

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-122 (M.C. No. 2008 TRD 180933)
David N. Presar,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 29, 2009

Richard C. Pfeiffer, Jr., City Attorney; *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Jeffrey L. McClelland, for appellant.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Defendant-appellant, David N. Presar, appeals from a judgment of conviction and sentence entered by the Franklin County Municipal Court. For the following reasons, we affirm that judgment.

{¶2} On August 22, 2008, appellant was driving a tractor-trailer north on I-270 near Columbus, Ohio. He exited the freeway at West Broad Street. Appellant stopped at the red light at the end of the exit ramp. He looked to the left and saw no oncoming traffic, so he turned right (east) onto West Broad Street. West Broad Street has three

lanes for eastbound traffic as well as a left-hand turn lane. Very shortly after completing his right turn onto West Broad Street, appellant attempted to make a right-hand turn into the entrance of Westland Mall. As appellant was executing the right-hand turn into the mall, a pickup truck traveling eastbound in the right curb lane struck the side of appellant's tractor-trailer.

{¶3} There was conflicting testimony regarding the position of appellant's tractor-trailer immediately prior to the collision. There was also conflicting evidence regarding appellant's use of his right turn signal before turning. Appellant testified that his tractor-trailer was largely in the right curb lane as he began his right turn into the mall entrance and that he activated his right turn signal before executing the turn. The driver of the pickup truck, Scott Hoover, and his passenger, Christina Meredith, testified that appellant's tractor-trailer was in the middle lane when appellant executed his right turn and that they did not see appellant's right turn signal. Hoover further testified that he was driving east in the right curb lane at approximately 35-40 miles per hour when the collision occurred.

{¶4} As a result of the accident, appellant was charged with one count of turning or changing lanes without exercising due care or using an appropriate signal in violation of R.C. 4511.39(A). After a bench trial, the trial court found appellant guilty as charged and sentenced him accordingly.

{¶5} Appellant appeals and assigns the following errors:

I. THE FINDINGS AND DECISION OF THE TRIAL COURT THAT APPELLANT WAS GUILTY OF A VIOLATION OF 4511.39(A), O.R.C. IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED IN THAT SUCH EVIDENCE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT DID NOT USE A TURN SIGNAL

AND DID NOT EXERCISE DUE CARE IN MAKING A RIGHT HAND TURN.

II. THE COURT, BY DENYING APPELLANT'S MOTION FOR A CONTINUANCE OF THE TRIAL HEREIN TO PROCURE THE ATTENDANCE OF A SUBPOENAED DEFENSE WITNESS, ABUSED ITS DISCRETION AND COMMITTED ERROR PREJUDICIAL TO DEFENDANT.

{¶6} We first address appellant's second assignment of error, in which he contends the trial court abused its discretion by denying his request for a continuance. We disagree.

{¶7} The grant or denial of a continuance is a matter that is entrusted to the sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65, syllabus; *State v. Conway* (Mar. 30, 1989), 10th Dist. No. 88AP-798. An appellate court must not reverse the denial of a continuance unless there has been an abuse of discretion. *Unger* at 67. An abuse of discretion refers to more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶8} Whether a trial court has abused its discretion in denying a continuance depends upon the circumstances of each case, including the reasons presented to the trial judge at the time of the request. *State v. Powell* (1990), 49 Ohio St.3d 255, 259; *State v. Jackson*, 10th Dist. No. 02AP-867, 2003-Ohio-6183, ¶84. We also consider the length of the requested delay, prior continuances requested and received, the presence or absence of legitimate reasons for the requested delay, appellant's participation or contribution to the circumstances giving rise to the request for a continuance, and any other relevant factors. *Unger* at 67-68.

{¶9} On the morning of trial, appellant's trial counsel requested a continuance because Shana Davis, a properly subpoenaed witness, was not present to testify. The trial court had continued the trial on two prior occasions because Davis failed to appear. Appellant's counsel claimed that Davis was vital to appellant's defense. However, appellant's counsel did not at that time proffer the substance of Davis' anticipated testimony.¹ The trial court denied appellant's request.

{¶10} Appellant contends the trial court abused its discretion by denying his request for a continuance because Davis was a vital defense witness. However, the trial court did not know the substance of Davis' testimony when it denied appellant's request. Appellant's trial counsel did not proffer Davis' anticipated testimony at the time he requested the continuance. "When the reason for a continuance is to secure the attendance of a witness, 'it is incumbent upon the moving party to show that such witnesses would have given substantial favorable evidence and that they were available and willing to testify.' " *State v. Komadina*, 9th Dist. No. 02CA008104, 2003-Ohio-1800, ¶32, quoting *State v. Mills*, 5th Dist. No. 01-COA-01444, 2002-Ohio-5556.

{¶11} Because appellant's counsel did not make a timely proffer of Davis' anticipated testimony, the trial court could not have known how or why Davis' testimony was vital to appellant's defense when it denied the continuance. *State v. Snowden* (1976), 49 Ohio App.2d 7, 17 (not an abuse of discretion to deny continuance due to absence of purportedly "critical defense witness" where no proffer made of witness' anticipated testimony at the time of decision). Nor did appellant's counsel indicate that Davis would be available and willing to testify if the trial court continued the trial again.

¹ Counsel did make a proffer of Davis' testimony at the conclusion of appellant's trial.

Lastly, if it granted another continuance, the trial court was concerned about the inconvenience to the state's witnesses who were present, particularly given that these witnesses previously attended scheduled trials that were continued because of Davis' repeated absences. Under these circumstances, the trial court did not abuse its discretion in denying appellant's motion for a continuance. Accordingly, we overrule appellant's second assignment of error.

{¶12} Appellant contends in his first assignment of error that his conviction is against the manifest weight of the evidence. We disagree.

{¶13} A manifest weight of the evidence claim concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, 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 reversed and a new trial ordered.' " *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id.*

{¶14} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. The trier of fact is free to believe or disbelieve all or any

of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams*, 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston*, 10th Dist. No. 01 AP-1393, 2002-Ohio-4491, ¶74.

{¶15} The trial court found appellant guilty of violating R.C. 4511.39(A), which provides that:

No person shall turn a vehicle * * * or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety nor without giving an appropriate signal * * *.

{¶16} In order to find appellant guilty of violating this statute, the state had to prove beyond a reasonable doubt that appellant turned or changed lanes without exercising due care or without using an appropriate signal. *State v. Smith*, 156 Ohio App.3d 238, 2004-Ohio-791, ¶8, citing *State v. Richardson* (1994), 94 Ohio App.3d 501. The failure to do either gives rise to a violation. *Id.* The trial court found that appellant changed lanes without exercising due care and without using a turn signal. Given the evidence presented at trial, the trial court's finding is not against the manifest weight of the evidence.

{¶17} Hoover testified that he watched appellant turn right onto West Broad Street and proceed into the middle lane. Driving in the right curb lane, Hoover attempted to pass appellant. Hoover estimated his speed at about 35-40 miles per hour. Hoover testified that he was almost halfway past appellant's tractor-trailer when appellant turned right from the middle lane, causing the collision. In addition, Hoover did not see any turn signal to warn him that appellant intended to turn right. Meredith also testified that Hoover was driving in the right hand curb lane and had driven almost to appellant's cab when appellant attempted a right turn from the middle lane. Meredith did not see appellant utilize a right turn signal.

{¶18} Although appellant offered conflicting testimony regarding which lane he was in and whether or not he signaled before turning, we cannot say that the trial court clearly lost its way by finding appellant guilty of violating R.C. 4511.39(A). *Cuyahoga Falls v. Ivanov*, 9th Dist. No. 24202, 2009-Ohio-3000, ¶21-22 (conviction not against the manifest weight of the evidence where trial court is faced with two conflicting versions of events). The trial court specifically found Hoover and Meredith credible when they testified that they did not see appellant use a right turn signal before beginning his right hand turn. This was well within the province of the trier of fact. A conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution's witnesses and disbelieved the appellant's testimony. *State v. Williams*, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶19.

{¶19} Appellant claims that Hoover's testimony was not credible because Hoover was driving at an "obviously excessive speed." However, there was no evidence at trial indicating the speed limit on that portion of West Broad Street. Nor was there any

evidence that Hoover was driving at an excessive speed. Hoover estimated that he was driving between 35-40 miles per hour as he tried to pass appellant. Additionally, a picture taken of the accident scene shows skid marks made by Hoover's pickup. Those skid marks indicate that Hoover's pickup truck was in the right curb lane immediately before the collision. This fact lends credibility to Hoover's version of events and casts doubt on appellant's testimony that his tractor-trailer was primarily in the right curb lane immediately before the collision.

{¶20} Appellant also contends that Hoover's testimony that he did not see a right turn signal was not inconsistent with appellant's claim that he used his right turn signal. Appellant argues that Hoover would not have seen his right turn signal because Hoover was at the middle point of appellant's tractor-trailer when appellant attempted to turn. As the trial court noted, however, appellant's tractor-trailer had turn signal indicators in the back and over appellant's front tires. The trial court did not lose its way by suggesting that Hoover would have seen the signal indicator over the right front wheel of appellant's tractor-trailer if appellant had used his right turn signal.

{¶21} We also note that appellant does not directly challenge Meredith's testimony. She also testified that she did not see appellant use a right turn signal before making the right hand turn from the middle lane of West Broad Street. The trial court expressly found her testimony credible.

{¶22} The trial court did not clearly lose its way when it found that appellant did not use a right turn signal before beginning his right hand turn. Accordingly, appellant's conviction for violating R.C. 4511.39(A) is not against the manifest weight of the evidence, and we overrule appellant's second assignment of error.

{¶23} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

FRENCH, P.J., and BROWN, J., concur.
