

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

STATE OF OHIO,	:	APPEAL NO. C-120412
Plaintiff-Appellee,	:	TRIAL NO. B-1105234
vs.	:	<i>JUDGMENT ENTRY.</i>
DAVION ROEBUCK,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Davion Roebuck appeals from the judgment of the Hamilton County Court of Common Pleas convicting him, after a jury trial, of aggravated robbery in violation of R.C. 2911.01(A)(1), with a three-year firearm specification, and felonious assault in violation of R.C. 2903.11(A)(2). The court imposed consecutive sentences, resulting in an aggregate prison term of 16 years. We affirm.

In August 2011, Roebuck entered the Hook Fish and Chicken restaurant and, at gunpoint, demanded the money from inside the safes and registers. Once outside, Roebuck was confronted by the store owner, who also had a gun. The two exchanged gunfire. Roebuck shot and seriously injured Al Rfai Hilal, an employee whom Roebuck had used as a shield, and the owner shot Roebuck. The police found the injured Roebuck in the restaurant's parking lot, with cash stuffed into his pockets, and at the end of a money trail that led from the restaurant. While in the justice center awaiting his trial,

Roebuck made recorded telephone calls to his family asking them to arrange for the witnesses to be paid in exchange for not testifying against him.

We overrule the first three assignments of error. First, upon the evidence adduced at trial, reasonable minds could have reached different conclusions as to whether each element of the offenses had been proved beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965 (1995).

And second, we find nothing in the record of the proceedings below to suggest that the jury, in resolving the conflicts in the evidence adduced on the charged offenses, including Roebuck's defense, lost its way or created such a manifest miscarriage of justice as to warrant the reversal of Roebuck's convictions. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We note that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

In his fourth assignment of error, Roebuck argues that his sentence is both contrary to law and an abuse of discretion, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. But Roebuck was sentenced after the effective date of 2011 Am.Sub.H.B. No. 86. Therefore, we apply the standard of review for felony sentences set forth in R.C. 2953.08(G)(2), which does not allow for review of Roebuck's sentence under an abuse of discretion standard. *State v. White*, 1st Dist. Hamilton No. C-130114, 2013-Ohio-____ (Sept. 27, 2013), ¶ 9.

In this case, Roebuck argues that his sentence is contrary to law because the trial court did not make the findings required by R.C. 2929.14(C) to impose consecutive terms. We disagree. Our review of the record reveals that the trial court made the requisite

findings. Thus, we do not clearly and convincingly find that Roebuck's sentence is contrary to law. *See* R.C. 2953.08(G)(2). Accordingly, we overrule the fourth assignment of error.

We overrule the fifth assignment of error because the aggravated-robbery and felonious-assault offenses were not subject to merger when the evidence at trial demonstrated that Roebuck had a separate animus as to each. *See* R.C. 2941.25(B). The felonious assault of Hilal was not merely incidental to the aggravated robbery of the restaurant, and Roebuck's conduct subjected Hilal to a substantial increase in the risk of harm apart from that involved in the aggravated robbery. *See State v. Chaffer*, 1st Dist. Hamilton No. C-090609, 2010-Ohio-4471, ¶ 12; *see also State v. Logan*, 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979), syllabus.

Likewise, we overrule the sixth assignment of error. The record demonstrates that the state presented sufficient authentication for the admission of the challenged handgun, bullet, and shell casing. *See* Evid.R. 901. Any error in the trial court's admission of the gunshot-residue-test results that were based on an undated test was harmless beyond a reasonable doubt because Roebuck did not dispute being near a fired weapon and the other evidence of guilt was overwhelming. *See* Crim.R. 52(A).

Finally, we overrule the seventh assignment of error, because Roebuck has failed to demonstrate that the prosecutor's allegedly improper comments during closing argument were reversible preserved-or-plain error, where it is clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found Roebuck guilty. *See State v. Smith*, 14 Ohio St.3d 13, 15, 470 N.E.2d 883 (1984).

Therefore, we affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

OHIO FIRST DISTRICT COURT OF APPEALS

CUNNINGHAM, P.J., DINKELACKER and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on September 27, 2013
per order of the court _____.
Presiding Judge