

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
PAULDING COUNTY**

STATE OF OHIO

CASE NO. 11-2000-07

PLAINTIFF-APPELLEE

v.

TOM O. OVERMYER

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed.

DATE OF JUDGMENT ENTRY: November 6, 2000

ATTORNEYS:

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For Appellee**

BRYANT, J. Defendant-appellant Tom O. Overmyer (“Overmyer”) brings this appeal from the judgment of the Court of Common Pleas of Paulding County finding him guilty of assault on a peace officer and felonious assault on a peace officer.

On January 1, 2000, Deputy Shane Dyson (“Dyson”) responded to a dispatch of an unwanted intruder at the residence of Diane Overmyer. The suspect was her estranged husband, Overmyer. Upon arriving at the residence, Dyson saw Overmyer leaving the garage and attempted to speak with Overmyer. Overmyer refused to stop and continued to his truck. Dyson then attempted to arrest Overmyer, but Overmyer ignored him and left the property. At this time, Dyson proceeded to activate his lights and siren and pursue Overmyer to his residence. At no time did Overmyer stop.

At Overmyer’s residence, Overmyer pulled onto the lawn and refused to leave the vehicle. Dyson again instructed Overmyer to leave the vehicle. Overmyer then restarted the vehicle and proceeded to drive around the house. As backup arrived, Overmyer continued to drive around the lawn and refused to leave the vehicle. During his driving, Overmyer narrowly missed striking Dyson with the truck.

Captain Mark Butler (“Butler”) arrived on the scene and was informed of the events. Butler then approached the vehicle and instructed Overmyer to roll

down the window so they could talk. Butler then told Overmyer that he was under arrest and attempted to reach through the window to shut off the truck. At this time, Overmyer placed the truck into gear and began to move with Butler hanging onto the outside of the truck. Overmyer then began to roll up the window. When Butler continued to reach for the keys, Overmyer began striking him in the hand causing injury. Butler was eventually able to shut off the truck and remove the keys from the vehicle. At this time, Dyson managed to break into the passenger door and Overmyer was taken into custody.

On January 14, 2000, Overmyer was indicted on two counts of assault on a peace officer, one count of failure to comply with the order or signal of a police officer, and one count of felonious assault on a peace officer. Overmyer pled not guilty to all counts. On May 16 and May 17, 2000, Overmyer was tried before a jury. The jury found Overmyer guilty of Count I, Count III, and Count IV, and not guilty of Count II. On May 18, 2000, the trial court entered a judgment dismissing Count III due to inconsistencies in the jury's verdict. Overmyer was then sentenced to 17 months in prison for Count I, assault on a peace officer, and five years in prison for Count IV, felonious assault on a peace officer. The sentences were ordered to be served concurrently. Overmyer filed his appeal from this judgment on June 7, 2000.

Overmyer raises the following assignments of error.

The verdict of guilty as to Count IV was against the manifest weight of the evidence and the evidence was insufficient to support the conviction.

The trial court committed an error of law by imposing a sentence contrary to R.C. 2929.11 through 2929.18.

The trial court erred when it granted the State's motion in limine thereby limiting possible defense theories.

In the first assignment of error, Overmyer argues that the guilty verdict on Count IV was against the manifest weight of the evidence and was insufficient to support the conviction. "When a defendant challenges the sufficiency of the evidence, 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Johnson* (2000), 88 Ohio St.3d 95, 112, 723 N.E.2d 1054, 1080. Count IV of the indictment was a charge of felonious assault on a peace officer. To prove a charge of felonious assault on a peace officer, the State must prove that the defendant 1) knowingly, 2) attempted to cause physical harm to another, 3) by use of a deadly weapon, and 4) the victim was a police officer. A deadly weapon is defined as any instrument capable of inflicting death and used as a weapon. R.C. 2923.11(A).

Here Overmyer was charged for attempting to strike Dyson with his truck. Dyson testified that Overmyer drove the truck directly at him and that he had to jump out of the way to avoid being struck. While jumping out of the way, his

hand was struck by the mirror of the passing truck. Dyson testified that Overmyer was probably driving at a rate of 10 or 15 miles per hour at that time. Based upon this testimony, a reasonable juror could conclude that Overmyer had attempted to cause serious physical injury by attempting to strike Dyson with his truck. A motor vehicle is capable of inflicting death and can be used as a weapon, so it meets the statutory definition of a deadly weapon. Additionally, Overmyer knew that Dyson was a deputy sheriff. Thus, there is sufficient evidence for a juror to find all the essential elements of felonious assault on a peace officer.

The second argument Overmyer makes is that the verdict is against the manifest weight of the evidence.

In considering a manifest-weight claim, “[t]he 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 conviction.”

State v. Lindsey (2000), 87 Ohio St.3d 479, 483, 721 N.E.2d 995, 1002. When witnesses present conflicting testimony, the determination of the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact. *State v. Thompson* (1998), 127 Ohio App.3d 511, 713 N.E.2d 456.

The fact-finder, being the jury, occupies a superior position in determining credibility. The fact-finder can hear and see as well

as observe the body language, evaluate voice inflections, observe hand gestures, perceive the interplay between the witness and the examiner, and watch the witness's reaction to exhibits and the like. Determining credibility from a sterile transcript is a Herculean endeavor. A reviewing court must, therefore, accord due deference to the credibility determinations made by the fact-finder.

Id. at 529, 713 N.E.2d at 468.

In this case, Dyson testified that the truck came straight at him and that he had to jump out of the way to avoid being hit. Overmyer testified that he never attempted to hit anyone with his truck. The testimony of these two witnesses is in direct conflict. The jury evidently determined that Dyson's testimony was more credible and returned a verdict of guilty on Count IV. Given the evidence before us, we cannot conclude that the jury so "clearly lost its way" that a manifest miscarriage of justice was created. Thus, the first assignment of error is overruled.

Overmyer argues in the second assignment of error that his sentence was contrary to statute. When reviewing a sentence, a presumption is raised that the trial court considered the necessary criteria unless the record shows otherwise.

State v. Ramirez (1994), 98 Ohio App.3d 388, 648 N.E.2d 845. "Thus, an appellate court will uphold the trial court's sentencing absent an abuse of discretion." *Id.* at 395, 648 N.E.2d at 849-50. Generally, an appellate court will not reverse a trial court's exercise of discretion if the sentence imposed is within

the statutory limit and the trial court considered the statutory criteria. *State v. Tutt* (1988), 44 Ohio App.3d 138, 541 N.E.2d 1090.

Here, the trial court specifically states in its journal entry that the statutory factors were considered. Then the trial court made a finding that prison terms were appropriate and that the shortest prison terms would demean the seriousness of the conduct and would not adequately protect the public. Based upon these findings, the trial court sentenced Overmyer to 17 months in prison for the assault and to five years in prison for the felonious assault, to be served concurrently. Neither of these sentences is the maximum allowed by law. The trial court is only required to make findings that the minimum sentence would either demean the seriousness of the offence or not adequately protect the public. *State v. Edmonson* (1999), 86 Ohio St.3d 324, 715 N.E.2d 131. The statute does not require the trial court to state its reasons underlying these findings. *Id.* Since the trial court made the appropriate findings and did not impose the maximum sentence, no explanation for the findings is necessary. The trial court did not abuse its discretion in imposing sentence and the second assignment of error is overruled.

In the third assignment of error, Overmyer argues that the trial court should not have granted the State's motion in limine. "The power to grant [a motion in limine] is not conferred by rule or statute, but instead lies within the inherent power and discretion of a trial court to control its proceedings." *State v. Grubb*

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(1986), 28 Ohio St.3d 199, 201, 503 N.E.2d 142, 145. “At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion in limine, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal.” *Id.* at 203, 503 N.E.2d at 146. Failure to proffer waives the right to appeal the granting of the motion. *Id.*

Here, the trial court granted the State’s motion in limine. However, Overmyer did not proffer the testimony he wished to have admitted. By failing to proffer this testimony, he has waived his right to appeal exclusion of the testimony. Thus, for us to overrule the motion in limine we must find plain error on the part of the trial court. We do not, and thus hold that the trial court did not abuse its discretion in granting the motion. The third assignment of error is overruled.

The judgment of the Court of Common Pleas of Paulding County is affirmed.

Judgment Affirmed.

HADLEY, P.J. and SHAW, J., concur.

/jlr