the Supreme Court of Ohio directs otherwise. *State v. Mickens,* 10th Dist. No. 08AP-743, 2009-Ohio-2554, ¶33; *State v. Russell,* 10th Dist. No. 09AP-428, 2009-Ohio-6420, ¶16; *State v. Crosky,* 10th Dist. No. 09AP-57, 2009-Ohio-4216, ¶8; *State v. Potter,* 10th Dist. No. 09AP-580, 2010-Ohio-372, ¶8. Although defendant is correct in noting the Supreme Court of Ohio accepted *State v. Hodge*, 125 Ohio St.3d 1457, 2010-Ohio-2800, to review whether trial courts now must make the findings of fact set forth in R.C. 2929.14(E)(4), the court has not yet issued a decision and *Foster* remains binding on us. Accordingly, defendant's fifth assignment of error is overruled.

{¶48} Having overruled all of defendant's assignments of error, we affirm the judgments of the trial court.

Judgments affirmed.

TYACK, P.J., & SADLER, J., concur.

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