

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

STATE OF OHIO,	:	APPEAL NO. C-100738
Plaintiff-Appellee,	:	TRIAL NO. B-0906227
vs.	:	
MICHAEL QUINN,	:	<i>JUDGMENT ENTRY.</i>
Defendant-Appellant.	:	

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

Following a jury trial, defendant-appellant Michael Quinn was found guilty of four counts of felonious assault. The trial court sentenced Quinn to an aggregate sentence of nine years in prison. This appeal followed, with Quinn raising six assignments of error for our review.

In his first and second assignments of error, Quinn challenges the sufficiency and weight of the evidence adduced to support his convictions. In his third assignment of error, Quinn contends that the trial court erred in overruling his motion for acquittal under Crim.R.29. We consider these assignments together.

A Crim.R.29 motion for a judgment of acquittal challenges the sufficiency of the evidence to prove an offense.<sup>2</sup> In a challenge to the sufficiency of the evidence,

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

<sup>2</sup> *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

the question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.<sup>3</sup> Conversely, in resolving a challenge to the weight of the evidence, we must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>4</sup> A new trial should only be granted in the exceptional case where the evidence weighs heavily against the conviction.<sup>5</sup> Ultimately, the “weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact.”<sup>6</sup>

Our review of the record leads us to conclude that the state presented sufficient evidence of the felonious assault offenses. At trial, four Cincinnati police officers, Michael Roth, Brian Scott, Charles Bell, and Doug White, testified that they were in plainclothes, working an undercover prostitution sting operation when they saw Quinn run across the street to his small red car and begin speeding erratically down the street. Quinn squealed his tires, did 180 degree turns, crossed two lanes of traffic, and almost hit a fire hydrant and his own brother. The police officers, concerned that Quinn could harm someone with his reckless driving, sped after Quinn in hot pursuit.

At some point, Quinn pulled his car over to the curb on Mayfield Street. The four officers hopped out of their SUV and ran up to Quinn’s car screaming, “Police! Show us your hands.” The officers testified that they were wearing tactical vests and badges, which identified them as police officers. At Officer Roth’s command, Quinn

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

<sup>4</sup> See *id.* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

<sup>5</sup> See *id.*

<sup>6</sup> *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

turned off his car, but he ignored Officer Roth's repeated commands to show his hands. Quinn calmly stared at police officers Roth and Scott and rolled his window up. Then Quinn abruptly started his engine, slammed the car in reverse, and came close to striking Officers Bell and White who were standing behind Quinn's car. Officers Bell and White testified that if they had not jumped out of Quinn's way, he would have hit them. Quinn then put the car in drive and took a sharp turn towards Police Officers Roth and Scott. They too had to jump out of Quinn's way to avoid being struck.

Moreover, we cannot say the jury clearly lost its way when it found Quinn guilty of the offenses. Although Quinn testified that the street lighting that night was poor; that he could not tell the four men were police officers; that he could not hear what they were saying; and that he thought he was being robbed, the jury was in the best position to judge the credibility of the state's witnesses and Quinn. Based upon our review of the record, we cannot conclude that the jury lost its way in choosing to afford more weight to the testimony of the police officers than to Quinn's testimony or the testimony of the other defense witnesses. We, therefore, overrule Quinn's first, second, and third assignments of error.

In his fourth assignment of error, Quinn claims that the assistant prosecutor committed prosecutorial misconduct in his closing argument by (1) stating that Quinn was lying, (2) stating that Quinn was not credible based on "who he is [and] what he's done," and (3) by vouching for the credibility of the four police officers who had testified.

The test for prosecutorial misconduct is whether the prosecutor's remarks were improper, and if so, whether they prejudicially affected the defendant's

substantial rights.<sup>7</sup> The record reflects that the trial court sustained Quinn's objection to the prosecutor's first remark. Thus, he cannot demonstrate any prejudice. With respect to the prosecutor's remaining remarks, the record reveals that Quinn failed to lodge any objections. As a result, we review the alleged misconduct for plain error.<sup>8</sup> Thus, to reverse his conviction, we must be convinced that Quinn would not have been convicted but for the alleged misconduct.<sup>9</sup> We have reviewed the assistant prosecutor's remaining remarks and are not persuaded that they were improper. Nor can we say that the remarks prejudicially affected Quinn's substantial rights. As a result, we overrule his fourth assignment of error.

In his fifth assignment of error, Quinn argues that the trial court's imposition of a nine-year prison sentence was excessive. We disagree.

At the sentencing hearing, the trial court based its sentence on Quinn's deliberate acts of driving his car first at Officers Bell and White and then at Officers Scott and Roth. The trial court sentenced Quinn to concurrent four year terms for the felonious assault offenses related to Officers Bell and White and to concurrent five year terms for the felonious assault offenses related to officers Scott and Roth, and ordered those terms be served consecutively to each other for an aggregate prison term of nine years. The aggregate nine-year sentence was less than the maximum sentence Quinn could have received for just one count of felonious assault.<sup>10</sup> Given the facts of the offenses and Quinn's criminal record, we cannot conclude that the trial court abused its discretion in imposing the nine-year prison sentence.<sup>11</sup> As a result, we overrule Quinn's fifth assignment of error.

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<sup>7</sup> *State v. Cornwell* (1999), 86 Ohio St.3d 560, 570, 715 N.E.2d 1144.

<sup>8</sup> *State v. Green*, 90 Ohio St.3d 352, 373, 2000-Ohio-182, 738 N.E.2d 1208.

<sup>9</sup> *State v. Slagle* (1992), 65 Ohio St.3d 597, 605, 605 N.E.2d 916.

<sup>10</sup> See R.C. 2903.11(A)(2); R.C. 2903.11(D)(1)(a); R.C. 2929.14(A)(1).

<sup>11</sup> *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, at fn. 4 and ¶126.

In his sixth assignment of error, Quinn contends that the trial court violated his due process rights when it excluded the testimony of his expert witness.

Amended Crim.R. 16(K), effective July 1, 2010, expressly provides that “[a]n expert witness \* \* \* shall prepare a written report \* \*\* [which] shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert’s testimony at trial.”

Here, the trial court excluded Quinn’s expert witness’s testimony because defense counsel did not provide the state with the expert’s report until the middle of the trial. Because Quinn provided no good cause for the untimely report, we cannot say the trial court erred by employing the sanction specified in the rule. Quinn, moreover, never proffered what testimony the expert would have provided. In the absence of such evidence, he cannot demonstrate any prejudice. We, therefore, overrule Quinn’s sixth assignment of error, and affirm the judgment of the trial court.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

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

To the Clerk:

Enter upon the Journal of the Court on August 10, 2011

per order of the Court \_\_\_\_\_.

Presiding Judge