

[Cite as *State v. Oliver*, 2010-Ohio-5001.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 93674**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**CLAYTON OLIVER**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-490519

**BEFORE:** Kilbane, P.J., Blackmon, J., and Boyle, J.

**RELEASED AND JOURNALIZED:** October 14, 2010

## **ATTORNEY FOR APPELLANT**

Brian R. McGraw  
1280 West Third Street  
Third Floor  
Cleveland, Ohio 44113

## **ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor  
Anne Bringman  
Assistant County Prosecutor  
The Justice Center - 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Clayton Oliver (“Oliver”), appeals his convictions for aggravated vehicular assault and operating a motor vehicle while intoxicated.

Oliver argues that the trial court did not properly instruct the jury on proximate cause, that the State failed to produce sufficient evidence to support the convictions, and that his convictions are against the manifest weight of the evidence. After a review of the record and applicable case law, we affirm.

{¶ 2} On September 4, 2006, at approximately 3:15 p.m., Tamika Jackson (“Jackson”) was driving west on Kinsman Avenue, in Cleveland, Ohio, with her teenage son, to pick up his friends after the annual Labor Day parade. Jackson stated that the light was green as she approached the intersection of Kinsman Avenue and East 116th Street. As Jackson reached the intersection, Oliver, who was traveling east on Kinsman, made a left turn onto East 116th directly in front of Jackson. Jackson was unable to stop and struck Oliver’s passenger side door.

{¶ 3} Oliver and his passenger, Lonnie Lockett, were both transported to Huron Hospital. Oliver had a blood test that revealed he had a blood-alcohol level of .123. Oliver also had a broken rib and a punctured lung. He remained in the hospital for 22 days to receive treatment for his injuries and alcohol withdrawal. Lockett had three broken ribs and a punctured lung. He remained hospitalized for six days after the accident.

{¶ 4} On December 28, 2006, a four-count indictment was issued against Oliver stemming from the motor vehicle collision. Count 1 charged Oliver with aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a), a felony of the third degree. Count 2 charged Oliver with vehicular assault, in violation of R.C. 2903.08(A)(2)(b), a felony of the fourth degree. Count 3 charged Oliver with operating a motor vehicle while intoxicated, in violation of R.C. 4511.19, a misdemeanor of the first degree.

Count 4 charged Oliver with operating a motor vehicle while intoxicated, specifically with a blood-alcohol level of between .08 and .17, in violation of R.C. 4511.19, a misdemeanor of the first degree.

{¶ 5} Oliver pled not guilty on all counts, and on April 1, 2009, the matter proceeded to a jury trial. At the conclusion of the State's case, the trial court granted Oliver's Crim.R. 29 motion with respect to Count 2, vehicular assault.

{¶ 6} On April 3, 2009, the jury found Oliver guilty of Count 1, aggravated vehicular assault, and Count 4, operating a motor vehicle while intoxicated, with a blood alcohol level of between .08 and .17. The jury found Oliver not guilty with respect to Count 3, operating a motor vehicle while intoxicated.

{¶ 7} On June 29, 2009, the trial court sentenced Oliver to one year of imprisonment on Count 1, and six days in jail on Count 4. Oliver was also ordered to pay a fine in the amount of \$375, and his driver's license was suspended for six months.

{¶ 8} Oliver appealed, raising two assignments of error for our review.

#### ASSIGNMENT OF ERROR NUMBER ONE

**“The court gave an improper instruction to the jury on aggravated assault, lowering and simplifying what needed to be proven, thereby denying Mr. Oliver of a fair trial.”**

{¶ 9} Oliver argues that the trial court failed to adequately instruct the jury on proximate cause with respect to Count 1, aggravated vehicular assault. After a review of the record, we disagree.

{¶ 10} This court reviews a trial court's refusal to give a specific jury instruction for an abuse of discretion. *State v. Shropshire*, Cuyahoga App. No. 85063, 2005-Ohio-3588, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 11} Pursuant to Crim.R. 30, parties may file written requests for specific jury instructions at the close of the evidence. Oliver filed a proposed jury instruction regarding a motorist's right-of-way at an intersection and assured clear distance.<sup>1</sup> In addition, Oliver also requested the "standard OJI instruction" for proximate cause.

{¶ 12} Ultimately, the trial court did not provide the requested jury instruction on right of way and assured clear distance, but the trial court did

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<sup>1</sup>In support of the requested jury instruction, Oliver cited to *Crummett v. Corbin* (C.A.6, 1973), 475 F.2d 816, and *Erdman v. Mestrovich* (1951), 155 Ohio St. 85, 97 N.E.2d 674.

instruct the jury on causation and intervening causes pursuant to Ohio Jury

Instruction 417.23 and 417.25, and instructed the jury:

**“Cause is an essential element of the offense. Cause is an act or failure to act which in a natural and continuous sequence directly produces serious physical harm to a person, and without which it would not have occurred. The defendant’s responsibility is not limited to the immediate or most obvious result of the defendant’s act or failure to act. The defendant is also responsible for the natural and foreseeable consequences or results that follow in the ordinary course of events from the act or failure to act. There may be one or more causes of an event; however, if the defendant’s act or failure to act was one cause, then the existence of other causes was not a defense. The defendant is responsible for the natural consequences of the defendant’s unlawful act or failure to act, even though serious physical harm is also caused by the intervening act or failure to act of another person or agency.”**

{¶ 13} The trial court’s instructions on causation were taken nearly verbatim from the Ohio Jury Instructions, as Oliver requested. After the trial court instructed the jury, Oliver objected to the instructions, arguing that the instructions on causation were insufficient to illustrate to the jury that the defendant’s actions must not only cause serious physical harm, but must be the proximate cause of the serious physical harm. However, Oliver did not propose any specific jury instruction regarding proximate causation, and the trial court provided all of the standard jury instructions directly from Ohio Jury Instructions, just as Oliver requested.

{¶ 14} Therefore, we cannot find that the trial court abused its discretion, and this assignment of error is overruled.

#### ASSIGNMENT OF ERROR NUMBER TWO

**“Clayton Oliver’s conviction for aggravated vehicular assault should be reverse[d] due to insufficiency of evidence and a failure of the State to carry the manifest weight of the evidence burden.”**

{¶ 15} When reviewing the sufficiency of the evidence, we “examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Bradley*, Cuyahoga App. No. 87024, 2006-Ohio-4589, at ¶12, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. This court must view the evidence in the light most favorable to the prosecution, and determine whether any rational factfinder could have found all of the essential elements of the crime proven beyond a reasonable doubt. *Jenks* at paragraph two of the syllabus.

{¶ 16} Oliver only argues that the State failed to present sufficient evidence to support his conviction on Count 1, aggravated vehicular assault, in violation of R.C. 2903.08(A)(1), which states:

**“No person, while operating or participating in the operation of a motor vehicle, \* \* \* shall cause serious physical harm to another person \* \* \* [a]s the proximate**

**result of committing a violation of division (A) of section  
4511.19 of the Revised Code \* \* \*.”**

{¶ 17} Both Jackson, and Oliver’s longtime friend, Lockett, testified that Oliver was driving the car at the time of the accident. Oliver does not dispute that he was driving his car when the accident occurred.

{¶ 18} Lockett testified that he and Oliver had been drinking the night of September 3, 2009, and that he had been drinking the entire day of the accident, until the time of the collision. Lockett could not say whether Oliver had been drinking the day of the accident, but Lockett did state that Oliver was at the Gin Gin bar where he worked, cleaning up from the previous night, just before the accident.

{¶ 19} Lockett testified that he suffered serious physical injuries as a result of the accident. Lockett stated that he was hospitalized for six days following the accident, during which time he received treatment for three broken ribs and a punctured lung. At the time of trial, over two years after the accident, Lockett was still receiving treatment for his injuries.

{¶ 20} Oliver’s argument focuses mainly on whether the State presented sufficient evidence that the accident was the proximate result of his violation of R.C. 4511.19. Oliver was charged, and ultimately convicted of Count 4, operating a motor vehicle while intoxicated, in violation of R.C. 4511.19(A)(1)(b), which provides that no person shall operate a motor



vehicle with a blood alcohol level of between .08 and .17. Oliver does not dispute this conviction.

{¶ 21} Dr. Raphael Chung (“Dr. Chung”), a surgeon at Huron Hospital, testified that he treated Oliver when Oliver was brought into the hospital shortly after the accident. Dr. Chung stated that Oliver was given a blood test that concluded he had a blood-alcohol level of .123. He also testified that Oliver was hospitalized for 22 days after the accident, during which time he went through alcohol withdrawal.

{¶ 22} Jackson testified that she had a green light while traveling west on Kinsman. She stated that Oliver was traveling east on Kinsman Avenue when he made a left turn directly in front of her vehicle. Jackson stated the incident happened so quickly that she did not have time to stop. In light of this testimony, we conclude that the State presented sufficient evidence to support Oliver’s conviction for aggravated vehicular assault.

{¶ 23} Oliver also argues that even if the evidence was sufficient to support his conviction, it was against the manifest weight of the evidence. Sufficiency and manifest weight are two distinct concepts, therefore, even where there is sufficient evidence to support a conviction, the conviction may be against the manifest weight of the evidence. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541.

{¶ 24} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court explained the difference, stating “\* \* \* sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief.”

{¶ 25} Weight of the evidence 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.” *Thompkins* at 386-387. When an appellate court reverses a conviction as being against the manifest weight of the evidence, it acts as the thirteenth juror and disagrees with the factfinder’s resolution of conflicting testimony. This court’s power to grant a new trial is discretionary and should be exercised only in the exceptional case where a miscarriage of justice has occurred. *Id.*

{¶ 26} In the instant case, we cannot conclude that Oliver’s conviction was against the manifest weight of the evidence. The State presented significant evidence demonstrating that Oliver operated his vehicle with a blood-alcohol level of .123, and made a left turn in front of Jackson’s vehicle, resulting in his passenger suffering broken ribs and a punctured lung.

{¶ 27} Oliver argues that the photographs of the vehicles taken after the accident illustrate that Oliver’s passenger door was struck at a 90-degree angle, evidencing the fact that Oliver’s car was stopped at the time it was hit.

Oliver offered no expert testimony to support this contention. This is directly contradicted by both Lockett and Jackson who testified that Oliver's car was turning through the intersection at the time of the accident. After reviewing the evidence, we cannot conclude that Oliver's conviction was against the manifest weight of the evidence.

**Judgment affirmed.**

**It is ordered that appellee recover from appellant costs herein taxed.**

**The court finds there were reasonable grounds for this appeal.**

**It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.**

**A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.**

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**MARY EILEEN KILBANE, PRESIDING JUDGE**

**PATRICIA A. BLACKMON, J., and  
MARY J. BOYLE, J., CONCUR**

