[Cite as *State v. Kelso*, 2015-Ohio-2091.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 12 MA 188
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
CHRISTOPHER KELSO,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court
Case No. 10 CR 723

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Ralph Rivera
Assistant Prosecutor
Mahoning County Prosecutor's Office
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503-1426

For Defendant-Appellant

Attorney Joshua Hiznay
1040 South Commons Place
Suite 202
Youngstown, Ohio 44514

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: May 29, 2015

DEGENARO, J.

{¶1} Defendant-Appellant, Christopher Kelso, appeals the September 19, 2012 judgment of the Mahoning County Court of Common Pleas convicting him of aggravated vehicular homicide and aggravated vehicular assault and sentencing him to seven years in prison. Kelso's arguments are meritless. His conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Second, he has failed to demonstrate a colorable claim of ineffective assistance of counsel. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedure

{¶2} On February 2, 2010, Kelso, his friend Javier Colon, and his girlfriend Pamela Kennedy, traveled from Kelso's home to the Royal Gardens in Girard, Ohio for dinner and drinks. Colon and Kennedy arrived at the house around 8:00 p.m. and the parties arrived at the establishment around 8:30 p.m.

{¶3} Kelso drove his Ford Crown Victoria, while Kennedy sat in the front passenger's seat and Colon sat in the back. They arrived at the Royal Gardens between 8:30 p.m. and 9:00 p.m. Several of Kelso's friends were already there when the group arrived. Colon stated that he drank a "double Crown" and Kelso drank double bourbons.

{¶4} Colon's testimony was contradicted by Timothy Johnson and Dominic Lucarelli, friends of Kelso, who testified that they were at the Royal Gardens that evening and Kelso only drank draft beer that night. Johnson stated that everyone had three to four beers there. However, both Johnson and Lucarelli admitted that Kelso usually drinks bourbon more often than beer.

{¶5} Kelso, Colon and Kennedy left the Royal Gardens sometime between 11:00 p.m. and 12:00 a.m. and headed to Patsy's bar in Youngstown. At Patsy's, Kelso continued to drink and admitted to drinking three double bourbons. The three left Patsy's before 2:00 a.m. and headed to the Whiskey Club on Youngstown's north side. Kelso drove on Wilson Avenue towards downtown Youngstown. Colon described Kelso's demeanor as hyper and a bit aggressive; driving very fast and not speaking. Colon looked at the speedometer and witnessed that Kelso was driving at speeds of

80-85 mph, and he told Kelso to slow down. Colon fastened his seatbelt less than 30 seconds before the crash.

{¶6} Kelso testified that "the car veered" in a sideways motion that he tried to correct but lost control. Colon testified that Kelso was driving fast and turned the car to the left and right and flipped because of his "aggressive driving." At approximately 2:00 a.m. the vehicle crossed the center line into the oncoming lane of traffic and struck a telephone pole with its right side. The vehicle cracked the pole, continued another 100 feet and overturned in the process.

{¶7} Colon maintained consciousness and called 911. Youngstown police and fire responded, and it took firefighters forty-five minutes to cut Colon out from the vehicle. Colon and Kelso were transported to St. Elizabeth's Hospital. Colon suffered a broken hip, a broken pelvis, a broken femur, a torn MCL and ACL, a broken tibia, a broken fibula, and both ankles were broken. Colon required three surgeries and he was bedridden for four and a half months. Kelso suffered multiple abrasions, broken ribs, and nerve damage on his left side. Kennedy was pronounced dead at the scene.

{¶8} Youngstown Lieutenant Gerald Slattery responded to the crash near Wilson and Prospect. Slattery described the weather that night as cold and dry with no adverse conditions to the road. This was confirmed by Youngstown Officer Anthony Congemi and Youngstown Detective/Sergeant Patricia Garcar. Slattery testified that Kelso "smelled of alcohol." Because of the odor of alcohol, Slattery requested Officer Ron Barber meet Kelso at St. Elizabeth's Medical Center and "do a blood alcohol" on him.

{¶9} Officer Barber arrived at St. Elizabeth's 30-45 minutes after the accident and upon making contact with Kelso, smelled alcohol emanating from him. Kelso was alert and awake. Barber brought a State-approved blood analysis kit to Ron Guerrieri, the registered nurse that drew Kelso's blood. Barber read Kelso the BMV 2255 form, which Guerrieri witnessed. Guerrieri stated that Kelso was not given any anesthetic or painkillers before the blood draw. The form described the blood draw and possible consequences for refusal. Barber asked Kelso if he had anything to drink and he replied "yes." Barber explained to Kelso that he was requesting a blood draw for driving under the influence of alcohol.

{¶10} At 4:03 a.m. on February 3, 2010, Guerrieri drew Kelso's blood and returned two vials to Barber which he logged into an evidence refrigerator at the Youngstown Police Department. Emily Adelman, of the Ohio State Highway Patrol Crime lab's toxicology unit, analyzed Kelso's blood sample withdrawn by Guerrieri and concluded that his alcohol level was "0.115 grams percent alcohol."

{¶11} Eugene Zalka, a medical technologist and clinical chemistry specialist for St. Elizabeth Health Center Laboratories, analyzed a sample of Kelso's blood taken for medical purposes prior to the Guerrieri draw on the same date at 3:05 a.m., and concluded that his ethanol level was 139 milligrams per deciliter. Zalka explained that when converted to grams percent, 139 milligrams per deciliter equals 0.139.

{¶12} Ohio State Highway Patrol Trooper Christopher Jester is a crash reconstructionist who responded to and examined the crash site. Jester used measurements from Kelso's vehicle to estimate that it was traveling between 39 and 53 mph when it hit the telephone pole.

{¶13} Detective/Sergeant Patricia Garcar, assigned to Youngstown Police Department's crash investigation unit, responded to the crash site with her partner, Officer Brian Booksing, at approximately 2:30 a.m. She estimated that the vehicle lost control 160 feet prior to striking the pole which was "ripped from the ground, and it was cracked in half." There were no skid marks on the roadway but there were yaw marks demonstrating that the vehicle's tires were sliding sideways when it lost control. There was no evidence of braking found. She estimated that Kelso's vehicle traveled in excess of 60 m.p.h.; Wilson Ave. had a 35 mph speed limit. The vehicle's side impact made it harder to determine its speed at impact as opposed to if it was a front impact collision.

{¶14} Dr. Joseph Ohr, M.D., is Mahoning County's Deputy Coroner and Forensic Pathologist who performed Pamela Kennedy's autopsy. Dr. Ohr testified in detail about the multiple injuries suffered by Kennedy and concluded that she died as a result of "multiple blunt force injuries."

{¶15} Kelso testified on his own behalf stating that he lost control of his vehicle

as he approached Prospect on Wilson Avenue, and that he was going between 40 and 45 mph but no faster than 50 mph. After the collision, he was in and out of consciousness.

{¶16} The defense also presented expert witness Dr. Harry Plotnick, a licensed attorney in the State of Ohio and a forensic toxicology consultant, to review the blood samples. Dr. Plotnick testified that assuming the same facts according to Kelso's testimony concerning how much he drank, what he drank, and when he drank it; Kelso's BAC at the time of the accident would have been slightly below 0.08 BAC. Plotnick admitted that there was no way to verify the amount of alcohol consumed by Kelso and conceded that the type and amount of beverage ingested, the time, and course of ingestion could affect his opinion and conclusions.

{¶17} The State presented the testimony of Steve Perch, an analyst employed by the Summit County Medical Examiner's Office, as a rebuttal expert witness. Perch reviewed Dr. Plotnick's report and disagreed that Kelso's BAC was below 0.08 grams at the time of the accident. Perch looked at both Kelso's BAC levels calculated by the Ohio State Highway Patrol and St. Elizabeth's to opine that Kelso's BAC was above .08 grams at the time of the accident, either .10 or .131.

{¶18} Kelso was indicted with one count of Aggravated Vehicular Homicide, R.C. 2903.06(A)(1)(a), and one count of Aggravated Vehicular Assault, R.C. 2903.08(A)(1)(a). He was found guilty by a jury, and the trial court sentenced him to a seven-year term of incarceration.

Manifest Weight

{¶19} As Kelso's first four of five assignments of error address manifest weight and sufficiency of the evidence, they will be discussed together for clarity of analysis. Kelso asserts:

{¶20} "The trial court erred in finding Appellant Kelso guilty of aggravated vehicular homicide as that finding is not supported by the manifest weight of the evidence."

{¶21} "The trial court erred in finding Appellant Kelso guilty of aggravated vehicular assault as that finding is not supported by the manifest weight of the evidence."

{¶22} "The trial court erred in finding Appellant Kelso guilty of aggravated vehicular homicide as that finding is not supported by the sufficiency of the evidence."

{¶23} "The trial court erred in finding Appellant Kelso guilty of aggravated vehicular assault as that finding is not supported by the sufficiency of the evidence."

{¶24} When reviewing the sufficiency of the evidence, the court examines the evidence admitted at trial to determine whether the evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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 *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶25} "Weight of the evidence concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. A conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id*. This is so because the triers of fact are in a better position to determine credibility issues, since they personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill,* 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶26} To determine whether a verdict is against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine 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 reversed and a new trial ordered. *Thompkins* at 387.

{¶27} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the factfinder lost its way.'" *State v. Pallai*, 7th Dist. No. 07 MA 198, 2008-Ohio-6635, ¶31, quoting *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813

N.E.2d 964, ¶81 (2d Dist.). In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99 CA 149, 2002-Ohio-1152, *2, citing *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶28} Kelso was indicted with one count of Aggravated Vehicular Homicide, R.C. 2903.06(A)(1)(a):

> No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall cause the death of another or the unlawful termination of another's pregnancy in any of the following ways:
>
> 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;

{¶29} He was also indicted with one count of Aggravated Vehicular Assault, R.C. 2903.08(A)(1)(a):

> No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, 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.

{¶30} As referenced above, R.C. 4511.19 reads in pertinent part:

> (A)(1) No person shall operate any vehicle, streetcar, or trackless trolley 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.
>
> (b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

{¶31} Unlike a majority of cases which raise arguments relating to sufficiency and the manifest weight of the evidence, Kelso stipulates to a majority of the elements of the offenses as having been proven: that he operated the vehicle, that Pamela Kennedy died and Javier Colon was injured. However, in order to find Kelso guilty, the jury had to find that Pamela Kennedy died and that Javier Colon suffered serious injuries as the proximate result of Kelso operating a vehicle under the influence of alcohol. R.C. 2903.06(A)(1)(a); R.C. 2903.08(A)(1)(a); R.C. 4511.19. On appeal, Kelso solely challenges the finding that he operated his vehicle while violating R.C. 4511.19. Said differently, Kelso contends that his blood alcohol level was not over .08 at the time he was driving and the collision occurred.

{¶32} Kelso argues that defense expert Dr. Plotnick determined that Kelso's BAC was less than .08 and that the opinion of rebuttal witness, Perch, should be discounted because he used an incorrect weight for Kelso and had to estimate "one of the numbers he used." Kelso also argues that there was conflicting testimony of the speed at which the vehicle was traveling and there was no evidence of slurring, bloodshot eyes, or "running stoplights or stop signs."

{¶33} Kelso ignores an overwhelming amount of evidence establishing his impairment. Most significantly, Kelso admitted to consuming alcohol: drinking three

beers at the Royal Gardens, from approximately 8:30 p.m. to 11:45 p.m., and three "double" Jim Beam and sodas, from approximately 12:30 am to 1:45 pm, which resulted in Kelso's blood sample resulting in .115 grams percent alcohol as analyzed by the Ohio State Highway Patrol crime lab.

{¶34} Javier Colon testified that Kelso drank double Bourbons throughout the evening and that his drink was never empty. Further, the one-car accident occurred at around 2 a.m. with no adverse conditions to the weather or road. There was no testimony regarding slurred speech or bloodshot eyes because Kelso was unconscious and immediately transported to the hospital for life-saving treatment.

{¶35} Lieutenant Slattery testified that Kelso smelled of alcohol. Officer Barber interacted with Kelso soon after the incident at St. Elizabeth's Hospital at which time Barber smelled alcohol on Kelso, and Kelso admitted that he consumed alcohol. Eugene Zalka, a medical technologist at St Elizabeth's Hospital, testified that Kelso's BAC was .139 at 3:05 am on February 3, 2010, which was within an hour of when he arrived at the hospital. Finally, Kelso's admission that he was drifting in and out of consciousness at the scene could be indicative of the level of his impairment.

{¶36} Construing the evidence in a light most favorable to the State, there was sufficient evidence Kelso was under the influence at the time he operated the motor vehicle. Regarding the manifest weight issue, the jury, after listening to the testimony of all of the witnesses, chose not to believe, or to discredit, the testimony of Kelso and Dr. Plotnick; as well as the testimony of Johnson and Lucarelli, who had only been with Kelso for part of the time at one bar, whereas Colon was with Kelso for the entire evening at both bars. The assessment of witness credibility lies within the exclusive province of the jury, as well as the weight to accord their testimony. *Hill, DeHass,* supra. A review of the record demonstrates that Kelso's convictions are supported by ample, sufficient evidence from which a jury could conclude, beyond a reasonable doubt, that Kelso was under the influence of alcohol when he operated a motor vehicle which resulted in the death of Kennedy and injury of Colon, and that these convictions are not against the manifest weight of the evidence. Accordingly, Kelso's first four assignments of error are meritless.

Ineffective Assistance of Counsel

{¶37} In his final assignment of error, Kelso asserts:

{¶38} "Appellant Kelso's trial counsel was ineffective as he failed to pursue the suppression of the blood sample taken from Appellant Kelso."

{¶39} To prove an allegation of ineffective assistance of counsel, the defendant must satisfy a two-prong test; that counsel's performance has fallen below an objective standard of reasonable representation, and that he was prejudiced by counsel's performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E .2d 373 (1989), at paragraph two of the syllabus. To demonstrate prejudice, the defendant must prove that, but for counsel's errors, the result of the trial would have been different. *Id.* at paragraph three of the syllabus. “A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other.” *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52 (2000).

{¶40} "[F]ailure to file a suppression motion does not constitute per se ineffective assistance of counsel." *Id*., quoting *Kimmelman v. Morrison,* 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Consequently, "the decision to withdraw a motion to suppress does not constitute per se ineffective assistance of counsel." *State v. Dominguez,* 12th Dist. No. CA2011-09-010, 2012-Ohio-4542, ¶20. Kelso must show that the motion would have been meritorious —in other words granted— and then that there was a reasonable probability that he would have been acquitted, *State v. Massey*, 10th Dist. No. 12AP-649, 2013-Ohio-1521, ¶14. *See also, State v. Simms,* 10th Dist. No. 10AP-1063, 2012-Ohio-2321, ¶50; *State v. Raver* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶63.

{¶41} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. "[A]n appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence." *Id.* Thus, an appellate court independently determines, "without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *State v. McGee,* 2013-Ohio-

4165, 996 N.E.2d 1048, ¶ 15 (7th Dist.) citing *State v. McNamara,* 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶42} Kelso contends that his trial counsel was ineffective for failing to file a motion to suppress. However, a review of the record demonstrates that counsel did file a motion to suppress on November 4, 2010 requesting that all evidence obtained after Kelso's arrest, specifically the results of the blood test, be suppressed.

{¶43} The State filed a detailed response arguing to the trial court that law enforcement had reasonable grounds to believe that Kelso was driving under the influence of alcohol citing the crash, the time the crash occurred, that Kelso smelled of alcohol, and the passenger's statement that Kelso had been drinking. The State further provided details as to the manner and time that the blood was collected, the analysis techniques, and the analyst's qualifications. Kelso's attorney filed an additional motion for independent analysis of the blood sample and requested Kelso's entire medical file from St. Elizabeth's Hospital where his blood was drawn.

{¶44} As the State correctly argues on appeal, Kelso's expert witness, Dr. Harry Plotnick, relied upon the Kelso's blood sample in formulating his opinion. As such the decision to abandon the suppression and proceed with Dr. Plotnick was trial strategy: to attack the element that Kelso's BAC was not above .08 when he was operating the vehicle.

{¶45} It is unclear from the record what the ultimate disposition was on the motion to suppress. It does not appear that Kelso formally withdrew the motion. However, "motions that a trial court fails to explicitly rule upon are deemed denied once a court enters final judgment." *Savage v. Cody–Ziegler, Inc.,* 4th Dist. No. 06CA5, 2006–Ohio–2760, ¶ 28. "[T]he fact that counsel filed a motion to suppress, and later withdrew that motion, is compelling evidence of a tactical decision. It is not mere speculation to presume that defense counsel obtained information concerning the suppression motion that led to its withdrawal." *State v. Madrigal,* 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52.

{¶46} Kelso has failed to demonstrate that counsel's performance has fallen below an objective standard of reasonable representation; specifically, that the

motion would have been granted and then that there would have been a reasonable probability of being acquitted. As such, this assignment of error is meritless.

{¶47} In sum, Kelso's arguments are meritless as the conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Further, Kelso has not demonstrated a colorable claim of ineffective assistance of counsel. Accordinlgy, the decision of the trial court is affirmed.

Donofrio, P.J., concurs
Robb, J., concurs