

[Cite as *State v. Brown*, 2016-Ohio-5244.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 103748

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DARYL W. BROWN**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-15-595913-A

**BEFORE:** Celebrezze, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** August 4, 2016

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Appellant, Daryl W. Brown, appeals his aggravated vehicular homicide conviction arguing that it is unsupported by sufficient evidence and against the manifest weight of the evidence. After a thorough review of the record and law, this court affirms the convictions, but remands for the issuance of nunc pro tunc orders removing the notice of prior conviction from the journal entries of verdict and sentence.

### **I. Factual and Procedural History**

{¶2} On Saturday, May 9, 2015, appellant was driving westbound on Miles Avenue in Cleveland, Ohio. It was approximately 9:30 p.m. and he was driving home from a family event. Several people near the corner of Miles Avenue and East 114th Street observed a truck being driven by appellant swerve into the eastbound traffic lanes on Miles Avenue while traveling westbound. While driving in the wrong lane, the truck then made a left-hand turn onto East 114th Street. At that moment, Sheldon Starling was entering the intersection on his motorcycle traveling eastbound on Miles Avenue. Starling had the right-of-way, but appellant failed to yield. Appellant turned in front of Starling, causing Starling to collide with appellant's truck. Starling came to rest in the middle of the street, where he lay dying from his injuries. Appellant stopped his truck, got out, and walked to the rear of the vehicle. He paused momentarily, then ran back to the passenger compartment, got in, and drove away. Appellant drove a few blocks and then abandoned the truck in the driveway of a vacant house. Police officers searched for

appellant for several hours but did not find him.

{¶3} Through an investigation of the vehicle, police developed two suspects as the possible driver of the truck. After appellant learned that police were looking for him, he eventually turned himself in and he was charged with aggravated vehicular homicide with notice of prior conviction, a second-degree-felony violation of R.C. 2903.06(A)(2)(a), and failure to stop after an accident, a third-degree-felony violation of R.C. 4549.02(A). A bench trial began on October 13, 2015. Because the notice of prior conviction was essentially duplicative in this case, the state did not present any evidence of a prior conviction and the court dismissed the notice when appellant made his Crim.R. 29 motion. At the conclusion of trial, the trial court found appellant guilty of aggravated vehicular homicide and failure to stop. Appellant was sentenced to an aggregate prison term of eight years: An eight-year prison sentence for aggravated vehicular homicide and a three-year sentence for failure to stop after an accident. The court also suspended appellant's driver's license for life and informed him of a three-year term of postrelease control.

{¶4} Appellant then filed the instant appeal assigning two errors:

I. The trial court erred in denying appellant's motion for acquittal pursuant to Criminal Rule 29 where there was insufficient evidence of recklessness.

II. Appellant's convictions were against the manifest weight of the evidence.<sup>1</sup>

## II. Law and Analysis

{¶5} Appellant first argues that his conviction for aggravated vehicular homicide was unsupported by sufficient evidence because the state failed to adduce evidence that appellant acted recklessly in causing the death of Sheldon Starling.

{¶6} The test for sufficiency examines whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. Cuyahoga No. 92266, 2009-Ohio-3598, ¶ 12. An appellate court's function is to examine the evidence admitted 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. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). 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. *Id.*

{¶7} R.C. 2903.06(A)(2)(a) provides, in pertinent part, "[n]o person, while operating \* \* \* a motor vehicle \* \* \* shall [recklessly] cause the death of another \* \* \*."

{¶8} Appellant claims there is no evidence he acted recklessly. Appellant asserts that there may be sufficient evidence that he acted negligently, but not recklessly.

{¶9} Recklessness is statutorily defined:

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<sup>1</sup> Appellant's brief does not address the failure to stop after an accident conviction in either assigned error. His arguments relate solely to the aggravated vehicular homicide conviction. Therefore, this court will not address the failure to stop conviction in its analysis. App.R. 16; *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 2.

A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

R.C. 2901.22(C).

{¶10} Appellant argues that the fact his driver's license was suspended, that he failed to slow down before attempting to make a turn and, in fact, accelerated into the left-hand turn without slowing, and the fact that he was traveling westbound in the eastbound lane of travel before the accident do not constitute recklessness.

{¶11} Appellant claims driving when a person's driver's license is suspended does not constitute evidence of recklessness and should not be considered. Appellant points to *State v. Gayheart*, 12th Dist. Fayette No. CA97-01-001, 1997 Ohio App. LEXIS 4018, 5 (Sept. 8, 1997) for support: "Appellant's lack of a valid driver's license is not relevant to show that appellant operated his vehicle in a reckless manner." *Id.* at 10. A more recent case from the same district indicates that it may be relevant to inform the decision of whether a person acts recklessly. *See State v. Allison*, 12th Dist. Warren No. CA2011-03-025, 2012-Ohio-1126, ¶ 21-22. Even if this court ignores the fact that appellant's license was suspended, sufficient evidence of recklessness still exists.

{¶12} This court has addressed a similar case and found that a driver acted recklessly in traveling roughly 55 m.p.h. in a 35 m.p.h. zone, driving through a red light, and colliding with another vehicle. *State v. Rashad*, 8th Dist. Cuyahoga No. 79051, 2001 Ohio App. LEXIS 4995 (Nov. 8, 2001). After the collision, the driver exited the vehicle

and fled. This court found the acts constituted recklessness. The fact that the driver was speeding and never attempted to slow down or stop despite a red light was significant. *Id.* at 11.

{¶13} Here, appellant never attempted to slow down prior to making a left-hand turn when there was oncoming traffic. While no witness could quantify appellant's speed with any accuracy, Charles Davis, who was standing near the intersection of Miles Avenue and East 114th Street when the accident occurred, testified that appellant did not attempt to slow down before making a left-hand turn. Davis testified that appellant accelerated into the turn without slowing.

{¶14} Jason Roberts, who was standing next to Davis, testified he witnessed the truck appellant was driving travel in the wrong lane from approximately the intersection of East 116th Street to the intersection of East 114th Street, where appellant attempted to turn. This was not some momentary veering into another lane to avoid an obstruction in the road. This constituted a sustained course of travel in the wrong lane with heedless indifference to the risks posed to oncoming traffic.

{¶15} While appellant relies on *Gayheart*, 12th Dist. Fayette No. CA97-01-001, 1997 Ohio App. LEXIS 4018, for the proposition that evidence of a suspended driver's license does not constitute evidence of recklessness, it is more interesting for the holdings appellant does not point out. There, the Twelfth District also noted, "evidence of crossing the double-yellow line is an act which reflects a blatant disregard for the safety of others and is therefore a reckless act in itself." *Gayheart* at 5. Therefore, driving in

the wrong lane of travel without justification constitutes heedless indifference to the risk of a collision with oncoming traffic.

{¶16} Here, three independent witnesses testified that appellant traveled westbound in the eastbound lane of travel for varying significant distances. That act, when done without some justification or explanation, constitutes reckless behavior. *Id.*<sup>2</sup> Appellant argues that he was driving the wrong direction in the eastbound lane because there were traffic cones in the westbound lanes, so he moved over to avoid them. This testimony is contradicted by the evidence adduced at trial.

{¶17} Davis testified that he witnessed the accident. He was standing in front of a business on Miles Avenue talking to Roberts, when he observed a truck driving in the wrong lane as it drove by. He testified there was no construction or obstruction in the second westbound lane on Miles Avenue. Photographs taken of the intersection soon after the accident do show a number of cones in the westbound curb lane, but the second lane of travel of this four-lane road was clear and unobstructed. On cross-examination, appellant even conceded that this westbound lane was not obstructed. Therefore, appellant's course of travel without justification offers significant indicia of recklessness.

{¶18} This also differentiates this situation from the one appellant points to for support in *State v. Kortum*, 12th Dist. Warren No. CA2001-04-034, 2002 Ohio App. LEXIS 639 (Feb. 19, 2002). There, a driver stopped at an intersection before making a

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<sup>2</sup> The justification or explanation may constitute negligent conduct, in which case, a factual analysis may determine that the conduct constitutes negligence and not recklessness.



left-hand turn, but failed to yield to oncoming traffic and struck a motorcyclist. *Id.* at 2. In that case, the driver was convicted of vehicular homicide, not aggravated vehicular homicide. The issue was whether the state demonstrated criminal negligence. The *Kortum* court stated “[a] mere violation of a traffic law with nothing more does not necessarily demonstrate a substantial lapse of due care as required to convict a defendant of vehicular homicide.” *Id.* at 14. Here, there is more evidence of recklessness than a mere violation of a traffic law such as a failure to yield to oncoming traffic.

{¶19} Appellant also attempted to argue that he was not reckless because Starling was intoxicated, did not have a motorcycle endorsement, and did not have his headlight on.

{¶20} Dr. Dan Galita with the Cuyahoga County Medical Examiner’s Office testified the victim had a small amount of alcohol in his system. Dr. Galita tested Starling’s vitreous fluid for alcohol and found a concentration well under the legal limit. He further testified that this was a very stable source for analysis, even after death. No witness noticed the motorcycle commit any traffic violations, drive in an unsafe manner, or do anything to contribute to the accident. Every independent witness testified that appellant made a left-hand turn in front of Starling, causing the motorcycle to collide with the side of appellant’s truck.

{¶21} Further, Shawn Mack indicated the motorcycle’s headlight was on at the time of the collision. Appellant asserts that this testimony should not be believed because Mack knew the victim, and Mack testified he was walking with his son in a

direction away from the intersection and away from the motorcycle when the accident occurred. Appellant asserts that Mack was not in a position to be able to see that the motorcycle's headlight was on. However, the fact that the headlight on Starling's motorcycle was on was not contradicted by any other testimony. Further, the irony of claiming that the lack of a motorcycle endorsement somehow contributed to the accident when appellant asserts that his lack of a valid driver's license should not be considered is not lost on this court. The testimony indicated that the motorcycle was traveling lawfully. There is no indication that a lack of a motorcycle endorsement had any impact in this case.

{¶22} The state presented evidence that appellant was driving against traffic in the wrong lane of travel and attempted to make a left-hand turn without slowing down. The state adduced sufficient evidence of recklessness to satisfy this element of aggravated vehicular homicide. Appellant's first assignment of error is overruled.

### **B. Manifest Weight**

{¶23} Appellant next claims that his conviction for aggravated vehicular homicide is against the manifest weight of the evidence.

{¶24} A manifest weight challenge questions whether the prosecution met its burden of persuasion, rather than its burden of production. *State v. Ponce*, 8th Dist. Cuyahoga No. 91329, 2010-Ohio-1741, ¶ 17, citing *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982). A reviewing court may reverse the judgment of conviction if it appears that the trier of fact "clearly lost its way and created such a manifest

miscarriage of justice that the conviction must be reversed and a new trial ordered.”  
*Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541 (1997).

{¶25} Appellant claims that this court should follow its prior decision in *State v. Harris*, 8th Dist. Cuyahoga No. 72767, 1998 Ohio App. LEXIS 4874 (Oct. 15, 1998), and find that his actions constituted negligent, rather than reckless conduct. In *Harris*, a motorist, on two-hour’s sleep, drove from the east side of Cleveland to the west side, and back again. The motorist fell asleep on the return trip and caused an accident that resulted in the death of another. These actions differ markedly from appellant’s actions that caused the death of Starling. Appellant’s actions were purposeful in nature. He purposefully drove in the wrong direction in a lane of travel and then intentionally attempted to make a left-hand turn without slowing, and in fact, sped up without yielding to oncoming traffic. This constitutes reckless conduct. The situation where someone falls asleep while driving is factually distinguishable and the difference between recklessness and negligence in that case will be heavily fact-dependant.

{¶26} The evidence presented in this case does not weigh heavily in favor of acquittal. There is no dispute between the witnesses, other than appellant, as to the facts of this case. Appellant recklessly caused the death of Starling by driving against traffic in the wrong lane and turning into traffic abruptly without slowing. Appellant then fled the area.<sup>3</sup> The manifest weight of the evidence supports the verdict returned by the trial

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<sup>3</sup> Appellant claims he fled because the accident occurred adjacent to a biker clubhouse and was afraid for his life. However, witnesses testified no one threatened appellant prior to his departure from the scene. That departure

court finding appellant guilty of aggravated vehicular homicide. Appellant's second assignment of error is overruled.

### III. Conclusion

{¶27} Appellant's conviction for aggravated vehicular homicide is supported by sufficient evidence and is not against the manifest weight of the evidence. However, the journal entries of verdict and sentence indicate that the aggravated vehicular homicide conviction includes a notice of prior conviction. The state did not present evidence of the prior conviction and conceded that the court should dismiss the notice during appellant's Crim.R. 29 motion. The court did just that. Tr. 202-203. Therefore, the journal entries must be amended to remove the notice of prior conviction. The case is remanded to the trial court for nunc pro tunc entries removing the notice.

{¶28} Judgment affirmed and cause remanded.

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 convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for correction of the journal entries.

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occurred almost immediately, before anyone came out of the clubhouse, and appellant did not contact the police to report the accident.

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

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, P.J., and  
EILEEN T. GALLAGHER, J., CONCUR