

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

STATE OF OHIO,	:	APPEAL NO. C-100198
Plaintiff-Appellee,	:	TRIAL NO. B-0908336
vs.	:	<i>JUDGMENT ENTRY.</i>
DONALD SPENCER,	:	
Defendant-Appellant.	:	

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

Defendant-appellant Donald Spencer appeals from the judgment of the Hamilton County Court of Common Pleas convicting him on one count of felonious assault in violation of R.C. 2903.11(A)(2). We affirm.

On November 5, 2009, Jason Mallott, while working as a security guard in Good Samaritan Hospital’s parking garage, observed Spencer and his companion, Albert McFinley, collecting scrap metal from the hospital’s dumpster. Mallott approached the dumpster and issued McFinley a trespasser warning.

Mallott then approached Spencer, who had climbed out of the dumpster and had entered his pickup truck—a dark blue or green, older model Ford with a red hood. As Mallott walked to the front of Spencer’s truck, he looked into the truck and made eye contact with Spencer. Spencer put the truck into gear and struck Mallott’s knee with the

---

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

front of the vehicle, dislocating Spencer's kneecap and causing bruising. When Mallott began to yell, Spencer stopped momentarily. Spencer looked again at Mallott, whose uniform had become entangled with Spencer's side-view mirror, but then accelerated and dragged Mallott alongside the truck. Mallott pulled out his service weapon and repeatedly ordered Spencer to stop.

Spencer eventually stopped abruptly, causing Mallott to become untangled but thrusting him forward off the mirror. Spencer sped away, and another security officer, Chris Berger, pursued him in a car. Berger was unable to catch up to Spencer or to record the license plate number of the truck, but he noted the colors of the truck and that the bed of the truck contained sheets of wood with scrap metal on top.

Spencer left the parking garage without McFinley, his scrapping companion. Cincinnati police officer William Springer interviewed Mallott, Berger, and McFinley to compile a police report. He also took photographs of Spencer's injuries, and these photographs were admitted at trial.

Rick Kibbe, an investigator for the Cincinnati police department, contacted McFinley and learned Spencer's address. Kibbe then located Spencer and his older model, bicolored Ford pickup truck with sheets of plywood in the bed. Kibbe showed Mallott a six-person photographic lineup containing Spencer, and Mallott identified Spencer as his assailant.

Spencer was then charged with violating the felonious-assault statute by knowingly causing or attempting to cause physical harm to Mallott by means of a deadly weapon—a motor vehicle.

At trial, Mallott identified Spencer's truck as the vehicle that had struck him and Spencer as its driver. Berger also identified Spencer's truck as the vehicle that had struck Mallott, but Berger testified that he had only seen Spencer from behind and could not

identify him as the driver. McFinley testified that he had seen Spencer drive off in his truck after Mallott had issued him the trespass warning, but that he had not seen the truck strike Mallott. The jury found Spencer guilty of felonious assault.

In his first assignment of error, Spencer contends that the trial court erred by allowing Kibbe to testify about hearsay statements of Mallott and Berger concerning general information about the offense as compiled in the police report, and about hearsay statements of McFinley concerning Spencer's presence at the scene of the crime, his description, and his license plate number. Spencer objected to this testimony at trial. The state argued that the testimony was offered not for the truth of the matters asserted but to show the reasons for Kibbe's actions during the investigation. The trial court overruled the objection. Spencer did not request, and the trial court did not provide, a limiting instruction to the jury.

Spencer maintains that these statements did not fall under any exception to the hearsay rules and, therefore, were inadmissible. Assuming that the trial court erred by admitting this testimony over Spencer's objection, we determine that the error was harmless beyond a reasonable doubt. Mallott, Berger, and McFinley all testified at trial and provided essentially the same testimony contained in the challenged hearsay. Thus, the challenged evidence was cumulative. Further, Mallott was unequivocal in his identification of Spencer and his truck at trial, and his testimony was consistent with Berger's and McFinley's testimony. Thus, the remaining evidence constituted overwhelming proof of Spencer's guilt. Under the circumstances of this case, we conclude that there is no reasonable possibility that the challenged evidence may have contributed to Spencer's conviction.<sup>2</sup>

---

<sup>2</sup> *State v. Bayless* (1976), 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3135.

In his second and third assignments of error, Spencer contends that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. We overrule these assignments of error. First, upon the evidence adduced at trial, viewed in the light most favorable to the state, a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.<sup>3</sup> And second, we find nothing in the record of the proceedings below to suggest that the trier of fact, in resolving the conflicts in the evidence adduced on the charged offense, lost its way or created such a manifest miscarriage of justice as to warrant the reversal of Spencer's conviction.<sup>4</sup> We note that the weight of the evidence and the credibility of the witnesses were primarily for the trier of fact.<sup>5</sup> The trial court's judgment is accordingly affirmed.

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.

**CUNNINGHAM, P.J., HENDON and DINKELACKER, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on March 16, 2011

per order of the Court \_\_\_\_\_  
Presiding Judge

---

<sup>3</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. See, also, *State v. Wagers* (Mar. 21, 1983), 1st Dist. No. C-820336 (holding that a motor vehicle may be used as deadly weapon).

<sup>4</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

<sup>5</sup> See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.