

[Cite as *State v. Jones*, 2010-Ohio-4116.]

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

STATE OF OHIO,	:	APPEAL NO. C-090137
	:	TRIAL NO. B-0803379
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
CALVIN JONES,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 3, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

CUNNINGHAM, Presiding Judge.

{¶1} Defendant-appellant Calvin Jones appeals from the judgment of the Hamilton County Court of Common Pleas convicting him on one count of conspiracy to commit aggravated murder. We affirm.

{¶2} In April 2008, the Cincinnati Police Department received information that renewed its interest in a missing-person investigation from 2005. The information came from “Big Cheese,” who had been incarcerated at a local correctional facility and had claimed that another inmate had approached him about “murder for hire.” Based on Big Cheese’s statement, Cincinnati Police Officers James Wigginton and Jennifer Mitsch enlisted Big Cheese as a confidential informant in an investigation that targeted Jonathan Watkins and Calvin Jones, known only at the time as “Big Cal.”

{¶3} After Big Cheese had been released from jail, the police had Big Cheese arrange a meeting with Jones and Watkins that undercover Cincinnati Police Officer Howard Fox would attend. As part of the plan, Big Cheese and Fox would pose as a rap singer and a manager in need of security and a “hit.”

{¶4} Fox was present when Big Cheese called Watkins to set up a meeting for April 15, 2008, at the Frisch’s restaurant in the Queensgate area of Cincinnati. On April 15, Jones and Watkins met with Big Cheese and Fox at Frisch’s for lunch. Watkins and Jones promoted themselves as security personnel. During the conversation, Fox stated that he needed a “m***** f***** taken out.” Jones indicated that he could take care of the business and that he would keep their hands clean. Watkins indicated that he had already known about the “delicate business” Fox needed to talk about and that that was why he had brought Jones with him. Watkins

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suggested that the topic should be discussed in Fox's car. Fox later asked Jones to go to the car with him. Jones agreed.

{¶5} In the car, Fox told Jones that he had a "m***** f*****" in California that needed to be taken care of. Jones said that he could make the "m***** f*****" disappear and prove his worth to Fox before Fox hired him for security. Fox asked Jones about the cost, and Jones replied that it would depend "if it was one or two." Jones said that he charged \$10,000 for one murder, but only \$15,000 for two.

{¶6} Jones assured Fox that he could murder a target without a trace. Jones explained in great detail his method for killing people. This included using a revolver so that he would not have "to police for shells," hanging his shooting victims to dry in a warehouse, hacking the torso with a machete, cutting the remains in pieces with a saw, and stuffing the remains in a bag that he would slit so that it would fill with water after being dropped in the river. Jones mentioned a person named "Ambrose" as his partner in his "unlegitimate" business.

{¶7} Jones encouraged Fox to lure the target to Cincinnati so that he could use his warehouse for his hit. Jones told Fox to call him and to refer to a "construction rehab" if he needed "the end to someone's existence." Jones then said that he had to go to "clean his car" by removing a gun.

{¶8} Fox returned to the restaurant, where Big Cheese and Watkins were finishing their meals. Watkins commented to Big Cheese and Fox that Jones was the "real deal" and that once a person went inside Jones's warehouse, Jones "chop[ped] them up." Watkins also encouraged Fox to bring his "problem" to Cincinnati from California. The conversations in the restaurant and in the car were recorded.

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{¶9} Fox contacted Jones by telephone several times after the lunch meeting. During a conversation on April 22, Fox told Jones that he could bring the target from California to Cincinnati. Jones exclaimed that the news “ma[d]e[] his dick hard.” He also reminded Fox that “nothing would be seen or heard.” In a later conversation, Fox and Jones agreed to meet in the parking lot of the Queensgate Frisch’s, where Fox would give to him details of the hit, and Jones told Fox that he was trying to locate a “throw-away” gun. These calls were also recorded.

{¶10} On April 29, 2008, Fox and Jones met in the parking lot of Frisch’s. Fox gave Jones a note with the name William Marshall and the location of Room 721, Ramada Inn. Fox told Jones that he had a limited window of time to complete the hit. He was to pick up Marshall at the Ramada Inn in the Chrysler 300 that Fox had driven to the meeting. Jones was then to take Marshall to his warehouse under the ruse that Jones was offering it for sale as a potential nightclub. Fox showed Jones \$5000 in cash. Jones accepted \$1000 in partial payment and then drove away in the Chrysler 300 with the note.

{¶11} Jones had called Ambrose Foster before the April 29 meeting with Fox and asked Foster for a small handgun that he needed “to take care of some things.” Foster told him that he did not have a gun for him. After Jones’s meeting with Fox, Jones told Foster that he needed the small handgun to shoot a man who was located at the Ramada Inn. Foster never gave him a gun.

{¶12} Jones did not go to the Ramada Inn after his meeting with Fox. Several hours later, the police arrested Jones at his house, where they recovered \$800 of the marked money. The police went forward with the arrest at that time because they had concluded that Jones was not going to appear at the Ramada Inn.

{¶13} Jones was subsequently indicted on one count of conspiracy to commit aggravated murder. He was tried before a jury. Foster and Officers Wigginton and Fox testified at trial. Big Cheese, Watkins, and Jones did not.

{¶14} In his defense, Jones argued that he had intended only to take money from Fox and that he was never going to kill anyone. In addition, he contended that the state had entrapped him. The trial court refused to instruct the jury on the defense of entrapment. The jury returned a guilty verdict, and the trial court sentenced Jones to ten years' incarceration.

{¶15} In his first assignment of error, Jones argues that the trial court erred by allowing into evidence the hearsay statements of an alleged co-conspirator, Watkins, before any independent evidence of a conspiracy was presented, in violation of Evid.R. 801(D)(2)(e).

{¶16} Jones does not specify the statements he challenges, nor does he cite where in the record the statements were erroneously admitted. But he does state that Watkins's alleged statements "about Mr. Jones'[s] propensity for violence" were first introduced by Officer Wigginton and then later mentioned by Officer Fox. Because Jones has failed to properly cite to the record, we are not required to address the assignment of error.¹ But in the interests of justice, we do so, at least as we have interpreted the subject of the assignment.

{¶17} The state offered two sets of statements from Watkins at trial: (1) Watkins's statement to Big Cheese in jail that he and Jones could be hired for a hit, and (2) Watkins's statements at Frisch's that Jones was the "real deal" and that was why he had brought him to the meeting. The state contended that both sets of

¹ See App.R. 16(A)(6) and (D).

Watkins's statements were admissible under Evid.R. 801(D)(2)(e), which provides that a statement of a co-conspirator is not hearsay when certain requirements are met. Specifically, the rule provides that "[a] statement is not hearsay if * * * [t]he statement is offered against a party and is * * * a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy."²

{¶18} At trial, Officer Wigginton testified first. The state had intended for Wigginton to testify about what he had learned from other officers who had information from Big Cheese that Watkins had indicated that he and Jones could be hired for a hit. But when the state solicited this information from Wigginton, the court sustained Jones's objection and held that Watkins's statement could not be admitted because the state had not established a conspiracy by independent proof. The court also noted that the statement was contained within other out-of-court statements that could not be offered for their truth.

{¶19} When Fox testified, the state attempted to admit Watkins's statements made at Frisch's in Fox's presence. The court ruled that Fox could relay these statements but that the ruling was conditioned on the state's subsequent presentation of independent proof of the conspiracy. Jones renewed his objection when Fox began testifying about Watkins's statements at Frisch's after Jones had departed. At that point, Fox's testimony established that both Watkins and Jones had attended the meeting that had been arranged to discuss a murder for hire, and that Jones had confirmed at the meeting that he was available for hits. Based on that

² Evid.R. 801(D)(2)(e).

testimony, the court ruled that the state had established the existence of a conspiracy by independent proof and overruled Jones's objection.

{¶20} We find no reversible error in the trial court's evidentiary rulings concerning Watkins's statements. The court sustained the objection to the introduction of Watkins's statement to Big Cheese in jail. Further, the court allowed Fox to present Watkins's statements at Frisch's only on the condition that the state would later establish the existence of a conspiracy by independent proof. The state eventually met this foundational requirement during Fox's direct examination.

{¶21} The court's premature admission of evidence under Evid.R. 801(D)(2)(e) can be harmless if independent prima facie proof of the conspiracy is produced before the case is presented to the jury.³ Where that happened in this case, and the state presented abundant evidence of Jones's guilt, we hold that the court's error was harmless.

{¶22} Jones presents other arguments under this assignment of error. He argues that Watkins did not qualify as a "co-conspirator" for purposes of Evid.R. 801(D)(2)(e) because Watkins was not charged with conspiracy. But the evidentiary rule does not distinguish between an unindicted and an indicted co-conspirator. Jones cites no cases in support of his argument, and we have found none. Conversely, we have found case law rejecting the same argument with respect to Fed.R.Evid. 801(D)(2)(e), which similarly does not make a distinction between an unindicted and an indicted co-conspirator.⁴ Thus, we conclude that Evid.R.

³ See *State v. Jalowiec*, 91 Ohio St.3d 220, 227, 2001-Ohio-26, 744 N.E.2d 163; *State v. Smith*, 87 Ohio St.3d 424, 434-435, 2000-Ohio-450, 721 N.E.2d 93.

⁴ *United States v. Adkins* (C.A.8, 1988), 842 F.2d 210, 213.

801(D)(2)(e) applies to both indicted and unindicted co-conspirators, and we reject Jones's argument.

{¶23} Jones also suggests that Watkins did not qualify as a co-conspirator under Evid.R.801(D)(2)(e) because Watkins did not testify at trial. But the rule of evidence does not require that the co-conspirator testify. Thus, under the rule, Watkins's failure to testify did not render his statements inadmissible.

{¶24} Further, Jones contends that the state did not present sufficient evidence that Watkins was part of the conspiracy. According to Jones, Watkins's statements suggested only that Jones would be a good security guard, and Jones also points out that Watkins was not present when Fox and Jones had discussed "taking someone out." But the recorded conversation inside Frisch's demonstrated that Watkins had helped to arrange the meeting between Jones and Fox in part because he was aware that Fox was in need of a "chop shop," and he considered Jones to be the "real deal." Although the recordings were difficult to understand at times, Fox testified based on his recollection that similar statements had been made. This evidence sufficiently undermines Jones's argument. Thus, notwithstanding Jones's arguments, the record demonstrates that Jones and Watkins had conspired to solicit customers for a murder-for-hire business.

{¶25} Accordingly, we overrule the first assignment of error.

{¶26} In his second assignment of error, Jones contends that the trial court erred when it refused to instruct the jury on the defense of entrapment. We disagree.

{¶27} Entrapment, as defined by the Ohio Supreme Court in *State v. Doran*,⁵ "is the classic confession and avoidance [defense.]"⁶ "When an accused

⁵ (1983), 5 Ohio St.3d 187, 449 N.E.2d 1295

⁶ *Id.* at 193.

raises the defense of entrapment, the commission of the offense is admitted and the accused seeks to avoid criminal liability therefor by maintaining that the government induced him to commit a crime that he was not predisposed to commit.”⁷

{¶28} “Entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the * * * offense and induce its commission in order to prosecute.”⁸ Conversely, “[e]ntrapment is not established when government officials merely afford opportunities or facilities for the commission of the offense and it is shown that the accused was predisposed to commit the offense.”⁹

{¶29} In Ohio, the entrapment defense is defined subjectively.¹⁰ Relevant factors on the issue of predisposition include “(1) the accused’s previous involvement in criminal activity of the nature charged, (2) the accused’s ready acquiescence to the inducements offered by the police, (3) the accused’s expert knowledge in the area of the criminal activity charged, (4) the accused’s ready access to contraband, and (5) the accused’s willingness to involve himself in criminal activity.”¹¹

{¶30} Entrapment is an affirmative defense.¹² Therefore, the defendant bears the burden of production and the burden of persuasion, by a preponderance of the evidence.¹³

{¶31} “[A] trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and

⁷ Id.

⁸ Id. at paragraph one of the syllabus.

⁹ Id. at 192.

¹⁰ Id. at 191.

¹¹ Id. at 192.

¹² Id. at paragraph two of the syllabus.

¹³ R.C. 2901.05(A).

discharge its duty as the fact finder.”¹⁴ To determine whether an instruction on an affirmative defense is warranted in a criminal case, the court must determine “whether [the] defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable [jurors] concerning the existence of such issue.”¹⁵ The trial court has the discretion to determine whether the evidence adduced at trial is sufficient to require an instruction because it is in the best position to gauge the evidence before the jury.¹⁶

{¶32} At Jones’s trial, the state contended that an entrapment instruction was not warranted because the evidence showed that the criminal design had originated only with Jones, and that Jones had been predisposed to commit the offense. Further, the state argued that the instruction was not appropriate as a matter of law because Jones had not admitted to the offense but had claimed that his dealings with Fox were only a scam to obtain money.

{¶33} The court refused to give the instruction based on its conclusion that no reasonable jury could have found in favor of Jones on the issue of predisposition. We agree with the trial court’s conclusion that the evidence was such that no reasonable juror could have found that Jones had not been predisposed to commit the offense. All the evidence, and in particular Jones’s statements and actions, along with Foster’s testimony, showed that Jones had previously committed murder for hire on several occasions, that he had readily acquiesced in Officer Fox’s inducement, that he had “expert” knowledge on how to commit a murder and to avoid detection,

¹⁴ *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus.

¹⁵ *State v. Melchior* (1978), 56 Ohio St.2d 15, 381 N.E.2d 195, paragraph one of the syllabus.

¹⁶ *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, ¶72, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443, paragraph two of the syllabus.

that he had access to a “chop shop” and weapons, and that he was undoubtedly willing to involve himself in criminal activity.

{¶34} Jones further contends that the court’s decision not to give the instruction was based on Watkins’s statement to Big Cheese soliciting a hit. But the court held that this statement, which was offered within other statements not admissible for their truth, was inadmissible. Thus, the record does not support Jones’s argument. And even if the court had considered that statement, the error would have been harmless in light of the other evidence that unequivocally demonstrated Jones’s predisposition to commit the offense notwithstanding Officer Fox’s inducement.

{¶35} The entrapment instruction was not warranted because Jones produced insufficient evidence of a lack of predisposition. Therefore, the trial court did not err in refusing to give the instruction.¹⁷ In light of this holding, we decline to address whether the instruction was inappropriate because Jones had purportedly never intended to kill anyone, a seemingly contradictory defense.¹⁸ Accordingly, we overrule the second assignment of error.

{¶36} In his third assignment of error, Jones contends that the trial court erred by overruling his challenge to the state’s use of three of its four preemptory challenges to dismiss African-American jurors. According to Jones, the state dismissed these jurors on the basis of race.

{¶37} The state may not use its preemptory challenges during jury selection to exclude a potential juror on the basis of race.¹⁹ In *Batson v. Kentucky*, the United

¹⁷ See *State v. Kimbro* (1996), 109 Ohio App.3d 802, 805, 673 N.E.2d 192.

¹⁸ See *State v. Justice*, 6th Dist. No. H-07-025, 2008-Ohio-4280, at ¶35.

¹⁹ *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712.

States Supreme Court delineated a three-step inquiry for evaluating whether the state's use of a peremptory challenge is discriminatory.²⁰ A defendant must first make a prima facie showing that the state has exercised a peremptory challenge on the basis of race.²¹ Then the burden shifts to the state to provide a race-neutral explanation for its challenge.²² If the state offers a race-neutral explanation, the burden shifts back to the defendant to establish that the reason advanced by the state is pretextual. The court must then determine whether the defendant has proved purposeful racial discrimination.²³

{¶38} The race-neutral explanation by the state during a *Batson* challenge does not need to rise to the level justifying a challenge for cause.²⁴ And a trial court's finding of no discriminatory intent will not be reversed on appeal unless it is clearly erroneous.²⁵

{¶39} In this case, the state provided fact-based, race-neutral reasons in support of each dismissal. Jones does not challenge the factual accuracy of those reasons. On this record, Jones has failed to demonstrate that the trial court's finding of no discriminatory intent was clearly erroneous.²⁶ Accordingly, we overrule the third assignment of error.

{¶40} In his fourth assignment of error, Jones argues that the state failed to present sufficient evidence of his guilt. In his sixth assignment of error, Jones contends that the trial court erred by denying his Crim.R. 29 motion for an acquittal.

²⁰ *Id.*

²¹ *Id.* at 96-97.

²² *Id.* at 97-98.

²³ *Id.* at 98.

²⁴ See *State v. White*, 85 Ohio St.3d 433, 437, 1999-Ohio-281, 709 N.E.2d 140, citing *Batson* at 97.

²⁵ See *State v. Hernandez* (1992), 63 Ohio St.3d 577, 583, 589 N.E.2d 1310, following *Hernandez v. New York* (1991), 500 U.S. 352, 111 S.Ct. 1859.

²⁶ See *State v. King*, 1st Dist. No. C-060335, 2007-Ohio-4879, at ¶30.

In his fifth assignment of error, Jones contends that his conviction was against the manifest weight of the evidence.

{¶41} When an appellate court reviews a record for sufficiency, “[t]he 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.”²⁷ A motion for an acquittal under Crim.R. 29(A) is governed by the same standard.²⁸

{¶42} A claim that a jury verdict was against the manifest weight of the evidence involves a separate test from a sufficiency review: “ ‘The 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.’ ”²⁹

{¶43} We first address Jones’s sufficiency argument. Jones was convicted of conspiring to commit aggravated murder in violation of R.C. 2923.01(A)(1). In general, a conviction for conspiracy to commit aggravated murder must be based on proof of an agreement by two or more persons to commit aggravated murder, coupled with a substantial overt act by one of the co-conspirators showing their intent to carry out the agreement.³⁰ The indictment charging Jones with the offense

²⁷ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

²⁸ See *State v. Carter*, 72 Ohio St.3d 545, 553, 1995-Ohio-104, 651 N.E.2d 965; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

²⁹ *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

³⁰ See R.C. 2923.01(A)(1).

alleged that Jones, with the purpose to commit or to promote or to facilitate the commission of aggravated murder, had planned or aided in the planning of the commission of aggravated murder with Fox, and that subsequent to Jones's entrance into such plan or agreement, Jones had received money and a car and had taken "steps to acquire a firearm" in furtherance of the conspiracy.

{¶44} Jones contends that no reasonable juror could have found him guilty of the offense where "it appeared he made no attempt to even go to the Ramada Inn." We disagree with Jones's contention.

{¶45} First, the essence of a conspiracy is the agreement or plan. The state was not required to prove that Jones had attempted to go to the Ramada Inn to establish the conspiracy. Rather, beyond establishing the agreement and the requisite intent, the state only needed to prove a "substantial act" in furtherance of the conspiracy. Here, Jones took partial payment for the hit after receiving the name and location of the target, drove off in the supplied car, and sought a gun to commit the murder.

{¶46} Second, there was evidence at trial that Jones had attempted to go to the Ramada Inn. As planned, Jones took from Fox the note containing the location of the hotel, and he drove off in the car provided to facilitate the hit. Jones then contacted Foster and told him that he needed a gun for a hit at the Ramada Inn.

{¶47} This evidence, along with other substantial evidence in the case, when viewed in the light most favorable to the state, was sufficient to establish (1) Jones's decision to enter into an agreement and (2) Jones's intent to achieve the object of the agreement—the aggravated murder of another. We note that a defendant can establish a withdrawal from the conspiracy only by a showing of conduct that

manifests a complete renunciation³¹ or abandonment³² of the conspiracy and its objectives.

{¶48} On this record, the state met its burden of establishing a conspiracy to commit aggravated murder. Thus, whether Jones had the criminal purpose to commit aggravated murder posed a question of fact that depended upon the jury's assessment of the weight and credibility of the evidence. And after reviewing the entire record, we are not convinced that the jury clearly lost its way and created a miscarriage of justice in finding Jones guilty of conspiracy to commit aggravated murder. Accordingly, we overrule the fourth, fifth, and sixth assignments of error.

{¶49} In his seventh assignment of error, Jones argues that the trial court erred by imposing a sentence that was an abuse of discretion because it was excessive.

{¶50} In *State v. Kalish*,³³ the Ohio Supreme Court set forth a two-part test for appellate review of felony sentencing after *State v. Foster*.³⁴ Under *Kalish*, this court must first examine “the sentencing court’s compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law.”³⁵ Then, if the first prong is satisfied, this court must review the sentence for an abuse of discretion.³⁶

{¶51} The plurality opinion in *Kalish* pointed out that “[i]n *Foster*, [this court] severed the judicial-fact-finding portions of R.C. 2929.14, holding that ‘trial courts have full discretion to impose a prison sentence within the statutory range and

³¹ R.C. 2923.01(I)(1).

³² R.C. 2923.01(I)(2).

³³ 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

³⁴ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470

³⁵ *Kalish* at ¶26.

³⁶ *Id.*

are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences.’ ”³⁷ The plurality opinion further explained that “[a]lthough *Foster* eliminated mandatory judicial fact-finding for upward departures from the minimum, it left intact R.C. 2929.11 and 2929.12. The trial court must still consider these statutes.”³⁸

{¶52} “R.C. 2929.11 and 2929.12 * * * serve as an overarching guide for trial judges to consider in fashioning an appropriate sentence. In considering these statutes in light of *Foster*, the trial court has full discretion to determine whether the sentence satisfies the overriding purpose of Ohio's sentencing structure. Moreover, R.C. 2929.12 explicitly permits a trial court to exercise its discretion in considering whether its sentence complies with the purposes of sentencing.”³⁹

{¶53} In this case, Jones was convicted of a first-degree felony. He concedes and we agree that his ten-year sentence was within the statutory range for the offense and was not otherwise contrary to law.

{¶54} In addition, the record demonstrates that the sentencing court considered the relevant statutes before imposing the maximum, ten-year prison term. The court stated that it had considered the purposes and principles of sentencing and the information presented at the sentencing hearing, including the presentence-investigation report, the facts of the offense, Jones’s prior convictions for aggravated burglary, aggravated robbery, and breaking and entering, and the fact that Jones was on community control at the time of the offense. On this record, we

³⁷ *Kalish* at ¶1, quoting *Foster* at ¶100.

³⁸ *Id.* at ¶13, citing *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶38.

³⁹ *Kalish* at ¶17.

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cannot say that the court's imposition of the maximum term was excessive and an abuse of its discretion. Accordingly, we overrule the seventh assignment of error.

{¶55} We affirm the judgment of the trial court.

Judgment affirmed.

SUNDERMANN and HENDON, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.