[Cite as *State v. Scott*, 2009-Ohio-5067.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-10-025
	:	O P I N I O N
- vs -		9/28/2009
	:	
DELBERT W. SCOTT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. 2008CR-07-070

Stephen J. Pronai, Madison County Prosecuting Attorney, Kirsten J. Gross, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Shannon M. Treynor, 63 North Main Street, P.O. Box 735, London, Ohio 43140, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Delbert W. Scott, appeals his conviction in the Madison County Court of Common Pleas for failure to comply with the order or signal of a police officer.

{¶2} At approximately 9:30 p.m. on June 13, 2008, Deputy Christopher Stone of the Madison County Sheriff's Office was dispatched to a Jefferson Street residence located in the village of Mount Sterling. After responding to the residence, Deputy Stone decided to

issue an arrest warrant for appellant who, at that time, was "at his house in another county."[1] A short time later, and while "getting the warrant typed up," Deputy Stone was dispatched back to the Jefferson Street residence because appellant had arrived and was reportedly standing outside on the porch.

{¶3} Upon Deputy Stone's arrival, appellant was standing outside of the residence, but, after being approached by the deputy who asked him to stop, appellant ran to the adjacent alleyway and got inside his parked vehicle. After seeing appellant enter his vehicle, Deputy Stone immediately ran back to his police cruiser, turned on his overhead lights, and radioed to dispatch that appellant was "taking off." When appellant failed to stop his vehicle, Deputy Stone initiated his siren and continued his pursuit through the residential neighborhood. The chase, which lasted less than a minute, concluded when appellant drove head-on into a tree located in the front yard of a local home. A five-gallon can of gasoline was later removed from behind the passenger seat of appellant's smoking vehicle.

{¶4} Appellant was charged with one count of failure to comply with an order or signal of a police officer in violation of R.C. 2921.331(B), which included a specification that he caused a substantial risk of serious physical harm to persons or property under R.C. 2921.331(C)(5)(a)(ii), thereby raising the charge to third-degree felony. Following a jury trial, appellant was found guilty and sentenced to four years in prison. Appellant timely appealed his conviction, raising two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "REVISED CODE 2901.01(A)(5) AND (6) AND REVISED CODE 2921.331(C)(5)(A)(I) AND (II) ARE UNCONSTITUTIONAL AS APPLIED TO [APPELLANT] FOR CRIMINALIZING THE [APPELLANT'S] RIGHT TO DESTROY HIS OWN PERSON AND

1. Although not presented at trial, the state informed the trial court during sentencing that appellant's arrest warrant was issued based on an alleged domestic violence incident that occurred earlier that day.

HIS OWN PROPERTY."

{¶7} In his first assignment of error, appellant argues that he has an "inalienable, long-standing and well-recognized, albeit unpopular, right to the destruction of his own property," and therefore, because "the destruction of his own property has resulted in the enhancement of his criminal indictment from a felony of the fourth degree to a felony of the third," his conviction was "without the due process of law, and a violation of [his] constitutional rights to a fair trial." However, after reviewing the record, we find that appellant failed to raise his constitutional argument at the trial level. It is well-settled that the "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *Hamilton v. Ebbing*, Butler App. No. CA2008-06-135, 2009-Ohio-3674, ¶73, quoting *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus; *State v. Fairbanks*, 172 Ohio App.3d 766, 2007-Ohio-4117, ¶37; *State v. Tranovich*, Butler App. No. CA2008-09-242, 2009-Ohio-2338, ¶20. Accordingly, appellant's first assignment of error is overruled.

{¶8} Assignment of Error No. 2:

{¶9} "THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE FOR EACH AND EVERY ELEMENT OF FELONY III FAILURE TO COMPLY TO SUPPORT THE CONVICTION AND [APPELLANT'S] CONVICTION FOR FELONY III FAILURE TO COMPLY IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶10} In his second assignment of error, appellant argues that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

{¶11} Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Whitaker*, Butler App. No. CA2008-01-034, 2009-Ohio-926, ¶6. In

reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Greathouse*, Warren App. No. CA2009-01-009, 2009-Ohio-3829, ¶7; *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. The relevant inquiry is whether, after reviewing 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. *Greathouse* at ¶7; *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶12} Unlike a sufficiency of the evidence challenge, 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. *State v. Ghee*, Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *Thompkins* at 387. In turn, "weight is not a question of mathematics, but depends on its effect in inducing belief." *Ghee* at ¶9. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. 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 since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Suggs*, Butler App. Nos. CA2008-02-052, CA2008-02-053, 2009-Ohio-95, ¶15, quoting *State v. Walker,* Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, upon review, the question is 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. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton,* Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7; *Thompkins*, 78 Ohio St.3d at 387.

{¶13} Furthermore, as this court has noted previously, "[b]ecause 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." *State v. Smith*, Fayette App. No. CA2006-08-030, 2009-Ohio-197, ¶73; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, this court's determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶14} Appellant was charged with one count of failure to comply with an order or signal of a police officer, in violation of R.C. 2921.331(B), which provides, "[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop." The offense, which is generally classified as a first-degree misdemeanor, is elevated to a third-degree felony if the jury finds, by proof beyond a reasonable doubt, that the "operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property." R.C. 2921.331(C)(5)(a)(ii); R.C. 2901.01(A)(5)-(6), (8) (defining "substantial risk" and "serious physical harm" to persons or property).

{¶15} At trial, Deputy Stone testified that upon his return to the Jefferson Street residence he saw appellant standing outside on the porch. After he pulled his police cruiser up to the house, Deputy Stone testified that appellant "started walking towards the alley where his vehicle was parked," and that after he was asked to stop, appellant "looked over his shoulder * * * and took off running to the alley." When asked if he believed appellant

heard his command, Deputy Stone responded affirmatively.

{¶16} After appellant ran to his vehicle, Deputy Stone testified that he immediately ran back to his cruiser, "turned [his overhead] lights on, radioed [his] dispatch that [appellant] was taking off, and radioed the vehicle description that he was taking off in." The deputy then testified that he pulled his cruiser behind appellant's vehicle with his flashing lights on, which prompted appellant "to drive off * * * almost [losing] control and [hitting] this house." Once appellant regained control of his vehicle, Deputy Stone testified that he continued to pursue appellant "pretty much right on his bumper," and that he initiated his siren as appellant drove "through the yard."

{¶17} However, instead of stopping his vehicle, the deputy testified that appellant accelerated to "45 or 50 miles an hour" in the 25 m.p.h. zone, and that he "never stopped for any of the stop signs." When asked if he believed appellant was trying to elude him, Deputy Stone testified that appellant was "definitely trying to get away." The deputy also testified that "there [were] no brake lights" as appellant "deliberately" drove head-on into a tree located in the front yard of a local home. In addition, Deputy Stone testified that he removed a five-gallon gas can located behind the passenger seat of appellant's smoking vehicle because he "didn't want it to explode."

{¶18} Lieutenant Doug Crabbe, also with the Madison County Sheriff's Office, testified that appellant, after waiving his *Miranda* rights, told him that "the gasoline can was in the truck in case on impact of whatever he would impact, it would possibly explode and cause his death." Lieutenant Crabbe also testified that appellant was believed to be suicidal.

{¶19} In his defense, appellant testified that he went to the Jefferson Street residence in order to locate his wife. However, since she was not answering her phone, appellant indicated that he became "kind of worried about [his] kids and [his] wife," and that he was "frustrated" when he "didn't get no answer." Appellant then testified that he heard someone

"holler" at him as he was walking towards his vehicle, but that he "[i]gnored it, because [his] focus was on [his] family," and that, because he could not locate his family, he "got mad and just took off" making a "pretty bad" left turn. Appellant also testified that as he drove off he did not see anybody following behind him.[2] However, after seeing a police cruiser approaching him with its lights flashing, appellant testified that he "thought [he] tried to hit the brake. But evidently not."

{¶20} In addition, appellant testified that although he had trouble remembering, he knew that he crashed his vehicle into a tree, and that he "probably" ran through the stop signs because he was "upset." When asked if he did "substantial damage" to his vehicle, the tree that he crashed into, as well as to the stop sign and no-parking sign that he ran over, appellant responded affirmatively. Appellant then testified that he "probably" told Lieutenant Crabbe that he carried the five-gallon gas can in his vehicle in hopes that it would explode on impact.

{¶21} After a thorough review of the record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we cannot say that the jury clearly lost its way so that appellant's conviction must be reversed. As the evidence indicates, appellant led Deputy Stone on a frantic, albeit brief, bumper-to-bumper chase through a residential neighborhood at speeds up to 50 m.p.h. See *State v. Little*, Cuyahoga App. No. 84611, 2005-Ohio-400, ¶24; *State v. Love*, Summit App. No. 21654, 2004-Ohio-1422, ¶19. During this chase, in which Deputy Stone initiated his overhead lights and siren, appellant nearly drove into a neighboring house, and willfully ignored three stop signs, one of which he ran over and destroyed. See *State v. Binford*, Cuyahoga App. No. 81723, 2003-Ohio-3021, ¶33.

{¶22} In addition, the state presented evidence that appellant drove off of the

2. Appellant later testified that he "usually don't focus on what's behind [him]."

roadway on numerous occasions and that he demolished a no-parking sign before deliberately driving head-on into a tree located in the front yard of a local home in hopes that the impact would detonate a five-gallon gas can he placed behind the passenger seat of his vehicle. As a result of appellant's careless driving, not only did he put many people, not to mention himself, in substantial risk of serious harm had the gas can exploded, appellant actually did cause serious physical harm to property when he drove his vehicle into a stop sign, a no-parking sign, and, finally, into a tree. See *State v. Payne*, Hancock App. No. 5-04-21, 2004-Ohio-6487, ¶19. Therefore, because we cannot say that appellant's conviction created such a manifest miscarriage of justice that his conviction must be reversed, we find no reason to disturb the jury's finding of guilt.

{¶23} As we have already determined that appellant's conviction was not against the manifest weight of the evidence, we necessarily conclude that the state presented sufficient evidence to support the jury's guilty verdict in this case. Accordingly, appellant's second assignment of error is overruled.

{¶24} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.

[Cite as *State v. Scott*, 2009-Ohio-5067.]