

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

STATE OF OHIO,	:	APPEAL NO. C-090250
Plaintiff-Appellee,	:	TRIAL NO. B-0807039
vs.	:	<i>JUDGMENT ENTRY.</i>
ANTHONY THOLMER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Anthony Tholmer was convicted of vehicular assault.² He moved for a new trial, which the trial court denied. Tholmer was then sentenced to a five-year prison term. Tholmer now appeals, bringing forth six assignments of error. For the following reasons, we affirm.

On August 16, 2008, Tholmer, despite having a suspended license, was driving a “bluish/green” Cadillac on the Norwood Lateral in Hamilton County. Norwood police officers found the Cadillac disabled, on the side of the road, after responding to an accident report of an overturned Ford Ranger truck. The front right tire of the Cadillac was separated from the car, which was why it was disabled.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2903.08(A)(2)(b).

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At trial, Brian Graves testified that he had been driving eastbound on the Norwood Lateral when his red, Ford Ranger truck was hit from behind. He lost control of the vehicle and fishtailed, spinning out of control, hitting both the right and the left median barriers, and flipping over. Graves suffered compressed and broken vertebrae, as well as a broken arm and whiplash. He did not see the car or the driver of the car that had hit him. Shortly after the accident, Graves's wife arrived and took photographs of the truck, which were admitted into evidence at the trial. The photographs showed damage to the left rear bumper and to the rear left quarter panel.

While responding to the accident scene, police officer Craig Spille testified, he had observed a Cadillac stopped on the shoulder of the road and then observed Tholmer walking unsteadily past the accident scene. Spille stopped Tholmer, thinking he had been involved in the accident. Initially, Tholmer did not give Spille his correct name and social-security number. Because of this, and because Spille smelled a strong odor of alcohol on Tholmer's person, he detained Tholmer, placing him in the back of Spille's police cruiser. When Spille returned to the cruiser, Tholmer was asleep. At the police station, Spille had to assist Tholmer into the building, because Tholmer could barely stand. Tholmer refused a chemical test and told Spille that he had not been drinking or driving. But Tholmer later admitted to another witness that he had been driving the Cadillac. And another responding police officer, Scott Couch, testified that he had found the keys to the Cadillac in Tholmer's pocket and that the keys had fit the ignition of the Cadillac. Officer Couch also testified that Tholmer had smelled of alcohol.

Shannon Ward, a delivery-truck driver, testified that as he was driving on the Norwood Lateral, he observed a Cadillac speed past him, almost hitting his truck. He testified that the Cadillac had been speeding and weaving between lanes, passing other cars. Ward said that he lost sight of the Cadillac but, within a minute, came upon the accident scene. Ward stopped to help Graves. While assisting, Ward saw Tholmer stumbling past the accident.

Officer Couch testified that he had not seen any paint transfer from the red Ford Ranger on the Cadillac.

Tholmer presented the testimony of an accident reconstruction expert, Douglas Heard. Heard testified that he had seen no evidence of a paint transfer from the dark-colored Cadillac to the red Ford Ranger and, therefore, could not say definitively that the Cadillac Tholmer had been driving hit Graves's truck. But on cross-examination, he admitted that he was not an expert in paint transfer and that it was possible that the Cadillac driven by Tholmer could have hit the truck because the indentation damage on the truck matched the height of the Cadillac.

Near the end of its deliberations, the jury informed the trial court that it was at an impasse. In response, the trial court gave the jury a supplemental instruction. Following that instruction, the jury returned a guilty verdict against Tholmer for vehicular assault.

We consider Tholmer's first three assignments of error together. In his first and second assignments, Tholmer contests the sufficiency and weight of the evidence underlying his conviction. In his third assignment of error, he argues that the trial court erred by denying his Crim.R. 29 motion for an acquittal.

The standard of review for a sufficiency claim and for the denial of a Crim.R. 29 motion for an acquittal is the same. When the appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense.³ On the other hand, when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.⁴

Here, we conclude, after viewing the evidence in a light most favorable to the state, that the state presented adequate circumstantial evidence to demonstrate that Tholmer had recklessly operated a motor vehicle and caused serious physical harm to Graves. Although there were no witnesses to the accident, Ward, the delivery-truck driver, observed Tholmer speeding and weaving between lanes just prior to the accident. The Cadillac driven by Tholmer was found on the side of the road, approximately 200 yards past the accident, and Tholmer was seen walking unsteadily from the direction of the Cadillac back towards the accident. Heard, the accident-reconstruction expert, testified that the damage to the truck matched the height of the Cadillac's bumper and that the Cadillac could have possibly hit the truck. Graves testified that he had been hit from behind and that he had suffered serious physical injuries.

After reviewing the whole record, we also hold that the jury did not lose its way and create a manifest miscarriage of justice by finding Tholmer guilty of vehicular assault. Although the police officers could arguably have conducted a more thorough investigation, there was substantial evidence demonstrating Tholmer's guilt.

³ See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

⁴ See *id.* at 387.

The first, second, and third assignments of error are overruled.

In his fourth assignment of error, Tholmer argues that the trial court erred by imposing an excessive sentence. We overrule this assignment of error.

Under *State v. Foster*,⁵ a trial court has full discretion to impose any sentence within the applicable statutory range. Here, the five-year prison term imposed was within the appropriate statutory range.⁶ Further, given Tholmer's criminal history, including several convictions for reckless driving, we cannot say that the trial court abused its discretion in imposing the five-year sentence.

In his fifth assignment of error, Tholmer contends that the trial court erred by denying his motion for a new trial. Specifically, he argues that the jury's misconduct—using a magnifying glass to view a photograph of the truck for paint transfer—denied him due process. We are unpersuaded.

A jury can examine a photograph with a magnifying glass, even without any consultation with defense counsel or the defendant.⁷ The use of a magnifying glass does not constitute new or extrinsic evidence; instead, the use of the magnifying glass is simply an aide to the jurors' natural eyesight.⁸ Accordingly, the trial court did not err in denying Tholmer's motion for a new trial. The fifth assignment of error is overruled.

Tholmer maintains in his sixth and final assignment of error that he was prejudiced by the trial court's statement to the jury regarding the continuation of deliberations into another week. We disagree.

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

⁶ See R.C. 2929.14(A)(3).

⁷ *State v. Madaris*, 1st Dist. No. C-070287, 2008-Ohio-2470, ¶27.

⁸ *Id.*

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After deliberating, the jury informed the trial court that it had reached an impasse. In response, the trial court gave the proper supplemental charge to the jury.⁹ Immediately after giving the supplemental charge, the trial court stated, “I would ask Mr. Norman to take the jury back to the jury room. I will excuse the jury. If we haven’t reached a verdict for the night at 4 o’clock, then I expect we will continue deliberations on Monday morning.”

Tholmer argues that this statement about continuing the deliberations was a form of coercion to pressure the jury to reach a decision that Friday afternoon. We are not persuaded. The trial court was simply making the jury aware of its schedule, which was something that the trial court did throughout the jury’s deliberations. Accordingly, we hold that Tholmer was not prejudiced by this statement to the jurors. The sixth assignment of error is overruled.

Upon review of the record, we note that the trial court failed to address the costs of this action in its judgment. Accordingly, we remand this case to the trial court to consider that issue. The trial court’s judgment is affirmed in all other respects.

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.

HILDEBRANDT, P.J., DINKELACKER and MALLORY, JJ.

To the Clerk:

Enter upon the Journal of the Court on June 2, 2010

per order of the Court _____
Presiding Judge

⁹ See *State v. Howard* (1989), 42 Ohio St.3d 18, 537 N.E.2d 188.

