

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2009-10-020
 :
 - vs - : OPINION
 : 8/23/2010
 :
 ROGER D. MCGRAW, JR., :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09CRI00145

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BRESSLER, J.

{¶1} Defendant-appellant, Roger D. McGraw, appeals his conviction and sentence in the Fayette County Court of Common Pleas for attempted murder, felonious assault, aggravated burglary, theft of a motor vehicle, violating a protection order, tampering with evidence, and domestic violence. We affirm.

{¶2} During the early morning hours of May 16, 2009, appellant's ex-wife, Linda McGraw, and her companion, Heath Allen Gordon, were found "covered in blood," lying outside McGraw's home. McGraw and Gordon testified they awoke as they were being

stabbed repeatedly by appellant. They saw him standing above their bed. McGraw testified that as she crawled toward the bathroom, appellant turned on the light and watched as she "kept falling in [her] blood." McGraw testified that after she locked herself in the bathroom, she saw appellant standing in her driveway, next to her vehicle, which was later found parked several blocks away, containing multiple blood smears.

{¶13} In July 2009, a Fayette County Grand Jury returned an 11-count indictment against appellant. On October 16, 2009, appellant was found guilty on nine counts, including two counts of attempted murder, two counts of felonious assault, and one count each of aggravated burglary, theft of a motor vehicle, violation of a protection order, tampering with evidence, and domestic violence. Appellant now appeals his conviction and sentence, raising two assignments of error.

{¶14} Assignment of Error No. 1:

{¶15} "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN MR. MCGRAW'S CONVICTIONS FOR ATTEMPTED MURDER AND THEFT OF A MOTOR VEHICLE."

{¶16} In his first assignment of error, appellant argues that the state failed to produce evidence sufficient to prove (1) he acted with a specific intention to cause the death of Gordon and McGraw, and (2) he intended to permanently deprive McGraw of her vehicle. We will address each argument in turn.

{¶17} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. See *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence underlying a criminal conviction, the appellate court examines the evidence in

order to determine whether such evidence, if believed, would support a conviction. *Carroll* at ¶117. In reviewing a record for sufficiency, "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." *Id.*

{¶8} While the test for sufficiency requires a determination as to whether the state has met its burden of production at trial, a manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *Id.*, citing *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶34. In determining whether a conviction is against the manifest weight of the evidence, the appellate court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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. *Carroll*, 2007-Ohio-7075 at ¶118. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide. *Id.*; *State v. Ligon*, Clermont App. No. CA2009-09-056, 2010-Ohio-2054, ¶23.

{¶9} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Carroll* at ¶119, quoting *Wilson* at ¶35.

Attempted Murder

{¶10} Appellant first argues that because he did not attack the victims in areas of

the body "where death could have been assured," the state failed to prove he had the specific intention to cause their deaths. To support his claim, appellant argues that he stabbed Gordon only once, and stabbed McGraw solely in her arms and legs, which are "bodily areas that do not hold vital organs."

{¶11} As previously stated, appellant was convicted of attempted murder in violation of R.C. 2923.02(A), which 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 or result in the offense." A person acts purposely when it is his or her specific intention to cause a certain result. See R.C. 2901.22(A). Appellant disputes that the state proved, beyond a reasonable doubt that he "purposely engaged in conduct which, if successful, would have caused [the victims'] death."

{¶12} Appellant correctly notes the state presented no direct evidence that he intended to kill Gordon or McGraw when he attacked them. Purpose or intent, however, may be established by circumstantial evidence. See *State v. Gaefe*, Clinton App. No. CA2001-11-043, 2002-Ohio-4995, ¶14; *State v. Locklear*, Franklin App. No. 06AP-259, 2006-Ohio-5949, ¶15. A jury may infer an intent to kill where (1) the natural and probable consequence of a defendant's act is to produce death, and (2) all of the surrounding circumstances allow the conclusion that a defendant had an intent to kill. *Locklear* at ¶15, citing *State v. Robinson* (1954), 161 Ohio St. 213, 218-219.

{¶13} Regarding Gordon's injuries, several physicians testified that Gordon suffered a four-inch wound to his chest, placing him in "critical" condition, causing "tachycardia," "significant bleeding" and "hemorrhagic shock," forcing Gordon to remain hospitalized for eleven days. Testimony also revealed that Gordon's wound penetrated his chest cavity, causing one of his lungs to collapse and fracturing several ribs. In

addition, a telephone conversation recorded during appellant's incarceration revealed that appellant told a friend "I did him in. I did him bad." Further, appellant's argument does not take into account that Gordon's single stab wound was located on his torso, an area clearly containing vital organs. See *Locklear* at ¶16 ("Defendant's inflicting a wound directed at [the victim's] vital organs can indicate intent to kill").

{¶14} Regarding the extent of McGraw's injuries, McGraw testified that she suffered nine stab wounds: four to her right arm and five wounds to her right thigh. As a result of these injuries, McGraw received four blood transfusions at the hospital and further testified that she now has "irreversible nerve damage" in her right leg and lacks strength in her right arm. Further evidence revealed that while McGraw's injuries were not "life threatening," paramedics found her in a "state of shock," unable to speak, and "bleeding heavily." McGraw's attending physicians also testified that she had "actively bleeding" lacerations that required numbing medication and sutures.

{¶15} After reviewing the entire record, we cannot say the jury clearly lost its way and created such a manifest miscarriage of justice by finding that appellant acted with purpose to cause both victims' deaths. We find that from the evidence presented, the jury could reasonably have concluded that the person who inflicted such wounds had a specific intent to kill the victims. Accordingly, we find that appellant's convictions for attempted murder are not against the manifest weight of the evidence.

Theft of a Motor Vehicle

{¶16} Appellant next argues that the state failed to prove he intended to *permanently* deprive McGraw of her vehicle when it was "quickly found and only a short, few blocks from Ms. McGraw's residence."

{¶17} Appellant was convicted of one count of theft of a motor vehicle in violation of R.C. 2913.02(A)(1), which provides: "(A) No person, with purpose to deprive the

owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways: (1) Without the consent of the owner or person authorized to give consent[.] Pursuant to R.C. 2913.01(C), "'Deprive' means to do any of the following: (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration; (2) Dispose of property so as to make it unlikely that the owner will recover it; (3) Accept, use or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration."

{¶18} At trial, the state presented testimony of several witnesses, including McGraw, who testified that after she was stabbed, she observed appellant standing in her driveway next to her purple Plymouth Neon. Additionally, Lorie Brown, who lived four houses down from McGraw, testified that minutes before the police arrived at McGraw's residence, she observed a purple car "back out of the driveway with no headlights or anything, and he was speeding down the road and he didn't even stop at the stop sign[.]" Officer Matt Pfiefer of the City of Washington Court House Police Station testified that later the same day, he discovered McGraw's vehicle parked in a dead-end alley with blood smeared throughout its interior. Additionally, Donovan Knapp, appellant's friend, testified that appellant "said he took a car * * * and left it."

{¶19} We find that based upon the evidence presented, the jury could reasonably have concluded that appellant acted with the purpose to deprive McGraw of her vehicle without her consent when he stabbed her nine times, left her "covered in blood," and abandoned the vehicle in a deserted, dead-end alley. In light of these facts, the jury could reasonably have concluded that appellant disposed of McGraw's vehicle

so as to make it unlikely that a stabbing victim, left for dead, would recover it. Accordingly, we find that appellant's conviction for theft of a motor vehicle is not against the manifest weight of the evidence.

{¶20} Additionally, our finding that appellant's convictions for attempted murder and theft of a motor vehicle were supported by the manifest weight of the evidence is dispositive of the issue of sufficiency. See *Carroll*, 2007-Ohio-7075 at ¶119.

{¶21} Accordingly, appellant's first assignment of error is overruled.

{¶22} Assignment of Error No. 2:

{¶23} "THE COURT ERRED IN SENTENCING MR. MCGRAW CONTRARY TO LAW BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE FINDINGS SET FORTH IN R.C. 2929.14(E)(4)."

{¶24} In his second assignment of error, appellant argues that the trial court erred in imposing consecutive sentences without first making certain findings on the record.

{¶25} Appellant bases his argument on the recent United States Supreme Court ruling in *Oregon v. Ice* (2009), ___ U.S. ___, 129 S.Ct. 711. Appellant argues that the holding in *Ice* invalidates a portion of the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster*, the supreme court held that R.C. 2929.14(E)(4) and 2929.41(A), which required judicial fact-finding before imposition of consecutive sentences, are unconstitutional under *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531 and *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348. As a result, the supreme court severed these provisions from Ohio's sentencing framework and held that trial courts "have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences."

Foster at ¶100. See, also, *State v. Lewis*, Warren App. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684.

{¶26} As we have already held, the "United States Supreme Court did not expressly overrule *Foster* in the *Ice* decision. Unless or until *Foster* is reversed or overruled, we are required to follow the law and decisions of the Ohio Supreme Court." *Lewis* at ¶10. While the Ohio Supreme Court has acknowledged *Ice*, it has not yet addressed the application of *Ice* to *Foster*. See *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478; *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147. Thus, we see no reason to revisit these issues and decline appellant's invitation to reconsider our position at this time. *Lewis*, 2009-Ohio-4684; *State v. Montgomery*, Clermont App. No. CA2009-01-004, 2009-Ohio-5073, ¶9.

{¶27} Accordingly, appellant's second assignment of error is overruled.

{¶28} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.