[Cite as *State v. Brown*, 2018-Ohio-3294.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Appellate Case No. 27571
	:	
v.	:	Trial Court Case No. 2017-TRD-856
	:	
RENICK BROWN	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of August, 2018.

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Attorney for Plaintiff-Appellee

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Defendant-Appellant, Pro Se

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DONOVAN, J.

{¶ 1} Defendant-appellant Renick Brown, pro se, appeals his conviction and sentence for committing a marked lane violation, in contravention of Huber Heights Traffic Ordinance 331.08, a minor misdemeanor. Brown filed a timely notice of appeal with this Court on May 3, 2017.

{¶ 2} The incident which forms the basis of the instant appeal occurred on February 28, 2017, when Brown was involved in a traffic accident with another motorist, L.W., while traveling on State Route 4 near New Carlisle Pike in Montgomery County, Ohio. L.W.'s wife, D.W., was riding in the passenger seat of their vehicle. The record establishes that, while passing L.W. on the right side, Brown's vehicle drifted over from the right lane into the left lane and struck L.W.'s vehicle, thereby breaking his right-side mirror. The mirror on the left side of Brown's vehicle was also damaged in the accident.

{¶ 3} Both parties stopped their vehicles, and L.W. called the police to report the accident. Huber Heights Police Officer Kaleb Landers responded to the scene of the accident. After speaking with all of the parties involved in the accident, Officer Landers directed Brown, L.W., and D.W. to each fill out a Traffic Crash Witness Statement. After reading the statements and observing the damage to the vehicles, Officer Landers issued a traffic citation to Brown for a marked lane violation.

{¶ 4} Brown elected to go to trial, and on April 4, 2017, the matter was heard before a Montgomery County Municipal Court judge. L.W., D.W., and Officer Landers all testified. Brown, representing himself, cross-examined the other witnesses and also testified. After hearing all of the evidence from the State and Brown, the trial court found Brown guilty of the marked lane violation. The trial court imposed a fine of $150.00 and

ordered Brown to pay court costs in the amount of $121.00, for a payment totaling $271.00. The record establishes that Brown paid his fine and court costs on April 4, 2017. Specifically, the record contains a receipt indicating that Brown paid the trial court the sum of $274.00 (additional $3.00 credit card fee).[1]

{¶ 5} It is from this judgment that Brown now appeals.

{¶ 6} Because they are interrelated, Brown's first, second, and fourth assignments of error will be discussed together:

> THE TRIAL COURT ERRED BY ALLOWING [THE] STATE TO FAIL TO MEET BURDEN OF PROOF.
>
> THE TRIAL COURT ERRED DUE TO THE MANIFEST WEIGHT OF THE EVIDENCE DOES NOT SUPPORT A GUILT FINDING.
>
> THE TRIAL COURT ERRED BY NOT FOCUSING ON THE GUILT OR INNOCENCE OF THE DEFENDANT.

{¶ 7} In the foregoing assignments, Brown contends that his conviction and sentence for a marked lane violation were against the manifest weight of the evidence.

{¶ 8} "The manifest-weight-of-the-evidence standard of appellate review set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), applies in both criminal and civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E .2d 517, ¶ 17–23." *Mathews v. Mathews*, 2d Dist. Clark No. 2012-CA-79, 2013-Ohio-2471, ¶

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[1] Although Brown paid his fine for the marked lane violation, a minor misdemeanor, the case docket indicates that he was assessed points on his driving record, thereby creating a collateral disability which "preserves the justiciability of an appeal even if the offender has voluntarily satisfied the judgment." *State v. Bixby*, 2d Dist. Clark No. 2017–CA–11, 2017-Ohio-7927, ¶ 7, citing *In re S.J.K.*, 114 Ohio St.3d 23, 2007–Ohio–2621, 867 N.E.2d 408, ¶ 2. Therefore, Brown's appeal is not moot.

9.

{¶ 9} This court has stated that "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citations omitted). *State v. Jones*, 2d Dist. Montgomery No. 25724, 2014-Ohio-2309, ¶ 8. "When evaluating whether a [judgment] is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, 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.' " *Id*., quoting *Thompkins* at 387.

{¶ 10} Because the trier of fact sees and hears the witnesses at trial, we must extend deference to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997). However, we extend less deference in weighing competing inferences suggested by the evidence. *Id*. The fact that the evidence is subject to differing interpretations does not render the judgment against the manifest weight of the evidence. *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 14. A judgment should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E .2d 717 (1st Dist.1983).

{¶ 11} As previously stated, the evidence adduced by the State established that, while passing L.W. on the right side, Brown's vehicle drifted over from the right lane into the left lane and struck L.W.'s vehicle, thereby breaking his right-side mirror. Thus,

having reviewed the record, we find no merit in Brown's manifest weight challenge. It is well settled that evaluating witness credibility is primarily for the trier of fact. *State v. Benton*, 2d Dist. Miami No. 2010–CA–27, 2012–Ohio–4080, ¶ 7. A trier of fact does not lose its way and create a manifest miscarriage of justice if its resolution of conflicting testimony is reasonable. *Id*. Here, the trial court quite reasonably could have credited the State's evidence, which established that Brown was guilty of the offense for which he was convicted. Accordingly, the trial court did not lose its way and create a manifest miscarriage of justice in reaching a guilty verdict for a marked lane violation, in contravention of Huber Heights Traffic Ordinance 331.08, a minor misdemeanor.

{¶ 12} Brown's first, second, and fourth assignments of error are overruled.

{¶ 13} Because they are interrelated, we will discuss Brown's third and fifth assignments of error together as follows:

> THE TRIAL COURT ERRED BY NOT FOLLOWING THE RULES OF EVIDENCE.
>
> THE TRIAL COURT ERRED BY DECLARING STATEMENTS AS HEARSAY.

{¶ 14} In his third assignment, Brown argues that the trial court erred when it did not allow him to use Defense Exhibit 2 to impeach the testimony of L.W. regarding the length of the exit where the marked lane violation and accident occurred. In his fifth assignment, Brown argues that the trial court erred when it did not allow him to ask Officer Landers a question regarding what L.W. and D.W. told him immediately after the car accident had occurred.

{¶ 15} During trial, the following exchange occurred regarding the admittance of

Defense Exhibit 2:

> Brown: Is it – I'd like to introduce Defense Exhibit 2 and that would be the distance between where [L.W.] came on from Chambersburg or 235 to where the exit is.
>
> The State: I don't have an objection if it's a true aerial photo.
>
> Brown: It's done off of Google Maps.
>
> The State: I don't have a problem with it, Your Honor.
>
> The Court: All right. It will be admitted without objection.
>
> (Thereupon, Defendant's Exhibit Number 2, Google Map aerial view, was marked for purposes of identification and admitted into evidence.)
>
> The State: I'll just say I'm not sure what the relevance of the distance is if the question is whether the defendant came out of his lane of travel.
>
> Brown: Your Honor, he's already brought distance into it right at the beginning when he said it was about half a mile.
>
> The Court: I'll sustain the objection. The distance is irrelevant. So hand that back to him.

Tr. 19-20.

{¶ 16} Brown argues that by limiting his cross-examination regarding the distance of the roadway depicted by Defense Exhibit 2, the trial court unfairly prevented him from establishing that L.W. "was driving in an erratic and unsafe manner thereby causing the accident." We disagree.

{¶ 17} As this Court has previously noted, "[t]rial courts have discretion over the admission or exclusion of evidence, and we review the court's decision for abuse of

discretion. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus." *State v. Dyer*, 2017–Ohio–8758, 100 N.E.3d 993, ¶ 24 (2d Dist.). "A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary. An abuse of discretion includes a situation in which a trial court did not engage in a 'sound reasoning process.' Abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34.

{¶ 18} Upon review, we conclude that the trial court did not abuse its discretion when it limited Brown's cross-examination of L.W. regarding the distance of the roadway depicted by Defense Exhibit 2. The record establishes that the trial court allowed Brown to vigorously cross-examine L.W. regarding the chain of events leading to the car accident, including the distance of the roadway and the speed that the parties were traveling. Defense Exhibit 2 is an aerial photograph of the roadway where the accident occurred. The distance of that portion of the roadway depicted in the exhibit is not relevant to whether Brown committed a marked lane violation, nor is it relevant to establishing whether L.W. was driving erratically at the time of the accident. Accordingly, the trial court did not err by limiting Brown's cross-examination of L.W. regarding the distance of the roadway depicted by Defense Exhibit 2.

{¶ 19} In his fifth and final assignment, Brown argues that the trial court erred when it sustained an objection from the State and did not allow him to ask Officer Landers what L.W. and D.W. told him immediately after the car accident at the scene. Brown contends that the statements made by L.W. and D.W. to Officer Landers were excited utterances,

and therefore constituted an exception to the hearsay rule. Brown refers to the following exchange during Officer Landers's cross-examination:

> Brown: How did you come to the conclusion that they weren't all the way in the lane, that they were still merging onto it?
>
> Officer Landers: [L.W.] advised and [D.W.] as well, they stated something along the lines that as they were merging over into the left turn lane, that you [Brown] slightly went around their vehicle causing the collision.
>
> Brown: Now, we just – we heard [L.W.]. He was very adamant it wasn't around. It was from the side. He was very adamant too that he was all the way in that turn lane. So it's your testimony that they weren't in the turn lane per what they told you at the – at the scene?
>
> The State: This is hearsay, Your Honor. The officer can't testify what somebody else said.
>
> Brown: It's – if I'm correct, and I'm probably not, since they're here, he can testify and then he can ask them questions to that effect.
>
> The Court: Mr. Brunk?
>
> The State: That does not comport with the Rules of Evidence. It's hearsay.
>
> The Court: I'll sustain it. It's hearsay. Go ahead.

Tr. 69-70.

{¶ 20} As this Court has previously noted:

> " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). "To constitute hearsay, two

> elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.' " (Footnote and citations omitted) *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984). *Accord State v. Tate*, 2d Dist. Montgomery No. 25386, 2013-Ohio-5167, ¶ 75.

Abrams v. Abrams, 2017-Ohio-4319, 92 N.E.3d 368, ¶ 30 (2d Dist.).

{¶ 21} An out of court statement is not hearsay if it "is offered to prove a statement was made and not for its truth, * * * to show a state of mind, * * * or to explain an act in question." *Maurer* at 262. *Accord State v. Williams*, 38 Ohio St.3d 346, 348, 528 N.E.2d 910 (1988) (finding "[a] statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove the truth of its contents"). We review rulings regarding hearsay under an abuse-of-discretion standard. (Citation omitted.) *State v. Williams*, 2d Dist. Montgomery No. 26369, 2016-Ohio-322, ¶ 17.

{¶ 22} Evid.R. 803(2) provides an exception to the hearsay rule if the out-of-court statement constituted an "excited utterance," which the rule defines as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Reactive excited statements are considered more trustworthy than hearsay generally on the dual grounds that, first, the stimulus renders the declarant incapable of fabrication and, second, the impression on the declarant's memory at the time of the statement is still fresh and intense. *State v. Taylor*, 66 Ohio St.3d 295, 300, 612 N.E.2d 316 (1993).

{¶ 23} To qualify as an "excited utterance" the following four factors must be

established:

> (1) there was an event startling enough to produce a nervous excitement in the declaran[t], (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event.

Id. at 300-301, quoting *Potter v. Baker*, 162 Ohio St. 488, 124 N.E.2d 140 (1955), paragraph two of the syllabus. The controlling factor comes down to whether the declaration resulted from impulse as opposed to reason and reflection. *State v. Nixon*, 12th Dist. Warren No. CA2011-11-116, 2012-Ohio-1292, ¶ 13.

{¶ 24} In the instant case, Brown asked Officer Landers to testify to what L.W. and D.W. told him at the scene of the accident regarding whether they were completely in the turn lane when the accident occurred. This is clearly hearsay. L.W. and D.W. were both present during trial, and both of them testified. Accordingly, Brown could have made such an inquiry directly of them.

{¶ 25} The question therefore becomes whether L.W. and D.W.'s statements could be considered excited utterances. A trial court is entitled to some deference in its decisions concerning hearsay exceptions. A decision to admit or exclude hearsay statements under the excited utterance exception should be sustained where the decision appears to be reasonable, even if the reviewing court might have decided differently. *Taylor*, 66 Ohio St.3d 295, 305, 612 N.E.2d 316.

{¶ 26} Viewed objectively, an individual who has just been in a car accident could be in a startled or nervous state such that his or her statements to a responding police

officer could be considered excited utterances. In the instant case, however, no evidence was adduced which established that L.W. and D.W. were in a nervous or anxious state after a minor accident when they made the statements in question to Officer Landers. Officer Landers did not testify that the L.W. and D.W. were in an agitated state when they spoke to him. Simply put, there is nothing in the record which establishes that L.W. and D.W. were not acting rationally, logically or as a result of reflective thought when they provided Officer Landers with their accounts of the accident. Therefore, on the record before us, the trial court could certainly have reasonably concluded that L.W.'s and D.W.'s statements were not excited utterances, and therefore did not constitute exceptions to the hearsay rule.

{¶ 27} Brown's third and fifth assignments of error are overruled.

{¶ 28} All of Brown's assignments of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, J. and TUCKER, J., concur.

Copies mailed to:

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