[Cite as *Columbus v. McCash*, 2012-Ohio-3167.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 11AP-1118
v.	:	(M.C. No. 11TRD-178664)
Thomas M. McCash,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 12, 2012

Richard C. Pfeiffer, Jr., City Attorney, and *Melanie R. Tobias*, for appellee.

McCash, Baker and Plesich, L.P., and *Thomas M. McCash*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶ 1} Defendant-appellant, Thomas M. McCash, appeals from the judgment of the Franklin County Municipal Court finding him guilty of changing lanes without safety in violation of Columbus City Code ("C.C.C.") 2131.08. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was cited on November 22, 2011, after his vehicle collided into a vehicle driven by Ted Murdaugh in the eastbound lanes of I-670, near the Neil Avenue exit in Columbus, Ohio. Appellant elected to represent himself, and the case was tried to the bench that same month. The following testimony was presented at trial.

{¶ 3} Murdaugh testified that, on the morning of the incident, he was driving in the left-hand lane on I-670 east, approaching the Neil Avenue exit to his right. According to Murdaugh, the exit was congested; cars were backed up from the exit into the right-hand lane of the highway. Murdaugh saw appellant's black Mercedes Benz leave the exit lane and reenter into the right-hand lane of I-670. As Murdaugh was passing appellant on the left, he felt a "gradual" bumping of the passenger side of his car, which eventually sent him into a "violent whip" to the left. (Tr. 10.) When Murdaugh looked to his right, he saw appellant's Mercedes. Murdaugh testified that there were no cars ahead of appellant for approximately 200 yards and that there was no reason for appellant to stray into his lane.

{¶ 4} Appellant testified that the collision was unavoidable. He claimed that, after deciding to leave the congested Neil Avenue exit, he accelerated up to 45 to 50 miles per hour when a white pick-up truck pulled out of the exit lane in front of him, approximately 25 to 30 feet ahead. According to appellant, he then "reacted very quickly" and simultaneously applied his breaks and swerved left. (Tr. 26.) According to appellant, he "wasn't even sure" where Murdaugh's car was when he changed lanes. (Tr. 30.)

{¶ 5} During closing arguments, appellant argued the collision was caused by a "sudden emergency" based on the pick-up truck that pulled out in front of him. (Tr. 38.) After arguments, the trial court found appellant guilty of violating C.C.C. 2131.08(a)(1).

II. ASSIGNMENTS OF ERROR

{¶ 6} In a timely appeal, appellant advances the following three assignments of error for our consideration:

> [1.] The Municipal Court erred as a matter of law by applying a pure strict liability determination of guilt without consideration of the legal defense of sudden emergency recognized by the Supreme Court of Ohio in in [sic] the most

> recent case of *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204.
>
> [2.] The prosecution committed prejudicial error when it provided, unbeknownst to Defendant at the trial, a highlighted printed copy of *State of Ohio v. Robert L. Simpson*, 5th Dist., Knox, No. 07CA-000022, 2008-Ohio-1165 as controlling law indicating that the defense of sudden emergency is never permitted for a violation of Columbus City Code §2131.08 (R.C. §4511.33) and failed to disclose relevant case law brought to their attention by Defendant that such a defense is permitted.
>
> [3.] The Municipal Court's finding of guilt is against the manifest weight of the evidence presented.

A. First and Third Assignments of Error

{¶ 7} For ease of discussion, we will address appellant's assignments of error out of order. We begin by addressing his first and third assignments of error together, as each hinges on the applicability of the sudden-emergency defense. Appellant argues that the defense applies to prosecutions for violating C.C.C. 2131.08(a)(1) and, based on this theory, claims that his conviction was against the manifest weight of the evidence. We disagree with both arguments.

{¶ 8} C.C.C. 2131.08(a), which mirrors R.C. 4511.33(A), establishes rules governing when a roadway has been divided into two or more clearly marked traffic lanes or when traffic is lawfully moving in two or more substantially continuous lines in the same direction. The rule at issue here states that "[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 such lane or line until the driver has first ascertained that such movement can be made with safety." C.C.C. 2131.08(a)(1); *see also* R.C. 4511.33(A)(1).

{¶ 9} A violation of this statute requires proof the driver failed to maintain his or her lane of travel as nearly as is practicable and, "if a change of lanes is to be made," proof the driver failed to first ascertain that the lane change movement could be made with safety. *State v. East*, 10th Dist. No. 93APC09-1307 (June 28, 1994); *see also State v. Hernandez*, 10th Dist. No. 09AP-765, 2010-Ohio-2066. Courts have interpreted "practicable" to mean " 'that which may be done, practice or accomplished; that which is

performable, feasible, possible.' " *State v. Simpson*, 5th Dist. No. 07CA000022, 2008-Ohio-1165, ¶ 20, quoting *State v. Hodge*, 147 Ohio App.3d 550, 2002-Ohio-3053, ¶ 42 (12th Dist.), quoting Black's Law Dictionary (5th Ed.1979).

{¶ 10} In his first assignment of error, appellant argues that the trial court erroneously applied a "pure strict liability determination of guilt" under C.C.C. 2131.08(a)(1) without considering the defense of sudden emergency. Appellant does not, as the heading of his assignment may suggest, dispute whether C.C.C. 2131.08(a)(1) is a strict-liability offense. *See Simpson* at ¶ 27 (finding R.C. 4511.33(A)(1) to impose strict liability). Instead, he asserts that the defense is an "excuse" to strict liability and therefore should have been considered by the trial court. (Appellant's Brief, 4.) We disagree.

{¶ 11} The defense of sudden emergency is applicable in negligence cases where a driver is claimed to be negligent per se for violating a specific statute. *Timberlake v. Jennings*, 10th Dist. No. 04AP-462, 2005-Ohio-2634, ¶ 27. Under the defense, the driver may avoid liability for a statutory violation by showing that (1) compliance with the statute was rendered impossible (2) by a sudden emergency (3) that arose without the fault of the party asserting the excuse (4) because of circumstances over which the party asserting the excuse had no control, and (5) the party asserting the excuse exercised such care as a reasonably prudent person would have under the circumstances. *Id*., citing *Steffy v. Blevins*, 10th Dist. No. 02AP-1278, 2003-Ohio-6443, ¶ 27.

{¶ 12} The sudden-emergency defense is inapplicable, however, in a prosecution alleging a violation of a strict-liability statute, which does not require proof of negligence. *See Simpson* at ¶ 27 (finding the sudden-emergency defense inapplicable in prosecutions under R.C. 4511.33(A)(1)). Strict-liability offenses "impose liability for simply doing a prohibited act." *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, ¶ 17. Therefore, because the city was not required to prove that defendant was negligent in violating C.C.C. 2131.08(a)(1), the sudden-emergency defense did not apply.

{¶ 13} Appellant claims that the defense was recognized in this context by the Supreme Court of Ohio in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539. Nothing in *Mays* supports such a reading. In *Mays*, the court narrowly decided whether a police officer had reasonable suspicion and probable cause to believe a violation of R.C. 4511.33(A)(1) had occurred. *Id*. at ¶ 1. In rejecting the defendant's argument that the

officer had no reason to believe he failed to remain within his lane as nearly as practicable or ascertain safety, as required by R.C. 4511.33(A)(1), the court stated that "the question of whether appellant might have a possible defense to a charge of violating R.C. 4511.33 is irrelevant in our analysis of whether an officer has a reasonable and articulable suspicion to initiate a traffic stop." *Id*. at ¶ 17. However, this mention of "possible defense[s]" was in reference to the elements of "practicability" and "safety" in R.C. 4511.33(A)(1). It was not, as appellant contends, a recognition of the sudden-emergency defense. Therefore, appellant's reliance on *Mays* is misplaced.

{¶ 14} Given our holding that the sudden-emergency defense was inapplicable, we reject appellant's third assignment of error which claims that the defense rendered his conviction against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, an appellate court sits as the "thirteenth juror" and must weigh the evidence to determine whether 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.' " *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). The appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶ 15} Here, the evidence established that appellant violated C.C.C. 2131.08(a)(1) by failing to maintain his lane as nearly as practicable and by changing lanes without first ascertaining safety. It was undisputed that appellant's vehicle collided into Murdaugh's vehicle after appellant changed into Murdaugh's lane of travel. Although appellant testified that he had no opportunity to avoid the collision because of a pick-up truck that pulled out in front of him approximately 25 to 30 feet ahead, Murdaugh testified that there were no cars in front of appellant for approximately 200 yards and that there was no reason for appellant to change lanes. Additionally, Murdaugh described the collision as more gradual, contradicting appellant's claim that an immediate lane change was unavoidable. Given Murdaugh's testimony, any reasonable trier of fact could have

concluded that appellant could have ascertained safety and maintained his lane without colliding into Murdaugh. We do not find that the trial court clearly lost its way in finding appellant guilty.

{¶ 16} Accordingly, appellant's first and third assignments of error are overruled.

B. Second Assignment of Error

{¶ 17} Finally, we turn to appellant's second assignment of error, which argues that the prosecutor committed prejudicial error by providing the trial court with a copy of the Fifth District's decision in *Simpson* and by failing to provide relevant cases from this court discussing the defense of sudden emergency. However, appellant presents nothing from the record evidencing that such an incident took place. It is an appellant's burden to demonstrate error by reference to matters in the appellate record. *Williams v. Autozone*, 10th Dist. No. 11AP-134, 2011-Ohio-4985, ¶ 10, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980). Because appellant has not supported the alleged error with a transcript or any alternative form of the record permitted by App.R. 9, we must presume the regularity of the proceedings and the validity of the trial court's rulings. *See Frick, Preston & Assoc. v. Martin*, 10th Dist. No. 10AP-1208, 2011-Ohio-4428, ¶ 8. Therefore, appellant's second assignment of error is overruled.

III. CONCLUSION

{¶ 18} Having overruled appellant's first, second, and third assignments of error, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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