

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2011-03-025 |
| | : | |
| - vs - | : | <u>OPINION</u> |
| | : | 3/19/2012 |
| DOUGLAS M. ALLISON, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR26953

David Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Bryan Scott Hicks, P.O. Box 359, Lebanon, Ohio 45036, for defendant-appellant

HENDRICKSON, P.J.

{¶ 1} Defendant-appellant, Douglas M. Allison, appeals his conviction in the Warren County Court of Common Pleas for aggravated vehicular homicide in violation of R.C. 2903.06(A)(2). For the reasons discussed below, we affirm Allison's conviction.

{¶ 2} On October 14, 2010, at approximately 6:30 p.m., a motor vehicle accident occurred at the intersection of U.S. Route 42 and Miller Road in Lebanon, Ohio. Mary Wells

was driving a red Nissan Altima (red sedan) northbound on U.S. 42. As Wells approached the intersection, her vehicle was struck from behind by a white Ford Explorer (white SUV) driven by Allison. After the collision, Allison was able to climb out of his vehicle. Wells remained unresponsive in her vehicle until police and rescue units responded to the scene. Wells was transported to a nearby hospital by air, but later died as a result of her injuries from the crash.

{¶ 3} On October 25, 2010, Allison was indicted on one count of vehicular homicide in violation of R.C. 2903.06(A)(3), a fourth-degree felony, and one count aggravated vehicular homicide in violation of R.C. 2903.06(A)(2), a second-degree felony. Allison waived a jury trial, and a bench trial was held on February 24, 2011. The trial court found Allison guilty on both counts. The trial court merged the two charges together for purposes of sentencing, and on February 25, 2011, Allison was sentenced to six years in prison on the aggravated vehicular homicide conviction.

{¶ 4} Allison timely appealed his conviction, alleging a sole assignment of error.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT CONVICTED HIM OF AGGRAVATED VEHICULAR HOMICIDE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 7} Allison argues his conviction for aggravated vehicular homicide is against the manifest weight of the evidence because the evidence presented at trial establishes that he had an epileptic seizure just moments prior to the crash. Allison argues that because the accident occurred as a result of a seizure, and not as a result of a voluntary act, his actions do not rise to the level of recklessness. Allison contends that "[w]here there is evidence that a defendant suffers from epilepsy and takes medication to prevent seizures but suffers a

seizure while driving and causes a fatal accident, his actions do not rise to the level of recklessness."

{¶ 8} "A manifest weight challenge 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. Willis*, 12th Dist. No. CA2010-10-079, 2011-Ohio-3519, ¶ 24. "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines 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." *State v. Cummings*, 12th Dist. No. CA2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 9} "While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, 'these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence.'" *State v. Hernandez*, 12th Dist. No. CA2010-10-098, 2011-Ohio-3765, ¶ 26, quoting *State v. Walker*, 12th Dist. No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction in the absence of manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52; *State v. Woodward*, 12th Dist. No. CA2011-02-036, 2011-Ohio-6019, ¶ 10.

{¶ 10} In order to prove a violation of R.C. 2903.06(A)(2), the state was required to prove beyond a reasonable doubt that while operating his motor vehicle, defendant recklessly caused death or serious physical harm to another. Pursuant to R.C. 2901.22(C),

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. 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.

{¶ 11} At trial, the state presented testimony from Arthur Austin, an eyewitness to the accident. Austin testified he was stopped at a red traffic light at the intersection of U.S. Route 42 and Miller Road when he observed a red sedan approaching from the south traveling approximately 30 to 40 m.p.h. Austin testified that a white SUV, traveling approximately 60 to 80 m.p.h., approached the sedan rapidly from behind, struck the left rear of the sedan, and climbed up onto the sedan, wedging its front tire into the sedan's trunk. He explained that as the sedan began to spin clockwise, the SUV flipped over the sedan before it finally landed on its side. Austin described the collision as an explosion. He also testified Allison was able to exit his vehicle, but the driver of the sedan remained unresponsive in her vehicle and was bleeding from her nose.

{¶ 12} Krista Wyatt, a captain with the Lebanon Fire Division, testified that she and an engine crew had been dispatched to the scene of the accident. Wyatt stated that upon arriving at the scene, Allison was standing outside of his vehicle. Allison was wandering back and forth, trying to get back to his vehicle, and he was not communicating coherently. Wyatt testified that a person coming out of a seizure acts similarly to the manner in which Allison acted, and Allison's actions could have been indicative of a seizure or head injury.

{¶ 13} Adam Stafford, a firefighter and paramedic with the Lebanon Fire Division, testified that he provided medical care to Allison at the scene of the accident. Stafford described Allison as initially uncooperative and uncommunicative. Stafford testified that after Allison was placed on a backboard and loaded into an ambulance, Allison began to communicate and appeared to be more cognizant of the situation. Stafford stated Allison

called his girlfriend, Lois Tucker, while en route to the hospital. Stafford talked to Tucker on the phone and she informed him that Allison had a seizure disorder. From his discussion with Tucker, Stafford concluded that Allison's behavior was a result of coming out of a seizure and not from a head injury.

{¶ 14} Tucker testified that she was the owner of the white SUV, and Allison did not have her permission to drive the vehicle. Tucker testified that Allison has had epilepsy since childhood and, as a result, normally does not drive. Tucker stated Allison had previously experienced seizures while driving, and Allison's physician did not permit him to drive. Tucker also stated Allison's seizures could be very violent and happened "at least once a month." Tucker explained Allison took two medications, Keppra and Dilantin, twice a day to help control his seizures. She testified that she knew Allison had taken his medication the day before the accident. Tucker also testified that she believed Allison had taken her vehicle in order to visit his son in an attempt to prevent his son from taking drugs.

{¶ 15} At trial, Greg Vondenbenken, a sergeant with the City of Montgomery Police Department, testified that he had investigated a July 3, 2008 automobile accident caused by Allison. Vondenbenken testified Allison had been operating a U-Haul truck on Interstate 71 in Hamilton County when he stuck a Ford SUV in the rear before crashing into a guardrail. Vondenbenken testified that during the investigation Allison admitted he had epilepsy, had experienced a seizure, and had blacked out at the time of the crash.

{¶ 16} Edward Eckert, an investigator for the Ohio Bureau of Motor Vehicles, testified Allison's driver's license was suspended on the day of the October 14, 2010 accident. Eckert further testified that Allison has not had a valid Ohio driver's license since 1990.

{¶ 17} Patrick Jenkinson, an officer with the Lebanon Police Department, testified that he was the first officer to respond to the accident on October 14, 2010, and he was Allison's arresting officer. Although Allison was uncommunicative at the scene of the accident,

Jenkinson testified Allison was able to communicate at the time he was arrested. Jenkinson testified Allison asked if he was going to jail for having a seizure.

{¶ 18} Sergeant Richard Bens with the Lebanon Police Department testified that he performed an accident reconstruction of the crash between Wells and Allison. Bens arrived at the scene of the accident around 7:00 p.m. on October 14, 2010, and examined the pavement for markings and gouges, the damage to the vehicles, the position of the traffic control devices, and the condition of the roadway. Bens testified that at the time of the accident, it was daylight and the traffic lights were in working condition. He also testified that the brakes on Allison's white SUV were not damaged and the pavement was not a contributing factor to the accident. Bens explained he was unable to determine the speed of the vehicles because the pavement did not have any scuff marks or braking skids. Without the braking skids, Bens testified he was unable to determine if Allison had braked during the accident. However, based on the force of the impact and the damage sustained by Wells' vehicle, Bens did not believe Allison had slowed down or applied the brakes at any time.

{¶ 19} Bens interviewed Allison the day after the accident, and during this interview, Allison admitted that there was no emergency which necessitated him driving on October 14, 2010. Rather, Allison told Bens that he was on his way home from visiting his nephew. Allison told Bens that the last thing he remembered before he was pulled from his SUV and transported to the hospital was traveling north on Columbus Avenue and stopping at a traffic light behind a white van. Allison informed Bens that he was epileptic and took medication for his seizures. Allison stated that the last time he had taken his medication was on the morning of the accident, and he had been scheduled to take a second dose at 6:00 p.m on October 14, 2010. Allison admitted to Bens that at the time of the accident, it was past the time he was required to take his medication. Bens also testified Allison had mentioned being

involved in two prior car accidents. Allison told Bens that he had previously struck a courthouse in Dayton, Ohio and he had an accident in Hamilton County, Ohio.

{¶ 20} Although the defense did not present any witnesses, it introduced into evidence Allison's medical reports. These reports detailed the treatment Allison received after the accident and indicate Allison had a seizure prior to the car crash.

{¶ 21} After a thorough review of the record, we find the evidence supporting appellant's aggravated vehicular homicide conviction credible, and therefore, we cannot say that the trial court clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty. As the evidence indicates, appellant has a history of vehicular accidents caused by his susceptibility to seizures. The state presented evidence of two prior accidents appellant caused after suffering a seizure while driving a vehicle. The state also presented evidence that appellant was aware that he suffered from epilepsy and had a violent seizure "at least once a month." From the evidence presented it is clear that the appellant knew he needed to take his medication twice daily to help prevent and control his seizures, but on the day of the accident, he failed to timely take his second dosage. Finally, the testimony presented demonstrates that appellant drove without a valid driver's license, without the permission of the vehicle's owner, and without his physician's permission.

{¶ 22} From evidence in the record, the trier of fact could have reasonably concluded that appellant perversely disregarded a known risk that he would be placing other motorists in danger when he operated the vehicle without the owner's permission, without a valid license, without timely taking his seizure medication, and with knowledge of his propensity for seizures, which had caused two other motor vehicle accidents in the past. Accordingly, appellant's conviction for aggravated vehicular homicide was not against the manifest weight of the evidence.

{¶ 23} Appellant's sole assignment of error is overruled.

{¶ 24} Judgment affirmed.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6 (C), Article IV of the Ohio Constitution.