[Cite as *State v. Reese*, 2010-Ohio-5864.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
DANIEL REESE	:	Case No. 10CA13
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2009CR378D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 18, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KIRSTEN L. PSCHOLKA-GARTNER 38 South Park Street Mansfield, OH 44902	BRYON D. CORLEY 3 North Main Street Suite 714 Mansfield, OH 44902

Farmer, J.

{¶1} On May 14, 2009, the Richland County Grand Jury indicted appellant, Daniel Reese, on one count of failure to comply with the order or signal of a police officer in violation of R.C. 2921.331(B) and one count of tampering with evidence in violation of R.C. 2921.12(A)(1). Said charges arose from an incident wherein Richland County Sheriff's Deputy Stan Montgomery attempted to stop a speeding motorcycle, but the driver failed to comply with his lights and siren. Eventually, Deputy Montgomery stopped chasing the motorcycle and lost sight of it. Deputy Montgomery conducted an investigation which led him to appellant as the driver. The indictment alleged that in committing the offense of failure to comply, appellant's operation of the motorcycle caused a substantial risk of serious physical harm to persons or property.

{¶2} A jury trial commenced on December 17, 2009. The jury found appellant guilty as charged. By judgment entry filed December 23, 2009, the trial court sentenced appellant to an aggregate term of five years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED BY FAILING TO ALLOW APPELLANT TO OFFER THE TESTIMONY OF HIS WITNESS IN HIS DEFENSE THUS IMPEDING APPELLANT'S COMPULSORY PROCESS CLAUSE AS PROSCRIBED IN THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO CONSTITUTION."

II

{¶5} "THE TRIAL COURT ERRED BY ALLOWING AN EMPANLED (SIC) JUROR TO REMAIN WHEN SHE STATED NOT TO BE IMPARTIAL THROUGH EXTRINSIC CONSIDERATIONS THUS IMPINGING APPELLANT'S RIGHT TO AN IMPARTIAL JURY AS PROSCRIBED IN THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

III

{¶6} "THE TRIAL COURT ERRED IN THE CONVICTION FOR FAILURE TO COMPLY WITH THE ORDER OR SIGNAL OF A POLICE OFFICER AND TAMPERING WITH EVIDENCE AS THEY WERE AGAINST THE SUFFICIENCY OF THE EVIDENCE."

I

{¶7} Appellant claims the trial court erred in not permitting appellant to present the testimony of an expert witness. We disagree.

{¶8} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶9} Under Evid.R. 104(A), the trial court is the primary gatekeeper "concerning the qualification of a person to be a witness." In consideration of this rule, Evid.R. 702 provides for the testimony by experts and states the following:

{¶10} "A witness may testify as an expert if all of the following apply:

{¶11} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶12} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶13} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information.***"

{¶14} The state objected to the relevancy of the expert's testimony. T. at 268. "Relevant evidence" is "evidence having 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.

{¶15} Although an official proffer of the expert's testimony was not made, defense counsel outlined the following:

{¶16} "MS. BLAZEF: He has been qualified as an expert. He's testified as a traffic reconstructionist in Ashtabula County.

{¶17} "THE COURT: What is that?

{¶18} "MS. BLAZEF: That's like in this case he goes out and makes a determination as to what occurred. That's what he's doing in this matter. He's taking the facts as they are, and he's going to base an opinion on everything that he's personally viewed, and with his prior experience - -

{¶19} "THE COURT: Opinion about what?

{¶20} "MS. BLAZEF: As to whether or not there was distance between the two of them that he would not have been able to see the officer, just different things depending on how the testimony comes out." T. at 269-270.

{¶21} Defense counsel further argued the expert witness would testify as to the Richland County Sheriff's Department's pursuit policy. T. at 270. Following a discussion on the issue, defense counsel conceded the proper mode for authentication of the policy would be to subpoena the Sheriff. T. at 271.

{¶22} The trial court denied the expert's testimony, finding the testimony as to whether appellant could see the deputy pursuing him was not beyond the jury's ability to decide:

{¶23} "THE COURT: It sounds like to me those are matters in which expert testimony is not necessary. It's not an issue beyond the ability of the jury. In other words, the jury has to decide, did he run from the police officer, okay. They also have to decide whether he posed a serious risk, a substantial risk of serious physical harm. Those are both issues which the jury decides on the testimony. It's not something where they need an expert testimony between them and the decision." T. at 270.

{¶24} Deputy Montgomery testified he observed a motorcycle traveling at 70 m.p.h. T. at 184-185. He turned his cruiser around, activated his lights and siren, and pursued the motorcycle. T. at 185. Deputy Montgomery testified he observed the driver looking over his shoulder back at him at each curve and turn. T. at 187.

{¶25} Given this testimony, we concur with the trial court's decision that expert testimony was not proper as it did not meet the requirements of Evid.R. 702(A).

{¶26} Assignment of Error I is denied.

II

{¶27} Appellant claims the trial court erred in not excusing a sworn juror who claimed she may be bias. We disagree.

{¶28} R.C. 2313.42 governs examination of jurors. Subsection (J) states one of the good causes for challenge to any person called as a juror is, "[t]hat he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court."

{¶29} Trial courts have discretion in determining a juror's ability to be impartial. *State v. Williams* (1983), 6 Ohio St.3d 281, 288, 6 OBR 345, 351, 452 N.E.2d 1323, 1331.***However, a 'ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary***so as to constitute an abuse of discretion.' *State v. Tyler* (1990), 50 Ohio St.3d 24, 31, 553 N.E.2d 576, 587. Accord *Williams,* 79 Ohio St.3d at 8, 679 N.E.2d at 654." *State v. Nields,* 93 Ohio St.3d 6, 2001-Ohio-1291.

{¶30} On the first day of trial, testimony was elicited that the fleeing motorcycle went through a yard within fifteen to twenty feet from a couple and their ten month old child. T. at 113-114

{¶31} Prior to the start of the second day of trial, Juror Farland informed the trial court of the following:

{¶32} "JUROR FARLAND: I have a ten-month old son, and I find it really hard to be impartial thinking if that was me sitting outside with my ten-month old son. So just for reference, that could have been one of the questions yesterday that I think would have been helpful to be able to say, because I can't help but put myself in that situation with my little baby. Do you see what I'm saying?" T. at 261.

{¶33} Both the trial court and defense counsel questioned the juror:

{¶34} "MS. BLAZEF: Based on that, do you feel that emotionally you are going to be more drawn to want to convict my client because - - I mean, are you going to have a difficult time being logical and separating your personal feelings about just the fact that there was a ten-month-old baby, and there might have been a possibility that baby could have been harmed, is there a possibility you are not going to be able to be fair and impartial because of that? It's okay to be honest. It's a serious case. We appreciate you bringing it to our attention.

{¶35} "JUROR FARLAND: I'm a first-time mother. I have dealt with fears with other people's children, so it's a little bit different now.

{¶36} "MS. BLAZEF: Seems like it's bothering you too much and you wanted to bring it to our attention.

{¶37} "JUROR FARLAND: It did bother me. I thought that would have been important information to ask, because I would have been happy to say I don't belong here.

{¶38} "MS. BLAZEF: So if we would have asked that question yesterday you would have said you couldn't be fair and impartial?

{¶39} "JUROR FARLAND: I couldn't be fair and impartial. I would have said I wouldn't really want to be involved. I was thinking maybe if there was an alternate person maybe - -

{¶40} "THE COURT: There is, unfortunately we lost the alternate last night, who was a neighbor of this man's parents who didn't tell us during the voir dire.

{¶41} "JUROR FARLAND: Then I'm fine, I will just keep - -

{¶42} "THE COURT: Okay. This is a very important matter. It's essential that you decide this case only as the evidence and law require you to decide. I don't want you to stop being a mother, but you are not being a mother here, you are being a juror. You're a very intelligent woman, you are actually teaching people on the college level, so you understand what's at issue.

{¶43} "JUROR FARLAND: Well, I just wanted to be honest.

{¶44} "THE COURT: I appreciate you being honest.

{¶45} "MS. BLAZEF: I guess my concern is if she had known yesterday she couldn't have been fair and impartial, that was my understanding.

{¶46} "THE COURT: She's saying if we would have asked her that she would have told us about her feelings, and she would have been happy to be relieved from the duty of doing this jury.

{¶47} "JUROR FARLAND: Right. I guess I feel like now, okay, I am intelligent person, I am in a situation, if we are down to the wire, I just thought maybe I could be the alternate.

{¶48} "MS. BLAZEF: Are you drawn either way because of that?

{¶49} "JUROR FARLAND: No, I guess I just feel like, this kind of tugs at my heart a different way than just coming out cold and being like, you know, do you see what I'm saying?

{¶50} "THE COURT: Yes. I understand exactly what you are saying. Every person on this jury has some experience in their life that is somehow relevant to this.

{¶51} "JUROR FARLAND: Right. I guess it's being the same age, and I just - - that's all.

{¶52} "THE COURT: Well, again, you understand the importance of not deciding the case on feelings, and only on the evidence and law?

{¶53} "JUROR FARLAND: Right." T. at 262-265.

{¶54} Upon review, we find the trial court did not abuse its discretion in not excusing the juror. It is obvious the juror was being honest with the trial court, that a near miss to a young child bothered her. However, it is also clear that she understood she had to separate this emotional issue from deciding the facts of the case.

{¶55} Assignment of Error II is denied.

III

{¶56} Appellant claims his convictions were against the sufficiency of the evidence. We disagree.

{¶57} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "The 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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶58} Appellant was convicted of failure to comply with the order or signal of a police officer in violation of R.C. 2921.331(B) and tampering with evidence in violation of R.C. 2921.12(A)(1) which state the following, respectively:

{¶59} "(B) No 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.

{¶60} "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

{¶61} "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation."

{¶62} The indictment also alleged that in committing the offense of failure to comply, appellant's operation of the motorcycle caused a substantial risk of serious physical harm to persons or property.

{¶63} First, appellant argues there was insufficient evidence to establish he saw or heard that he was being pursued by Deputy Montgomery.

{¶64} Deputy Montgomery testified he was one hundred percent confident that the driver of the motorcycle knew he was behind him:

{¶65} "He's looking over his shoulder as he's making turns. I got my lights, my siren on. He knows I'm back there. He passed me on Duke at the very beginning. It's a marked police car with lights and stuff. He had to have known he passed a sheriff's cruiser in the beginning. I mean, it wasn't like I was in stealth mode." T. at 210.

{¶66} Deputy Montgomery testified to activating his pursuit lights and siren, and did not turn them off until instructed to by his supervisor. T. at 185, 189, 214. He also testified at the beginning of the pursuit, he was the only vehicle following appellant and he was in a marked sheriff's cruiser. T. at 183, 187.

{¶67} Upon investigation, Deputy Montgomery discovered appellant was the driver of the motorcycle. T. at 193. Joshua Secrist testified appellant left his home on the motorcycle at approximately 4:30/4:45 p.m. on the day of the incident. T. at 171.

The pursuit began at 5:00/5:15 p.m. T. at 184. Later the same evening, Rebecca Gordon testified appellant came to her home and admitted to fleeing from Deputy Montgomery. T. at 139.

{¶68} Matthew Chase testified during the pursuit, the motorcycle cut across his lawn and came within fifteen to twenty feet of his wife and child on a lawn blanket. T. at 114. Deputy Montgomery testified the 70 m.p.h. chase in a 25 m.p.h. zone was very dangerous. T. at 207.

{¶69} Upon review, we find sufficient evidence to substantiate the jury's finding of guilty on failure to comply with the order or signal of a police officer.

{¶70} Secondly, appellant argues there was insufficient evidence to establish he knew about any proceedings or investigations when he disposed of his motorcycle.

{¶71} During the evening of the incident, appellant admitted to Mrs. Gordon that he had been involved in a police chase, and he wanted to turn himself in to her husband, Sheriff's Deputy Will Gordon. Deputy Montgomery contacted appellant's father that evening and requested that he tell appellant to contact him about the incident. T. at 194. Deputy Montgomery attempted to locate and retrieve the motorcycle. T. at 195-196, 199-200. Appellant told Deputy Montgomery that he sold the motorcycle, although there was no evidence that the title had ever been transferred out of appellant's name. T. at 199-200.

{¶72} Upon review, we find sufficient evidence to establish that appellant disposed of the motorcycle despite knowing about the ongoing investigation.

{¶73} Assignment of Error III is denied.

{¶74} The judgment of the Court of Common Pleas of Richland County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Hoffman, J. concur.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ William G. Hoffman_____

JUDGES

SGF/sg 1028

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DANIEL REESE	:	
Defendant-Appellant	:	CASE NO. 10CA13

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Richland County, Ohio is affirmed. Costs to appellant.

_s/ Sheila G. Farmer_____

_s/ W. Scott Gwin_____

_s/ William G. Hoffman_____

JUDGES