[Cite as *E. Cleveland v. Thomas*, 2021-Ohio-2779.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF EAST CLEVELAND, :

Plaintiff-Appellee, :

No. 109146

v. :

TIMIKA THOMAS, :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED
RELEASED AND JOURNALIZED: August 12, 2021

Criminal Appeal from the East Cleveland Municipal Court
Case No. 19TRD01994

Appearances:

Timika Thomas, *pro se*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant Timika Thomas ("Thomas") appeals her conviction by the East Cleveland Municipal Court, arguing that it was not supported by sufficient evidence. After a thorough review of the law and facts, we reverse the judgment of the trial court.

I. Factual and Procedural History

{¶ 2} On May 22, 2019, East Cleveland Police Officer Willie Warner-Sims issued a traffic citation to Thomas for violation of East Cleveland Codified Ordinances ("E.C. Ord.") 331.08, driving in marked lanes or continuous lines of traffic. Thomas entered a plea of not guilty.

{¶ 3} A bench trial was held before a magistrate, where Officer Warner-Sims and Thomas were the only witnesses. Officer Warner-Sims was asked by the prosecutor as to the circumstances of the citation issued to Thomas, and he testified as follows:

> She pulled — she was going westbound toward Euclid. She made a left into Taco Bell.
>
> There's a sign that clearly says you cannot make a left to turn into Taco Bell due to the traffic coming on eastbound.
>
> She made a left into Taco Bell while I was conducting traffic inside of the Taco Bell parking lot. We seen her — we were trying to give her the benefit of the doubt and see if she was going into Taco Bell.
>
> She didn't go into the Taco Bell and order no food. She went directly into Taco Bell lot, because she seen us having — writing other people citations. So she avoided to go out toward Forest Hill Boulevard.
>
> That's when we pulled her over.

{¶ 4} Thomas testified that she was not traveling westbound but, rather, was coming from downtown Cleveland, traveling eastbound, and made a *right* turn into the Taco Bell. She described where the officer's vehicle was positioned in the parking lot and maintained that he would not have been able to see her make the turn into the parking lot.

{¶ 5} Thomas further disputed that there was a sign prohibiting a left turn. She stated that when she took pictures of the area later, there was no sign present. Officer Warner-Sims acknowledged that someone had stolen the sign, but stated that there were still cones present.

{¶ 6} Officer Warner-Sims testified that they were not going to pull Thomas over until they saw whether she was going to get in the Taco Bell line or use the parking lot as a shortcut. They decided to pull her over once they determined that she was simply taking a shortcut; they presumed that she was doing so because she saw the officers ticketing other drivers.

{¶ 7} At the conclusion of the testimony, the magistrate stated that the testimony of Officer Warner-Sims was more credible, and found Thomas guilty of the offense of violating marked lines.

{¶ 8} Thomas filed objections to the magistrate's decision, which the court overruled. The court noted that the magistrate was the trier of fact and law and heard all of the relevant testimony. The court stated that it was not present and could not confirm any inconsistencies or mistakes in the magistrate's ruling. The trial court judge further stated that Thomas had contacted him via social media about the case which would prohibit him from deciding the issues fairly and impartially. Finally, the court stated that Thomas had other legal and formal remedies.

{¶ 9} Thomas then filed the instant appeal, assigning one error for our review:

1. There was insufficient evidence to find Thomas guilty of E.C. Ord. 331.08.

II. Law and Analysis

{¶ 10} In her sole assignment of error, Thomas argues that her conviction was not supported by sufficient evidence. Preliminarily, we note that Thomas did not move for acquittal under Crim.R. 29 at trial. Failure to move for a judgment of acquittal waives all but plain error involving the sufficiency of the evidence. *Cleveland v. Ellsworth*, 8th Dist. Cuyahoga No. 83040, 2004-Ohio-4092; *State v. Reid*, 8th Dist. Cuyahoga No. 83206, 2004-Ohio-2018.

{¶ 11} Crim.R. 52(B) provides that "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The standard for noticing plain error is set forth in *State v. Barnes*, 94 Ohio St.3d 21, 759 N.E.2d 1240 (2000):

> "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. * * * Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial."

(Citations omitted.) *Id.* at 27.

{¶ 12} Errors that satisfy these three limitations may be corrected by the appellate court. However, notice of plain error should be done "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶ 13} A sufficiency challenge requires a court to determine whether the state has met its burden of production at trial and to consider not the credibility of the evidence but whether, if credible, the evidence presented would support a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 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. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The state may use direct evidence, circumstantial evidence, or both, in order to establish the elements of a crime. *See State v. Durr*, 58 Ohio St.3d 86, 568 N.E.2d 674 (1991). Circumstantial evidence is "proof of facts or circumstances by direct evidence from which the trier of fact may reasonably infer other related or connected facts that naturally or logically follow." *State v. Seals*, 8th Dist. Cuyahoga No. 101081, 2015-Ohio-517, ¶ 32.

{¶ 14} E.C. Ord. 331.08, entitled driving in marked lanes or continuous lines of traffic, provides as follows:

> (a) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within the municipality traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:
>
> (1) A vehicle shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from the lane or line until the driver has first ascertained that the movement can be made with safety.

(2) Upon a roadway which is divided into three lanes and provides for the two-way movement of traffic, a vehicle shall not be driven in the center lane, except when overtaking and passing another vehicle where the roadway is clearly visible and the center lane is clear of traffic within a safe distance, or when preparing for a left turn, or where the center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding, and is posted with signs to give notice of that allocation.

(3) Official signs may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction, regardless of the center of the roadway, or restricting the use of a particular lane to only buses during certain hours or during all hours, and drivers of vehicles shall obey the directions of the signs.

(4) Official traffic-control devices may be installed prohibiting the changing of lanes on sections of roadway, and drivers of vehicles shall obey the directions of every such device.

(b) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

(c) If the offender commits the offense while distracted and the distracting activity is a contributing factor to the commission of the offense, the offender is subject to the additional fine established under § 303.99(f).

{¶ 15} E.C. Ord. 331.08 is nearly identical to R.C. 4511.33, except that the Revised Code section includes "trackless trolley." Thus, we will utilize cases interpreting R.C. 4511.33 in our analysis.

{¶ 16} The citation issued to Thomas did not specify which subsection of the ordinance she violated. However, from the testimony at trial regarding the sign prohibiting left turns, it is apparent that the city was accusing Thomas of violating subsection (a)(1) combined with subsection (a)(3).

{¶ 17} Thomas argues that the ordinance does not pertain to prohibitions regarding turns, but rather, deals solely with the operation of vehicles within lanes. We agree. "In interpreting a criminal statute, courts must construe the statute strictly against the [s]tate and liberally in favor of the accused." *State v. Phillips*, 3d Dist. Logan No. 8-04-25, 2006-Ohio-6338, ¶ 22, citing R.C. 2901.04(A); *State v. Gray*, 62 Ohio St.3d 514, 515, 584 N.E.2d 710 (1992), *State v. Fuqua*, 3d Dist. Hardin No. 6-02-01, 2002-Ohio-4697, ¶ 16. "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42.

{¶ 18} The city did not file an appellate brief and thus has not responded to Thomas's argument.

{¶ 19} Subsection (a)(1) of E.C. Ord. 331.08 requires a driver to drive entirely within a single lane or line of traffic and not move from that lane or line until the driver has first ascertained that the movement can be made with safety.

{¶ 20} Subsection (a)(3) of the ordinance requires that drivers of vehicles obey the directions of signs that are "erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a

particular direction * * * ." The subsection does not reference turns or prohibited turns; rather, this part of the ordinance only appears to refer to signs requiring traffic to use a particular lane.

{¶ 21} In considering what type of evidence is sufficient to prove a marked lanes violation, this court has previously concluded that "a driver's simply crossing a lane line is in itself insufficient to establish a prima facie violation of R.C. 4511.33(A); the evidence must address conditions of practicality and safety, for which the state bears the burden of proof." *State v. East*, 10th Dist. Franklin Nos. 93APC09-1307 and 93APC09-1308, 1994 Ohio App. LEXIS 2834 (June 28, 1994). *See also State v. Barner*, 9th Dist. Medina No. 04CA0004-M, 2004-Ohio-5950, ¶ 14 ("It is clear from a plain reading of the statute that in order to sustain a conviction pursuant to R.C. 4511.33(A), the [s]tate must put forth evidence that the driver of a vehicle moving either between lanes of traffic or completely out of a lane of traffic failed to ascertain the safety of such movement prior to making the movement."); *Middleburg Hts. v. Quinones*, 8th Dist. Cuyahoga No. 88242, 2007-Ohio-3643, ¶ 57-59 (city did not provide evidence to establish impracticability or safety elements of violation); *State v. Phillips*, 3d Dist. Logan No. 8-04-25, 2006-Ohio-6338, ¶ 49.

{¶ 22} There was no testimony or evidence demonstrating that there was a sign requiring traffic to move in a particular lane, much less any evidence that Thomas violated any such sign with regard to traveling in a particular lane. It does not appear that E.C. Ord. 331.08 pertains at all to the facts alleged in this matter. Accordingly, we conclude that the city failed to submit sufficient evidence to show

that Thomas violated E.C. Ord. 331.08. The trial court committed plain error in convicting Thomas of violating that ordinance, and Thomas's sole assignment of error is sustained.

III. Conclusion

{¶ 23} Thomas's conviction for violation of E.C. Ord. 331.08 was not supported by sufficient evidence, and her sole assignment of error is sustained.

{¶ 24} This cause is reversed, Thomas's sentence is vacated. The East Cleveland Municipal Court is directed to return to Thomas all fines and costs incurred by her as a result of her conviction.

It is ordered that appellant recover of appellee 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 East Cleveland Municipal Court to carry this judgment into execution.

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

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FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, A.J., and
EILEEN T. GALLAGHER, J., CONCUR