[Cite as *State v. Crabtree,* 2010-Ohio-3843.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1097
v.	:	(C.P.C. No. 08CR-3823)
Donna M. Crabtree,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 17, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard,* for appellee.

Stephen Dehnart, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Donna M. Crabtree, appeals from a judgment of the Franklin County Court of Common Pleas finding her guilty, pursuant to jury verdict, of aggravated vehicular homicide in violation of R.C. 2903.06. Because both sufficient evidence and the manifest weight of the evidence support the jury's verdict, we affirm.

I. Procedural History

{¶2} In the early morning hours of November 25, 2007, defendant and Shaun McKibben left the Galloway Tavern to go to defendant's home. With defendant driving, her vehicle collided a few moments later with a utility pole on Galloway Road. As a result of the collision, McKibben died of a lacerated aorta due to blunt force injuries to the chest. Defendant told an investigating deputy sheriff the accident occurred when she swerved to avoid a deer on Galloway Road. She admitted to the deputy she had been drinking; she stated she had consumed two beers and a shot of liquor over the course of the evening.

{¶3} Defendant was charged, through indictment filed on May 20, 2008, with one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a felony of the second degree, premised on allegations defendant violated R.C. 4511.19(A). The second count of the indictment charged defendant with one count of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), a felony of the third degree, premised on allegations defendant recklessly caused the victim's death. The third count of the indictment charged defendant with one misdemeanor count of operating a vehicle under the influence of alcohol or drugs of abuse in violation of R.C. 4511.19 ("OVI").

{¶4} In a trial that began on August 24, 2009, the state and defendant called both lay and expert witnesses. On September 4, 2009, the jury found defendant not guilty of aggravated vehicular homicide as a second-degree felony and not guilty of the misdemeanor count of OVI. The jury, however, found defendant guilty of the third-degree felony count of aggravated vehicular homicide. The trial court sentenced defendant to three years in prison.

II. Assignments of Error

{¶5} Defendant appeals, assigning three errors:

> First Assignment of Error: The evidence was legally insufficient to support appellant's conviction for aggravated vehicular homicide.
>
> Second Assignment of Error: The court erroneously overruled appellant's motion for acquittal pursuant to Criminal Rule 29.
>
> Third Assignment of Error: Appellant's conviction was against the manifest weight of the evidence.

III. First and Second Assignments of Error — Sufficiency of the Evidence

{¶6} Defendant's first and second assignments of error assert the state failed to present sufficient evidence to support the trial court's judgment finding defendant guilty of aggravated vehicular homicide as a third-degree felony.

{¶7} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶8} Under Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Analysis of the evidence for purposes of a Crim.R. 29(A) motion looks at the sufficiency of the evidence. A Crim.R. 29(A) motion and a review of the sufficiency of the evidence are thus subject to the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶9} Defendant was found guilty of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), which provides that "[n]o person, while operating or participating in the operation of a motor vehicle * * * shall cause the death of another * * * [r]ecklessly." "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). "A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." Id.

{¶10} To support the element of recklessness, the state points to evidence that defendant consumed alcohol on the night of the accident. Lisa Logan, bartender at the Galloway Tavern, recalled seeing defendant and McKibben come into the bar at some point after 1:00 a.m. Both defendant and McKibben ordered one beer and one cherry bomb, a mixture of Red Bull and seven-eighths of a shot of cherry vodka. Logan testified to defendant's "lifting the beer to her mouth and drinking it and * * * observed her drinking the shot, you know * * * [She] sipped on hers. She didn't like do it as a shot." (Tr. 109.) Although Logan did not see defendant drink all of every drink, the drinks were empty when they were removed.

{¶11} Douglas Stormont, owner of the Galloway Tavern, similarly testified that although he saw defendant drinking her beer and sipping her shot, he, too, did not watch to see whether she consumed the entire beer or shot. When defendant's cousin arrived, another beer and a shot were ordered for all three. At closing time, defendant's beer was more than half full. The state corroborated the testimony that defendant was drinking on the night of the accident with the video from Deputy Bret Ulry's police cruiser. According

to the video, Corporal William Cox inquired of defendant whether she had had anything to drink; she replied, "I had two beers and a shot. I'm not going to lie, yes. Two beers and a shot." (Tr. 221.)

{¶12} Multiple witnesses testified to defendant's actions being consistent with alcohol consumption. Logan noted defendant was "happy and kind of giddy." (Tr. 113.) On a scale of zero to ten, with zero being sober and ten being falling down drunk, Logan placed defendant at four or five, because she did not believe defendant "was stone sober when they arrived." (Tr. 114.) As she explained, "[F]or one thing they stated they'd been, you know, that they were partying, they were having a good time." (Tr. 114.) She stated "[t]hey just by outward appearances, she wasn't, you know, I've seen some really sloppy drunks. And she wasn't that. But I didn't feel that she was stone sober when she arrived either." (Tr. 114.)

{¶13} Stormont testified that at one point defendant engaged in a verbal altercation with three males that entered the Galloway Tavern to purchase take-out beer. Defendant was "screaming" that "she grew up in the Bottoms. She didn't care if you had a dick or a cunt she was going to kick your ass and this was over again and again and again." (Tr. 144.) During the exchange, defendant was "right in their face" for "three to five minutes" before Stormont asked the men to leave. (Tr. 144-45.) Stormont placed defendant at five on the ten-point scale because of her "aggressive action, just firing off and just going on and on. You get somebody that's had a few drinks and some of them get very aggressive, they want to fight in a second, in a heartbeat." (Tr. 146-47.) Deputy Ulry also found defendant "difficult to get along with" and said that she was "not cooperating at times." (Tr. 239.) Ulry associated the traits with intoxication.

{¶14} The state's witnesses also testified to an odor of alcohol on defendant after the accident. Cody Cook, happening upon the scene, noticed defendant "was stumbling out of the car and she was stumbling towards me." (Tr. 88.) Although he admitted he "wouldn't know if it was from the crash or the alcohol," he "did smell alcohol on her. So [he] assumed that she was intoxicated." (Tr. 88.) Deputy Ulry noted, as one sign of intoxication, "the odor of alcohol that was on her." (Tr. 239.) Corporal Cox also "noticed an odor of alcohol" while speaking with defendant. (Tr. 315.)

{¶15} The state also presented evidence that the accident occurred in a manner consistent with a driver who had consumed alcohol. The speed limit at the point of the accident is 35 miles per hour. Basing his testimony on his experience in accident reconstruction, Deputy Steve Fickenworth offered an estimate that defendant was traveling at a speed of approximately 40-50 miles per hour. Fickenworth, however, admitted no science was behind his estimate; it was based on crash testing he had observed.

{¶16} Fickenworth further noted the presence of a "rolling rut" in the grass to the right of Galloway Road. (Tr. 367.) A "rolling rut" refers to "a tire mark that's left by a car that indicates that the tire was rolling and was not creating any kind of directional force or braking force on the ground as it went across it. So it's a rolling tire." (Tr. 367–68.) Fickenworth traced the rut back 60 feet from the utility pole defendant struck. The 60-foot rolling rut revealed only a one-foot deviation. Fickenworth and his team looked for other marks in the road and on the grass up to 300-400 feet back from the rolling rut and found nothing. The single line mark displayed no indication of braking, steering, or evasive

maneuvering. In Fickenworth's opinion, the wreck occurred because defendant "just drifted off the right side of the road and struck the pole." (Tr. 373.)

{¶17} Acknowledging the evidence she consumed alcohol the evening of the fatal accident, defendant argues such evidence may not be considered to prove defendant recklessly caused McKibben's death. Defendant points out that even if intoxication generally is relevant to determining recklessness under R.C. 2903.06(A)(2), as in *State v. Hennessee* (1984), 13 Ohio App.3d 436 and *State v. Broomfield* (Sept. 4, 2001), 10th Dist. No. 00AP-1420, the jury found defendant not guilty on the two indicted offenses that charged alcohol related offenses. Defendant thus claims the jury's verdict finding she recklessly caused McKibben's death, to the extent it is grounded on evidence of her alcohol consumption, necessarily conflicts with verdicts finding her not guilty of the only two alcohol related offenses for which she was indicted.

{¶18} Although the jury's verdicts on the other two counts of the indictment indicate the jury was not convinced defendant was under the influence of alcohol to the degree needed to violate R.C. 4511.19(A), "consuming alcohol prior to operating a motor vehicle 'may demonstrate "heedless indifference to the consequences" of one's actions and a perverse disregard of a known risk as is required by R.C. 2901.22 to demonstrate reckless conduct.' " *State v. Gaughan*, 9th Dist. No. 08CA0010-M, 2008-Ohio-5528, ¶39, quoting *State v. Wamsley* (Feb. 2, 2000), 9th Dist. No. 19484, quoting R.C. 2901.22(C). As a result, even though "the jury found [defendant] not guilty of driving under the influence of drugs or alcohol, there was sufficient evidence for the jury to conclude" defendant's "consumption of alcohol that evening, while not being legally intoxicated, created a situation which was likely to result in an incident such as that which occurred."

Id., quoting *Wamsley*. Indeed, "after consuming alcohol, [defendant] disregarded the known risk that such alcohol consumption would slow [her] reflexes, impair [her] judgment and cause such an incident." Id.; see also *State v. Tamburin* (2001), 145 Ohio App.3d 774 (concluding alcohol consumption, coupled with other driving circumstances may support a finding of recklessness). The jury thus properly could consider defendant's alcohol consumption in determining whether defendant recklessly caused McKibben's death.

{¶19} The jury's verdicts also are not legally conflicting. A jury need not deliver rationally consistent verdicts in order for the verdicts to be upheld. *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶15. As long as sufficient evidence supports the jury's verdict at issue, other seemingly inconsistent verdicts do not undermine the otherwise sufficient evidence. Id.

{¶20} Here, the state presented evidence defendant consumed alcohol, exhibited behavior consistent with alcohol consumption, caused a vehicular accident in a manner consistent with an alcohol-induced error in judgment, and smelled of alcohol after the accident. Viewed in the light most favorable to the prosecution, the evidence is sufficient to suggest that defendant's consumption of alcohol led to her heedless indifference to the risks associated with her subsequent efforts to drive, causing McKibben's death. Defendant's first and second assignments of error are overruled.

IV. Third Assignment of Error — Manifest Weight of the Evidence

{¶21} Defendant's third assignment of error contends that, even if sufficient evidence supports the jury's verdict, the judgment is against the manifest weight of the evidence.

{¶22} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley,* supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶23} In the hours following the crash and throughout trial, defendant maintained her attempts to avoid a deer on Galloway Road caused the fatal accident. Defendant mentioned a deer on the police cruiser video no fewer than 12 times, though she did at one point express uncertainty as to what exactly was in the road, saying, "God, I tried to dodge whatever it was. It was a fucking deer or something. I don't know." (Tr. 213.) She stated that, as she was driving, "a deer just come out of nowhere and [she] tried to avoid it the best that [she] could." (Tr. 500.) Defendant testified the total time consumed for defendant to see the deer, react, and hit the utility pole was the "[b]link of an eye. That quickly." (Tr. 502.) Defendant stated she previously had seen deer in the area at night.

{¶24} To support defendant's testimony and refute Deputy Fickenworth's testimony about the speed of defendant's car at the time of the accident, defendant

presented the testimony of Laurence DuBois, an accident reconstruction consultant. According to DuBois, not enough information was available to determine the speed of the car. He testified that Deputy Fickenworth's approach was unreliable and not acceptable among accident reconstruction experts, because Fickenworth looked at, rather than measured, the damage to a car to determine the vehicle's speed. Considering the airbag in defendant's car had deployed, coupled with the distance from the Galloway Tavern to the utility pole, DuBois estimated defendant was traveling at a speed ranging from 15–39 miles per hour.

{¶25} Defendant also presented the testimony of Dr. Alfred Staubus to address the effect of defendant's alcohol consumption on her. Dr. Staubus performed various calculations based upon defendant's size and the different accounts of what she imbibed that night. He noted, in particular, that defendant's drinking was frequently interrupted on the night of the accident. More than once the group left a bar shortly after arriving.

{¶26} According to defendant, she had half of a Bud Light around 11:00 p.m. at the Outside Corner, nothing at City Limits, and half of a Bud Light at O'Toole's shortly after midnight. The group left to go to the Derby bar. Defendant and McKibben rode in defendant's car; the others rode in defendant's sister's car, which her sister's friend drove. Around 12:50 a.m., defendant's sister's friend was pulled over and was arrested for OVI. Whether the highway patrol officer administered a horizontal gaze nystagmus test to defendant and subsequently gave her permission to drive was the subject of disputed evidence. Either way, defendant left with McKibben, driving on the back roads rather than the freeway, and arrived at the Galloway Tavern no later than 1:45 a.m. At the Galloway

Tavern, defendant claimed that she drank one Bud Light and one half of each of two cherry bombs, for a total of one shot.

{¶27} Based upon the average person with the height and weight of defendant, Dr. Staubus concluded, premised on defendant's testimony about what she consumed, that the two half beers defendant consumed earlier in the night would have been eliminated from her system at the time of the accident. As a result, "the only [drinks] that would be left in her body that would be contributing to the alcohol concentration at the time of the accident would be the alcohol consumed at the Galloway Tavern." (Tr. 652.) According to Dr. Staubus' calculations, defendant's blood alcohol concentration at the time of the accident would have been between less than .02 and .025, a level that "falls within what's called a sobriety stage of alcohol influence. * * * And under the sobriety stage you would have no apparent influence." (Tr. 655.) Dr. Staubus also calculated defendant's blood alcohol based on the testimony of Stormont and Logan, concluding defendant's blood alcohol concentration at the time of the accident to be between less than .02 and .05.

{¶28} On cross-examination, Dr. Staubus explained that the stages of alcohol influence overlap. The sobriety stage ranges from .01 to .05; the next stage, euphoria, ranges from .03 to .12. He acknowledged the calculations would have reached different results had defendant more or less to drink than her testimony indicated.

{¶29} Other testimony would have allowed the jury to conclude defendant imbibed more alcoholic beverages that her testimony reflected. More significantly, however, the combined testimony about defendant's vehicular speed and her alcohol consumption allowed the jury to find she recklessly caused McKibben's death. Indeed, apart from the

testimony that defendant's alcohol consumption appeared to affect her generally, the physical evidence surrounding the accident suggests alcohol had some effect on defendant's driving. No tire marks were in the road to indicate any braking or steering. Similarly, the deviation in the rolling rut was small enough to reflect no braking or steering once defendant's passenger side tires left the road.

{¶30} Moreover, defendant's recollection of the incident may have caused the jury to doubt her credibility. She insisted she was not looking down or somewhere else at the time of the accident, but nonetheless testified she looked up to see the deer. Yet, when asked about the approach of the deer, defendant did not know whether it was walking or running, only that "[i]t come from my left and was in the road. * * * I was just driving and it was there." (Tr. 612.) Given the chance to explain the evasive maneuvers she took in order to avoid the deer, defendant said, "I moved my car—I went to the right." (Tr. 613.) When asked for details about her maneuvers, such as whether the tires squealed, she could feel the car going over two surfaces simultaneously for 60 feet, she felt like she was off the road, it felt like a drift, or she hit the brakes, defendant could only say that "you can ask me the same question a thousand million times, but I'm going to tell you the same answer. It was a blink of an eye. It was that fast. I did what I had to do to try to avoid it." (Tr. 617.) A jury reasonably could expect more specific details about the deer's appearing on the road or what defendant did to avoid the deer.

{¶31} Although defendant cast doubt on some of the accident reconstruction data Deputy Fickenworth provided and offered evidence to suggest defendant was not intoxicated, the jury was charged with the responsibility to weigh the evidence and determine credibility. *State v. Craig* (2000), 10th Dist. No. 99AP-379 (noting

inconsistencies in testimony do not render a verdict against the manifest weight of the evidence). Doing so, the jury could consider evidence of speed and defendant's alcohol consumption, the physical evidence of the crash, including the rolling rut and lack of tire marks on the road, as well as defendant's inability to describe her evasive maneuvers with any specificity, and the jury reasonably could conclude defendant drove recklessly. Despite the contrary evidence defendant presented, the jury's verdict was not against the manifest weight of the evidence. Defendant's third assignment of error is overruled.

{¶32} Having overruled defendant's three assignments of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.

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