[Cite as *State v. Moore*, 2017-Ohio-4014.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. W. Scott Gwin, J.
	:	Hon. William B. Hoffman, J.
-vs-	:	
	:	Case No. 16CAA070031
	:	
MISTY M. MOORE	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 15 CR I 04 0168
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 19, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
CAROL HAMILTON O'BRIEN DELAWARE CO. PROSECUTOR MARK C. SLEEPER 140 North Sandusky St. Delaware, OH 43015	JEFFREY P. UHRICH P.O. Box 1977 Westerville, OH 43086

Delaney, P.J.

{¶1} Appellant Misty M. Moore appeals from the June 15, 2016 Judgment Entry of Prison Sentence. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose on February 5, 2015, shortly after 7:00 a.m., as Michael Osborn proceeded eastbound on Hyatts Road in Delaware, Ohio. Osborn noted the roadway was straight and clear, and there were no unusual conditions although it was still dark. As he drove, Osborn suddenly saw headlights coming directly at him. He "froze" and slammed on the brakes. He described the oncoming vehicle as directly in front of him in his lane; he first saw the vehicle only seconds before impact and had no time to react. The oncoming vehicle slammed into Osborn's car, spinning his sedan completely around. His vehicle came to rest facing the opposite direction.

{¶3} Osborn could not move and tried to get his bearings. He felt intense pain in his lower back and right foot. He heard a woman screaming but was unable to reach his cell phone in his pocket. He remained in his vehicle until medics arrived and placed him on a stretcher. He was transported to Riverside Hospital and placed in back and foot braces. He could not move and was off work for a month waiting for the foot to heal. He was unable to drive, which inhibited his ability to parent his children. His condition required spinal surgery two weeks after the crash. At the time of trial over a year later, Osborn was still in pain and required ongoing medical treatment including pain medication and spinal injections.

{¶4} Angela Rafey was on her way to work and also traveling eastbound on Hyatts Road. She did not at first see the two vehicles ahead of her but heard a loud

sound of braking, followed by a crash, and slowed her speed. She saw a minivan strike the sedan in front of her, spinning it around in its lane, and the van proceeded toward Rafey's vehicle, striking her driver's-side door. Rafey's vehicle came to rest and she was able to get out. She saw no movement from the other two vehicles and went to a nearby house to ask for help. She identified appellant as the driver of the minivan that struck the sedan and then her Trailblazer, but she had no interaction with appellant.

{¶5} John O'Meara is the homeowner who came to Rafey's aid. He came out of his house to find the three vehicles in the yard. Osborn was still in his car and could not get out. Rafey and another woman, witness Jacquelyn Timple, were talking. O'Meara approached appellant and found her to be disoriented. He said she "kept asking for her daddy" and searching for her cell phone. O'Meara offered to help her find the phone which was possibly left behind in the van. The two walked to the van and appellant fell a little in the snow so O'Meara supported her. Due to debris in the van from the deployed airbag they were unable to find the phone.

{¶6} Timple had come across the crash scene and stopped to see if anyone needed help. Osborn was barely conscious and witnesses were afraid to move him and cause further injury. Timple approached appellant, who was sitting in the van with her legs outside the vehicle. Timple asked appellant if she was O.K. and appellant responded no, she was not O.K. Appellant attempted to get up but staggered and Timple told her to sit still, but then noticed a burning odor and advised appellant to get out of the van.

{¶7} When O'Meara and appellant were unable to find appellant's cell phone, Timple offered to make a call for her. Timple observed appellant's speech was very slurred and she said "740" and then took a long pause before stating three more numbers.

{¶8} Appellant then put her head on Timple's shoulder and stated, "I'm so drunk." O'Meara and Timple looked at each other in acknowledgment of the admission because Timple observed to O'Meara earlier that appellant "was either concussed or wasted."

{¶9} Timple eventually made the phone call and spoke to a man appellant identified as her husband. Timple advised him of the circumstances of the crash and he arrived at the scene shortly thereafter.

{¶10} In the meantime, E.M.S. and firefighters arrived on the scene, and as one approached, appellant clenched O'Meara's arm and kept asking "who's that?" Lt. Zachary Wolfe is a Delaware County E.M.S. medic who interacted with appellant at the crash scene. He introduced himself to appellant and asked her what happened. Appellant repeatedly said "I'm fine, I don't need you." Due to the significant damage to the vehicles, however, Wolfe wanted to make sure appellant was uninjured, and her slurred speech led him to suspect either a neurological injury or intoxication.

{¶11} Wolfe asked appellant if she had anything to drink based upon the odor of an alcoholic beverage about her person, and at that point appellant stopped answering questions and looked away. Wolfe advised appellant he was not law enforcement and was not there to arrest her, but to ensure her safety. She eventually allowed him to take her vitals, although Wolfe noted she refused to respond to questions although followed instructions such as holding out her arm. Wolfe did not observe any obvious injuries, and appellant's vital signs were normal; he described her overall condition as consistent with someone under the influence of something.

{¶12} Wolfe concluded appellant's vitals were fine when she became distraught, repeating "I'm going to die, take me to the hospital." E.M.T.s assisted appellant onto a

cot and placed her in an ambulance for transport to Grady Hospital. Inside the ambulance, Wolfe noted the odor of an alcoholic beverage was pronounced. At first appellant was cooperative inside the ambulance, but when a medic attempted to place E.K.G. electrodes upon her, she became combative and pulled them off. She also refused to allow a stick for a blood-sugar reading. As the ambulance neared the hospital, appellant again became distraught and said she did not consent to transport. The E.M.T.s reassured her and she calmed down.

{¶13} Wolfe noted the odor of an alcoholic beverage to an investigating trooper and to the nurse who took the report.

{¶14} Trooper Gregory Thomas of the Ohio State Highway Patrol investigated the crash and first made contact with appellant while she was still at the scene. She was sitting in the E.M.T. truck and Thomas tried to ask questions, but appellant didn't answer. Thomas detected the odor of an alcoholic beverage about her person, and observed bloodshot, glassy eyes and slurred speech. Thomas noted she was uncooperative with the E.M.T.s and "not making any sense." Thomas further smelled the odor of an alcoholic beverage on appellant's breath.

{¶15} Thomas followed appellant to the hospital and attempted to obtain a statement. She was uncooperative with hospital staff as they attempted to perform routine tests, pretending to be asleep. As Thomas asked questions, appellant sometimes answered but other times closed her eyes. She denied that she had any injuries and hospital staff told Thomas she had no injuries. Thomas read the B.M.V. 2255 form to appellant advising her of the consequences of refusing a chemical test. When he asked if she would take a chemical test, appellant asked what time the crash occurred because

"she knew they only had three hours to take a test." Thomas asked if she would take the test and appellant refused to answer.

{¶16} Thomas' opinion was that appellant was under the influence of alcohol. As he prepared a citation, he learned appellant had two prior O.V.I. convictions. Appellant left the hospital and Thomas called her at home the next day to take a statement. She claimed she didn't remember anything about the crash; she recalled working at P.J.'s Pub prior to the crash, but nothing at all after that. She told Thomas she got off work at 4:00 a.m. Thomas asked if she was on any medications and appellant said she took three types of antidepressants but didn't recall anything about the effects of those medications when combined with alcohol.

{¶17} Sgt. Ty Skaggs of the Ohio State Highway Patrol created a sketch of the crash scene admitted at trial as appellee's Exhibits 11 and 12. Unit Number 1 on the sketch is appellant's van; Unit Number 2 is Rafey's Trailblazer; and Unit 3 is Osborn's sedan. Skaggs identified the area of first impact using "heavy gouge marks" in the roadway in the eastbound lane, which are marks made in the pavement by the vehicles' undercarriage when two vehicles come together with significant force. The crushing action of the impact creates downward motion forcing portions of the vehicles' undercarriage to "gouge" the roadway.

{¶18} Appellant testified on her own behalf at trial. She stated she worked the night prior to the accident at P.J.'s Pub, where she did "pretty much everything" including counting the drawers, preparing the deposits, closing out Keno games, and locking up. She did all of these tasks alone and testified the bar is open as late as 2:30 a.m. but she sometimes closes around midnight if there are no customers. Appellant stated she

frequently spills drinks on herself at work so she was not surprised the witnesses smelled the odor of an alcoholic beverage on her. She testified she is strictly prohibited from drinking at work.

{¶19} Appellant did not remember anything specific about her work that night, only that she remembered working "7:00 to close," whenever that may have been, and then waking up in the hospital. The hospital performed a CAT scan and she had four contusions on her head. She testified that when the trooper called her the next day, she immediately told him she had a head injury and didn't remember anything. She had no idea how the crash occurred but her van was recalled. She was traveling her normal route home from work and had not taken any of her anti-anxiety medications prior to the crash.

{¶20} Upon cross-examination, appellant acknowledged that she didn't know when the bar closed that night but there was significant time unaccounted for, prior to the crash, when she was not "working." When asked if during that time she may have been drinking, her answer was "I don't know." T. 219. She could not dispute the testimony of the other witnesses because she had no memory of the events, but said her speech was slurred because she was struck by the airbag. She claimed she was staggering because she was "probably concussed" and overly emotional because she has severe anxiety. Appellant submitted selective portions of her medical records from the event, but admitted the records did not establish she had a concussion.

{¶21} Appellant was charged by indictment as follows: Count I, aggravated vehicular assault of Michael Osborn pursuant to R.C. 2903.08(A)(1), a felony of the third degree; Count II, aggravated vehicular assault of Michael Osborn pursuant to R.C.

2903.08(A)(2), a felony of the fourth degree; Count III, O.V.I. pursuant to R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree; and Count IV, O.V.I. pursuant to R.C. 4511.19(A)(2), a misdemeanor of the first degree. Appellant entered pleas of not guilty and waived her right to trial by jury.

{¶22} The matter proceeded to bench trial on March 31, 2016. Appellant moved for a judgment of acquittal pursuant to Crim.R. 29(A) at the close of appellee's evidence, and appellee conceded to the motion for acquittal as to Count IV only. The trial court thereupon dismissed Count IV but overruled appellant's motion as to Counts I through III. Appellant then presented her case which consisted of her own testimony. The trial court found appellant guilty upon Counts I through III and sentenced appellant to a prison term of 12 months.

{¶23} Appellant now appeals from the Judgment Entry of Prison Sentence dated June 15, 2016.

{¶24} Appellant raises two assignments of error:

ASSIGNMENTS OF ERROR

{¶25} "I. THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO OHIO RULE [OF] CRIMINAL PROCEDURE 29(A)."

{¶26} "II. THE TWO CONVICTIONS OF AGGRAVATED VEHICULAR ASSAULT AND THE CONVICTION OF OPERATING A VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS WERE NOT SUSTAINED BY THE EVIDENCE AND ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

ANALYSIS

I., II

{¶27} Appellant's assignments of error are related and will be considered together. Appellant argues the trial court should have sustained her motions for acquittal as to Counts I through III, and that her resulting convictions are against the manifest weight and sufficiency of the evidence. We disagree.

{¶28} First, appellant argues the trial court should have granted her motion for acquittal pursuant to Crim.R. 29(A) on Counts I through III. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Spaulding*, --Ohio St.3d--, 2016-Ohio-8126, --N.E.3d--, ¶ 164, reconsideration denied*,* 147 Ohio St.3d 1480, 2016-Ohio-8492, 66 N.E.3d 766, citing *State v. Tenace,* 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. "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., citing *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶29} 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 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."

{¶30} 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.*

{¶31} In the instant case, the trial court was the finder of fact and found appellant guilty of the following:

> **Count I: R.C. 2903.08(A)(1)[a], aggravated vehicular assault:**
>
> (A) No person, while operating or participating in the operation of a motor vehicle, * * * shall cause serious physical harm to another person or another's unborn in any of the following ways:
>
> (1)(a) As the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance [.]

Count II: R.C. 2903.08(A)(2)[b], aggravated vehicular assault:

(A) No person, while operating or participating in the operation of a motor vehicle, * * * shall cause serious physical harm to another person or another's unborn in any of the following ways:

* * * *.

(2) In one of the following ways:

* * * *.

(b) Recklessly.

Count III: R.C. 4511.19(A)(1)(a), O.V.I.:

(A)(1) No person shall operate any vehicle* * * within this state, if, at the time of the operation, any of the following apply:

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

{¶32} Appellant first contends appellee presented insufficient evidence that her actions caused the crash. We disagree. Osborn testified he saw headlights coming at him in his lane immediately prior to the crash and he never left his lane of travel. Osborn's testimony is consistent with the sketch drawn by Skaggs indicating the initial impact was in Osborn's lane of travel. Viewing the evidence in the light most favorable to appellee, the cause of the crash is simple and straightforward: appellant crossed the center line and slammed into Osborn with enough force that her vehicle continued onward to strike Rafey.

{¶33} Appellant further argues appellee failed to present evidence of her intoxication at the time of the crash. We note the testimony of the witnesses on the scene in the immediate aftermath of the crash, including lay people, medics, and law enforcement, who smelled an odor of an alcoholic beverage about her person and on her breath; noted her bloodshot, glassy eyes; testified to her emotional demeanor and inability to "get her bearings;" remarked upon her slurred speech and staggering attempts to walk; and last but not least, heard her statement that "I'm so drunk." We find this testimony by multiple witnesses to constitute sufficient evidence of appellant's intoxication at the time of the crash.

{¶34} Appellant contends that some of these facts can be explained by head injuries she sustained in the accident, but there is no evidence in the record appellant sustained head injuries significant enough to have caused any of these behaviors. Moreover, head injuries do not explain the odor of an alcoholic beverage, much less the admission of intoxication. Appellant, though, claims the odor may be explained by spilling beverages on herself at work. The credibility of this testimony was for the trier of fact to determine. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶35} Appellant also contends appellee presented insufficient evidence Osborn sustained serious physical harm necessary to support the convictions of aggravated vehicular assault. "Serious physical harm" is defined in R.C. 2901.01(A)(5) as any of the following:

> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶36} Contrary to appellant's assertions, Osborn testified he felt intense pain in his lower back and right foot immediately after the crash; he was unable to move and was off work for a month waiting for his foot to heal, during which time he was unable to drive; his condition required spinal surgery two weeks after the crash; and over a year later, he was still in pain to the extent that he required ongoing medical treatment including pain medication and spinal injections. We find this testimony substantiates serious physical harm, and the testimony of a single witness, if believed by the trier of fact, is sufficient to support a conviction. *State v. Nash*, 5th Dist. Stark No. 2014CA00159, 2015-Ohio-3361, ¶ 20, citing *State v. Cunningham,* 105 Ohio St.3d 197, 2004–Ohio–7007, 824 N .E.2d 504, at ¶ 51–57.

{¶37} In conclusion, we find appellant's convictions are supported by sufficient evidence and that the instant case is not an "'exceptional case in which the evidence weighs heavily against the conviction[s].'" *Thompkins,* 78 Ohio St.3d at 387, quoting

Martin, 20 Ohio App.3d at 175, 485 N.E.2d 717. The trial court was in the best position to evaluate appellee's competent, credible evidence, and we will not substitute our judgment for that of the trier of fact. The trial court neither lost its way nor created a miscarriage of justice in finding appellant guilty upon Counts I, II, and III.

{¶38} Appellant's two assignments of error are overruled.

CONCLUSION

{¶39} Appellant's two assignments of error are overruled and the judgment of the Delaware County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Gwin, J. and

Hoffman, J., concur.