IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-170709 C-170710
Plaintiff-Appellee,	:	TRIAL NO. B-1502712 B-16000986
vs.	:	
DERIUS POWELL,	:	*JUDGMENT ENTRY.*
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Derius Powell was charged with aggravated robbery for three separate robberies of different stores. Police believed that he committed the robberies with his cousin Billy Freeman and a man known as G. The first robbery occurred at the Reading Food Mart. At trial, the clerk testified that two individuals entered the store—one taller and one shorter. The taller man had a black gun with a green laser sight, and pointed the gun at him. The other person went to the register and removed cash. The second robbery occurred at a Cash America. At trial, the clerk testified that an individual indicated he wanted to be buzzed in. When the shorter man was allowed in, a taller man entered with him. The tall man again had a black gun with a green laser sight. The tall man pointed the gun at the clerk and emptied the register. The third robbery occurred at a United Dairy Farmers. At trial, the clerk testified that one tall and one shorter man entered the store. In this case, the shorter man had the black gun with the green laser site. The taller man approached her and demanded money. The shorter man pointed the gun in her face when she was not moving fast enough, and asked her if she wanted to die.

During the course of the investigation, police reviewed the security video from the different stores. They discovered that the same SUV was used in each instance.

Police were able to trace the vehicle to Freeman. When Freeman was arrested, police also recovered the black handgun. Freeman gave a statement to police and implicated Powell. During his interrogation by police, Powell initially claimed he was not involved, but later admitted that he had been present at each robbery. He then claimed that he had felt compelled to participate in the robberies because he was afraid of G. Powell was identified by the Cash America clerk at trial because he had entered the store with his face uncovered. Powell matched the general description of the shorter man who committed the other two robberies. The state also presented photographs of Powell and Freeman together with the SUV used in the robberies and a photograph of Powell posing with an assault rifle.

Powell was convicted of three counts of aggravated robbery, each with a three-year gun specification. The trial court sentenced him to the maximum prison term on each count and ordered Powell to serve the sentences consecutively. In eight assignments of error, Powell now appeals. For ease of analysis, we will address some of the assignments together.

In his first assignment of error, Powell claims that his convictions were based on insufficient evidence. In his fourth assignment of error, he claims that his convictions were contrary to the manifest weight of the evidence. In a challenge to the sufficiency of the evidence, the question is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. When considering a challenge to the weight of the evidence, the court must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the court clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

Powell claims that there was insufficient evidence to tie him to the crimes, and that he was only a witness to one of the robberies. But, in his statement to police, he admitted being involved in each of the three robberies—though he had claimed to have done so involuntarily at that time. At trial, he testified that he had not participated in the robberies, but was able to give the details to police when he made his statement because he had seen news coverage of the events. But the details of the robberies had not been released to the media. He was also seen in a photograph posing with Freeman and the vehicle used in the offenses. Additionally, when police came to his home to arrest him, Powell's sister yelled out that "someone told!" There was sufficient evidence to support the jury's determination that Powell was the individual who committed the three aggravated robberies, and that determination was not contrary to the manifest weight of the evidence. We overrule Powell's first and fourth assignments of error.

In his second assignment of error, Powell claims that the trial court abused its discretion when it admitted two photographs of Powell with Freeman flashing gang signs and holding guns. The admission of evidence is within the sound discretion of the trial court. *See State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 61. We will not disturb a trial court's ruling on evidentiary issues on appeal absent an abuse of discretion and proof of material prejudice. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 181. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. All relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *McKelton* at ¶ 144, citing Evid.R. 402 and 403(A).

As the state points out, the picture was relevant to tying him and Freeman together. But there was one photograph of Powell alone holding an assault rifle that

was admitted by the trial court. This photograph had little if any probative value, and the prejudicial effect of such an image was significant. Nonetheless, we find that the error was harmless because the evidence of Powell's guilt was overwhelming. *See State v. Buck*, 2017-Ohio-8242, 100 N.E.3d 118, ¶ 113 (1st. Dist.) (given the overwhelming evidence of guilt, we cannot say that but for the admission of the photograph the outcome of the trial would have been different). The second assignment of error is overruled.

In his third assignment of error, Powell claims that the trial court abused its discretion when it allowed a hearsay statement into evidence. During Powell's statement to police, the detective was trying to get him to admit his involvement when he reminded Powell that, when he had been arrested, his sister had yelled that "somebody told!" Powell claims that this statement was hearsay and that its admission was improper. Evid.R. 801(C) defines "hearsay" as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." But a statement is not hearsay when offered for a purpose other than to prove the truth of the matter asserted. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 118, citing *State v. Davis*, 62 Ohio St.3d 326, 343, 581 N.E.2d 1362 (1991).

In this case, the statement "someone told" was not offered for the truth of the matter asserted—i.e., that someone had actually implicated Powell. The statement was admitted to show that Powell had done something about which "someone" could tell, and was being presented to Powell in his interrogation to shake him from his claim that he had not been involved in the robberies. Because the statement was not being offered for its truth, it does not meet the definition of hearsay. We overrule Powell's third assignment of error.

In his fifth assignment of error, Powell claims that the trial court improperly admitted his statement into evidence because he claimed that he had been "high on PCP" when he spoke to the officers. But the officer testified that Powell seemed to

understand what was happening, and Powell did not tell the officer that he was high. Powell had been interviewed for approximately three hours. His answers were appropriate, he did not exhibit unusual behavior. Further, Powell had sufficient presence of mind to initially deny all involvement in the matter, and then was able to adjust his account as he learned what information law enforcement had against him. Other than his trial testimony, there is nothing in the record to support his claim, and the trial court specifically found that he had made his statement and waiver knowingly and intelligently. The record supports that conclusion. We overrule Powell's fifth assignment of error.

In his sixth assignment of error, Powell claims that the trial court improperly ordered him to serve his sentences consecutively. Under R.C. 2929.14(C)(4), a trial court may impose consecutive sentences if the court finds that (1) "the consecutive sentence is necessary to protect the public from future crime or to punish the offender," (2) the "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public," and (3) one or more of the conditions outlined in R.C. 2929.14(C)(4)(a) through (c) apply. If a trial court imposes consecutive sentences, the trial court must "make the findings at the defendant's sentencing hearing and incorporate its findings in the sentencing entry," but is "not required to state its reasons for imposing consecutive sentences." *State v. Sergent*, 148 Ohio St.3d 94, 2016-Ohio-2696, 69 N.E.3d 627, ¶ 41; *State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 37. At sentencing, the trial court explicitly made all the necessary findings under R.C. 2929.14(C)(4) and incorporated its findings in the sentencing entry. In addition to finding that consecutive sentences were necessary to protect the public from future crimes, were necessary to punish the offender, and were not disproportionate to the seriousness of the conduct and the danger he posed to the public, the trial court also noted that Powell was on community control at the time of the offenses, and that the harm caused by the offenses was "so great or unusual that no single prison term for any of

these offenses committed as part of one or more courses of conduct would adequately reflect the seriousness of [the] conduct." *See* R.C. 2929.14(C)(4)(a) and (b). We overrule Powell's sixth assignment of error.

In his seventh assignment of error, he claims that the trial court improperly imposed the maximum sentence for each count. The trial court must consider the purposes and principles of sentencing before imposing sentence, in accordance with the sentencing statutes, including R.C. 2929.11 and 2929.12. *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000). While a trial court is required to consider the purposes and principles of sentencing, it need not make specific findings. *See State v. Hendrix*, 1st Dist. Hamilton Nos. C-150194 and C-150200, 2016-Ohio-2697, ¶ 51. We presume that the trial court considered the appropriate factors unless the defendant affirmatively shows that the court failed to do so. *Id.* Powell does not argue that the trial court failed to consider the statutory factors, but instead argues that trial court should have given more weight to his young age, his claim of remorsefulness, and his claimed drug use. This is insufficient to require reversal by this court. We overrule Powell's seventh assignment of error.

In his eighth assignment of error, Powell claims that the cumulative effect of the errors outlined in previous assignments of error had resulted in an unfair trial even if their effects individually had not. The doctrine of cumulative error allows a conviction to be reversed if the cumulative effect of errors, deemed separately harmless, deprived the defendant of his right to a fair trial. *See State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. "The doctrine of cumulative error is inapplicable where there are not multiple instances of harmless error." *State v. Leach*, 150 Ohio App.3d 567, 2002-Ohio-6654, 782 N.E.2d 631, ¶ 57 (1st Dist.). Other than the admission of one photograph, which we found to be harmless, Powell had not demonstrated other instances of error. We overrule his eighth assignment of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and **CROUSE, JJ.**

To the clerk:

Enter upon the journal of the court on September 25, 2019

per order of the court _____.

Presiding Judge