[Cite as *State v. Nash*, 2015-Ohio-3361.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2014CA00159
	:	
EYDIE NASH	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case No. 2013 TRC 3131
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	August 17, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOSEPH MARTUCCIO CANTON CITY LAW DIRECTOR ANTHONY J. FLEX 218 Cleveland Ave. SW Canton, OH 44702	GEORGE URBAN 116 Cleveland Ave. North Canton, OH 44702

Delaney, J.

{¶1} Appellant Eydie Nash appeals from the Judgment Entry of conviction and sentence entered in the Canton Municipal Court on July 23, 2014. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the record of appellant's jury trial.

{¶3} This case arose on May 25, 2014 around 5:46 p.m. when Sgt. Joel Smith of the Ohio State Highway Patrol was monitoring holiday traffic in the city of Canton. On Wertz Avenue north of State Route 172, close to the Stark County Fairgrounds, Smith was northbound when he observed a vehicle driven by appellant speeding southbound. Smith clocked appellant's speed with radar and established she was traveling 46 miles per hour in a 35-mile-per-hour zone. As Smith passed appellant and prepared to turn around, he observed her vehicle travel slightly left of center. He also noticed appellant and her passenger were not wearing seat belts.

{¶4} Smith initiated a traffic stop. Appellant changed lanes abruptly and turned onto a side street without signaling. Smith approached the passenger side of the vehicle and advised appellant why he stopped her. He asked if she was in a hurry and why she wasn't wearing a seat belt. Appellant responded she was on her way from home to a store on West Tuscarawas and forgot to put on her seat belt. Smith noticed a strong odor of an alcoholic beverage emanating from the vehicle.

{¶5} Smith asked appellant to step out of the vehicle and brought her back to his patrol car. He asked how much she had to drink that day and she responded "Two

beers." Smith recalled appellant joked she drank Bud Ice because it was the cheapest beer in Canton.

{¶6} Smith asked appellant to submit to a series of standardized field sobriety tests including the horizontal gaze nystagmus (HGN), walk-and-turn, and one-leg stand. Smith stopped the HGN test because although appellant was not uncooperative, she kept talking and moving her head. During the one-leg stand, appellant swayed while balancing, lifted her foot higher than 6 inches, and did not count out loud. After about ten seconds, appellant put her foot down and asked "Now what?" On the walk-and-turn test, appellant moved her feet while keeping balance, did not touch heel to toe on any steps, turned improperly, and stopped to ask directions. Smith explained all of these clues are indicators of impairment.

{¶7} Smith determined appellant was under the influence of an alcoholic beverage or other drug while she operated the vehicle based upon a number of factors: erratic driving including speeding, the left-of-center movement and turning without signaling; the strong odor of an alcoholic beverage emanating from appellant; her admission to drinking; and her performance on the standardized field sobriety tests. Smith placed appellant under arrest for O.V.I. and transported her to the Canton post of the State Patrol.

{¶8} Smith prepared to ask appellant to submit to a breath test on the post's BAC Datamaster and read her the "B.M.V. 2255" form stating the consequences of refusing a chemical test. Appellant took several minutes to read the form again and refused to sign it stating she "doesn't trust cops." Appellant agreed to submit to a breath test but the Datamaster registered two invalid samples. Smith determined

appellant was not blowing into the machine as instructed because the machine was otherwise calibrated and functioning properly. Smith terminated the test.

{¶9} Smith asked appellant to provide a urine sample instead and she agreed. Smith personally mailed the sample that day in a pre-addressed, postage-paid package to the State Patrol crime lab but the lab did not receive the sample. Thus no chemical test result was obtained.

{¶10} Appellee's Exhibit 1 at trial is the videotape of appellant's stop and arrest. The video begins with Smith's surveillance of Wertz Avenue and includes appellant's speeding violation. The video also documents appellant's vehicle on the double yellow line and her abrupt lane change and failure to signal when turning. Although the first part of appellant's conversation with Smith is not audible on the video due to a problem with Smith's microphone, appellant can be heard clearly when she is placed in the patrol car for the HGN. The remaining field sobriety tests are also documented on the video.

{¶11} Appellant was charged with one count of O.V.I. pursuant to R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; one count of speeding pursuant to R.C. 4511.21(C), a minor misdemeanor; and one count of failure to wear a seat belt pursuant to R.C. 4513.263(B)(1). Appellant entered pleas of not guilty and the case proceeded to jury trial.[1] Appellant moved for judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence and at the close of all of the evidence; the motions were overruled. Appellant was found guilty of the O.V.I. by the jury and guilty of the speeding and seat belt offenses by the trial court.

[1] Appellant filed a motion to suppress the urine test result but the motion was withdrawn when it became evident the sample was lost and no test result was obtained.

{¶12} Appellant was sentenced to standard first-time O.V.I. penalties including 180 days in jail with 177 suspended on the condition that she completes a driver intervention program; a 180-day driver's-license suspension; and fines and court costs.

{¶13} Appellant now appeals from the judgment entry of her conviction and sentence.

{¶14} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶15} "I. APPELLANT'S CONVICTION FOR OVI WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

ANALYSIS

{¶16} In her sole assignment of error, appellant argues her conviction upon one count of O.V.I.[2] is against the manifest weight and sufficiency of the evidence. We disagree.

{¶17} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction 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. The relevant inquiry

[2] Appellant does not challenge her speeding and seat belt convictions.

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."

{¶18} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶19} Appellant was found guilty of one count of O.V.I. pursuant to R.C. 4511.19(A)(1)(a), which states: "No person shall operate any vehicle * * * if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." Appellant argues the evidence of the field sobriety tests and the trooper's testimony are insufficient to establish her guilt beyond a reasonable doubt. We disagree and note the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶20} Moreover, the testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction. *State v. Cunningham,* 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, at ¶ 51-57. In the case sub judice, the jury credited the

uncontroverted testimony of a patrol sergeant trained and experienced in detection of O.V.I. We note the trooper's testimony is also corroborated by the videotape which permitted the jury to observe appellant's demeanor for themselves.

{¶21} Upon our review of the record, including the videotape, we find appellant's conviction is not against the manifest weight of the evidence and is supported by sufficient evidence. See, *State v. Tisdale*, 5th Dist. Coshocton No. 10-CA-9, 2011-Ohio-1539, ¶ 16 [conviction not against manifest weight or sufficiency of evidence where defendant admitted drinking and had strong odor of an alcoholic beverage, glassy bloodshot eyes, and difficulty walking.]; *Norris*, supra, 168 Ohio App. 3d at 572 [defendant's bloodshot eyes, the odor of alcohol upon his breath, and admission to drinking, combined with officers' experience dealing with intoxicated individuals, provides sufficient evidence for guilty verdict.]; *State v. Grindstaff*, 12th Dist. Clermont No. 20134-09-074, 2014-Ohio-2581 [despite no evidence of erratic driving and no chemical test result, evidence sufficient where defendant exhibited indicia of impairment on field sobriety tests, had bloodshot, glassy eyes, and smelled strongly of alcohol, combined with officer's training and experience in detecting impaired drivers.]

{¶22} Appellant points to Smith's testimony that speeding and failure to wear a seat belt alone are not indicators of intoxication. Smith included these factors, though, in the totality of circumstances taken into account in his determination appellant was impaired. "[A] defendant's driving need not be erratic or in violation of a traffic law to be found guilty of driving under the influence." *State v. Evans,* 12th Dist. Warren No. CA2009–08–116, 2010–Ohio–4402, ¶ 17. The jury, as the trier of fact, was in the best position to weigh the evidence and judge the credibility of the witnesses on the issue of

whether appellant operated her vehicle while under the influence of alcohol. "[A] conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony." *State v. Williams,* 12th Dist. Warren No. CA2012–08–080, 2013–Ohio–3410, ¶ 35.

{¶23} Accordingly, appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence.

CONCLUSION

{¶24} Appellant's sole assignment of error is overruled and the judgment of the Canton Municipal Court is affirmed.

By: Delaney, J. and

Gwin, P.J.

Baldwin, J., concur.