[Cite as *State v. Barnett*, 2012-Ohio-2372.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-09-177
	:	O P I N I O N
- vs -		5/29/2012
	:	
LARRY BARNETT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 11 TRD 04551

Michael D. Hon, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Christopher Paul Frederick, 304 North Second Street, Hamilton, Ohio 45011, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Larry Barnett, appeals his conviction in the Hamilton Municipal Court for one count of failure to stop after a nonpublic road accident and one count of operation without reasonable control.

{¶ 2} A vehicle belonging to Kyle Cortright's father-in-law was parked at the Hampshire Apartments, where Cortright is employed as a maintenance worker. The vehicle, a light-colored Chevy Silverado pickup truck, was parked near a black pickup truck that was

being towed at the request of its owner. A short time after the black pickup truck was towed, Cortright noticed a large and deep gash along the length of the driver's side back panel of the Silverado, extending approximately three feet and between an inch and three inches wide. The gash was so extensive such that the metal was exposed, dented and crumpled. The gash started in the area of the rear driver door, and extended to the rear wheel well and then caught again on the rear quarter panel. Cortright began questioning others in order to ascertain what had happened to his father-in-law's Silverado.

{¶ 3} Ronald Meadows, another maintenance worker at the Hampshire Apartments, told Cortright that he had seen a tow truck trying to tow a black pickup that had been parked near the Silverado. Meadows, who later testified at trial, stated that he had watched the tow truck driver having difficulty positioning the tow truck in order to hitch the tow truck to the black pickup. After watching the tow truck driver make several failed attempts to position the tow truck correctly, Meadows went back to work and did not see anything related to the tow truck after that. Meadows also testified that he had seen the Silverado earlier that day, and that there was no gash on the side.

{¶ 4} Meadows and Cortright began looking for information associated with the tow truck driver, and were able to identify him by talking to the owner of the black pickup truck that was being towed. Cortright called the owner of the tow truck, later identified as Barnett, but Barnett refused to return to the apartment building to discuss the incident. Cortright then called police, and Hamilton Police Officer David Patterson responded. Officer Patterson made a report and took the information Meadows and Cortright had collected regarding Barnett, and told Cortright that he would turn the information over to the "hit skip" investigator. Officer Patterson, who also testified at trial and is a certified accident investigator, opined that when he saw the Silverado that morning, the gash was "pretty fresh."

{¶ 5} Officer Britt, also with the Hamilton Police Department, took over the investigation from Officer Patterson. He ran the license plate number of the tow truck that Meadows and Cortright had obtained, and confirmed that the tow truck was registered to Barnett. Officer Britt went to Barnett's residence, and located him and the tow truck there. Officer Britt testified that when he approached the tow truck, he observed a white paint "smear" on various locations on the tow truck that was otherwise painted black and red. Officer Britt testified that the paint color matched that of the Silverado, and that the sharp point of Barnett's truck bed would have been the correct shape and height to have caused the deep indentation on the Silverado. Officer Britt took several photographs, which were later admitted at trial, and then cited Barnett for failure to control his vehicle and for leaving the scene of an accident. During the exchange with Officer Britt, Barnett denied having hit the Silverado.

{¶ 6} Barnett challenged the citations and the matter was heard during a bench trial. The state called Meadows, Officer Patterson, and Officer Britt as witnesses, and Barnett testified in his own defense. Barnett testified that he made only two approaches in order to back up to the black pickup truck, and that he did not make contact with the Silverado. Barnett testified that while he was in the parking lot, he saw a short, "pudgy" male enter the Silverado and pull out of the parking lot. He also testified that he "didn't see nothing" when Officer Britt asked him about the white paint on his tow truck, and that in his opinion, there was no paint to be seen on his truck.

{¶ 7} After the trial, the court found Barnett guilty on both counts, and sentenced him to 30 days in jail, suspended, as well as probation, a $500 fine, and court costs. The trial court also ordered $1,000 restitution for the insurance deductible owed by Cortright's father-in-law. Barnett now appeals the decision of the trial court, raising the following assignments of error. For ease of discussion, we will discuss the two assignments together.

{¶ 8} Assignment of Error No. 1:

{¶ 9} APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED AS THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT APPELLANT OF STOPPING AFTER ACCIDENT INVOLVING INJURY TO PERSONS OR PROPERTY IN VIOLATION OF R.C. 4549.021 AND OF OPERATION WITHOUT REASONABLE CONTROL IN VIOLATION OF CITY OF HAMILTON ORDINANCE 333.022.

{¶ 10} Assignment of Error No. 2:

{¶ 11} APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 12} Barnett argues in his assignments of error that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶ 13} Manifest weight and sufficiency of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson,* 12th Dist. No. CA2006-01-007, 2007-Ohio-2298. "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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 14} While the test for sufficiency requires an appellate court to determine whether the state has met its burden of production at trial, a manifest weight challenge examines the inclination of the greater amount of credible evidence, offered at a trial, to support one side of the issue rather than the other. *Wilson*, 2007-Ohio-2298.

> 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.

{¶ 15} 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. Walker*, 12th Dist. No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction due to the 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. *Thompkins*, 78 Ohio St.3d at 387.

{¶ 16} "Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Wilson*, 2007-Ohio-2298 at ¶ 35, citing *State v. Lombardi*, 9th Dist. No. 22435, 2005-Ohio-4942, fn. 4.

{¶ 17} Barnett was convicted of failure to stop after an accident on property other than public roads or highways in violation of R.C. 4549.021, which states,

> (A) In case of accident or collision resulting in injury or damage to persons or property upon any public or private property other than public roads or highways, due to the driving or operation thereon of any motor vehicle, the person driving or operating the motor vehicle, having knowledge of the accident or collision, shall stop, and, upon request of the person injured or damaged, or any other person, shall give that person the driver's or operator's name and address, and, if the driver or operator is not the owner, the name and address of the owner of that motor

> vehicle, together with the registered number of that motor vehicle, and, if available, exhibit the driver's or operator's driver's or commercial driver's license.
>
> If the owner or person in charge of the damaged property is not furnished such information, the driver of the motor vehicle involved in the accident or collision, within twenty-four hours after the accident or collision, shall forward to the police department of the city or village in which the accident or collision occurred or if it occurred outside the corporate limits of a city or village to the sheriff of the county in which the accident or collision occurred the same information required to be given to the owner or person in control of the damaged property and give the date, time, and location of the accident or collision.
>
> If the accident or collision is with an unoccupied or unattended motor vehicle, the operator who collides with the motor vehicle shall securely attach the information required to be given in this section, in writing, to a conspicuous place in or on the unoccupied or unattended motor vehicle.
>
> (B) Whoever violates division (A) of this section is guilty of failure to stop after a nonpublic road accident, a misdemeanor of the first degree.

Barnett was also convicted of operating without reasonable control, in violation of Hamilton Codified Ordinance 333.022, which states in pertinent part that "no person shall operate a motor vehicle * * * without being in reasonable control of the vehicle* * * ."

{¶ 18} Barnett argues that his convictions were improper because the state had no direct evidence that he hit the Silverado with his tow truck or operated his tow truck without being in control. Admittedly, there is no direct evidence that Barnett hit the Silverado, or knew that he had done so. The evidence that Barnett hit the Silverado, or had such knowledge, is circumstantial and based on inferences to be drawn from the evidence collected in the aftermath of the incident, as well as the testimony from the witnesses. However, and as established by the Ohio Supreme Court, "circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof." *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus.

{¶ 19} The trial court heard testimony from Meadows that before Barnett towed the black pickup truck, he saw that the Silverado had no marks or scratches on it. Meadows also testified that the Silverado was parked in close proximity to the black pickup truck being towed, and that he witnessed Barnett struggle to find the correct angle, "making a couple attempts to try to get in there because it's such a tight fit because of cars in front of it also."

{¶ 20} The trial court also heard testimony from the officers who investigated the incident. Officer Patterson testified that when he saw the damage to the Silverado on the day that Barnett towed the black pickup truck, the gash on the Silverado was "pretty fresh." Officer Britt testified that when he saw the tow truck at Barnett's residence, he observed a white paint "smear" on various locations on the tow truck that was otherwise painted black and red. Officer Britt testified that the paint color matched that of the Silverado, and that the sharp point of Barnett's tow truck bed would have been the correct shape and height to have caused the deep indentation gash on the Silverado. The record is undisputed that the Silverado was damaged and that Barnett did not contact police within 24 hours of the accident, nor did he leave any of his contact information on the Silverado, as is required by the statute.

{¶ 21} The trial court also heard Barnett's own testimony, in which he denied having hit the Silverado. The trial court was able to gauge Barnett's credibility, which was a main component of the case given Barnett's claim that he did not hit the Silverado. Moreover, the trial court was able to determine Barnett's credibility regarding his assertion that he saw a man move the Silverado when he was there, which was in contradiction to Meadows' testimony that the Silverado had not been moved from the parking lot. If Barnett's claim was true, he could not have caused the damage. However, the trial court chose not to believe Barnett's claim, and instead determined from the evidence that Barnett hit the Silverado with his tow truck, and left without leaving any contact information. A determination that Barnett

hit the Silverado would also satisfy the elements of failure to control, as it is logical that Barnett hit the Silverado because he was not in reasonable control of his tow truck, and not because he did it on purpose.

{¶ 22} Regarding the requirement that Barnett had knowledge that the accident occurred, "a person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). This court has determined, from circumstantial evidence and inferences reasonably made, what a defendant's knowledge was at the time the crime was committed. *State v. Bass*, 12th Dist. No. CA90-10-094, 1991 WL 194742 (Sept. 30, 1991). In *Bass*, this court affirmed the appellant's conviction for obstructing justice where the jury determined that the appellant knew that her boyfriend was being pursued by police on drug charges because such knowledge could be gleaned from circumstantial evidence and inferences to be drawn from appellant's conduct. *Id.*

{¶ 23} Similarly, the Second District Court of Appeals affirmed the conviction of the appellant who was convicted of leaving the scene of an accident even though there was no direct evidence that he was the driver of the truck that fled after causing the accident. *State v. Rowland*, 2nd Dist. No. CA 16970, 1998 WL 754605 (Oct. 30, 1998). The court determined that a reasonable trier of fact could find the essential elements of the crime proven based on circumstantial evidence, the appellant's inconsistent stories to police, and eye-witness testimony that only one man was in the vehicle that caused the accident. *Id.* at *3. Moreover, the court determined that the trier of fact was permitted to draw reasonable inferences from the facts when determining whether the appellant "knew" an accident had occurred. *Id.* at *4.

{¶ 24} While the dissent points out factual differences in the above-referenced cases, it fails to apply a fair and comprehensive interpretation of the record sub judice. After reviewing the record, we find that the trial court was able to determine Barnett's knowledge

based on the testimony and evidence presented at trial. The trial court had the photographs of the damage to the Silverado and observed the testimony first hand. As the fact-finder, the trial court could make reasonable inferences therefrom. Given the fact that the gash was almost three feet long, and about three inches wide, the trial court could reasonably infer that the type of contact required to cause the damage that was done was of such a nature that Barnett would have known that his tow truck had contact with the Silverado. While the dissent speculates as to the degree, or extent, of the "jolt" Barnett would have experienced, any sensation of contact reasonably inferred gave Barnett knowledge of the contact.

{¶ 25} Additionally, the testimony established that the parking lot had several cars parked within a close proximity to the black pickup truck being towed, and that Barnett had trouble navigating his tow truck between the cars, as evidenced by Barnett making several attempts to approach the black pickup. Due to the difficulty Barnett had positioning the tow truck, it is reasonable to believe Barnett was observant of his actions before and after hooking the pickup truck to the tow truck he was operating.

{¶ 26} The trial court could also reasonably infer that Barnett would have also seen the paint on his tow truck because Office Britt noticed it as soon as he walked up to the tow truck parked at Barnett's residence. While Barnett testified there was no white paint on the tow truck for Office Britt to observe, we find this important credibility determination best placed with the trial court which heard and observed the two different versions firsthand. The dissent reviews all of this evidence and testimony in such a manner as to substitute its judgment, in the place of the trial court's reasonable inferences and judgment.

{¶ 27} This evidence, as well as the inference raised by Barnett's attempt to cast blame onto someone else by claiming that a man drove the Silverado away from the parking lot, establishes that Barnett was aware that his tow truck had contact with the Silverado. More than these inferences, the trial court was presented with Barnett's own testimony,

during which he testified that he did not hit the Silverado. The trial court was therefore given the opportunity to determine Barnett's credibility with respect to his knowledge of the accident. The dissent discusses the circumstantial evidence to support its conclusion that circumstantial evidence does not exist. We find this exercise somewhat circular, and unpersuasive.

{¶ 28} If the trial court found Barnett to be credible, it would have rejected the credibility of Meadows, who testified that the Silverado was not moved from the parking lot. The trial court would also have to find that Officer Britt lacked credibility when he testified that he saw white paint on Barnett's black and red tow truck, and that the tow truck's bed was the correct shape and size to make the gash on the Silverado. However, the trial court found that Barnett was *not* credible when discussing whether or not he knew he had hit the Silverado. This issue was primarily a matter for the trial court to decide because the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence. We cannot say that the evidence weighs heavily in favor of acquittal, nor do we see a manifest miscarriage of justice.

{¶ 29} Our finding that Barnett's conviction is supported by the weight of the evidence is also dispositive of the issue of sufficiency. Barnett's assignments of error are overruled.

{¶ 30} Judgment affirmed.

HENDRICKSON, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶ 29} I respectfully concur in part and dissent in part from the majority's decision. I concur with the majority's resolution of Barnett's assignments of error as they relate to his

conviction for operation without reasonable control, but dissent as they relate to his conviction for failure to stop after a nonpublic road accident. I dissent to the latter as reasonable minds could only reach the conclusion that the evidence failed to prove beyond a reasonable doubt an essential element of that crime, specifically knowledge of the accident.

{¶ 30} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, ¶ 65. When addressing sufficiency, 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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 31} The crime of failure to stop after an accident on nonpublic property requires as an essential element that the offender have, "*knowledge* of the accident or collision * * *." (Emphasis added.) R.C. 4549.021(A). While I agree with the majority that knowledge can be inferred based on circumstantial evidence, I would disagree with the assertion that such circumstantial evidence was introduced in the present case. Having thoroughly reviewed the record, I cannot find that there was a single scintilla of evidence, direct or circumstantial, to prove that Barnett had knowledge he had hit another vehicle.

{¶ 32} The majority points to photographs of the damage to the Silverado as circumstantial evidence of Barnett's knowledge. They have found that because of length and width of the scrape on the vehicle, he must have known he made contact with it. Based upon the fact that Barnett was driving a heavy-duty vehicle, a Chevrolet 3500 pickup truck with a tow bed, I cannot infer that he *must* have known when a piece of that truck was grazing another vehicle. This was not a case of a direct collision or abrupt contact that would jolt someone into an undeniable realization contact was being made. Indeed, the length of the

scrape itself attests to a lack of knowledge that contact was being made. Furthermore, the eye witness who saw Barnett attempting to maneuver his tow truck into position testified that he never heard any scraping at that time or thereafter. Nothing in the record indicates that when the eye witness walked away he moved out of earshot. Therefore, if that eye witness didn't hear the contact, it stands to reason that Barnett would not have either.

{¶ 33} The majority also relies on the inference that Barnett would have seen the paint on the bed of his tow truck because the investigating officer noticed it easily. I cannot find that a police officer noticing something on a vehicle that he is consciously searching for creates a reasonable inference that a person who has no reason to be inspecting his vehicle would have knowledge of it regardless. Indeed, Officer Britt testified that when he showed the alleged paint marks to Barnett, "[Barnett] didn't know it was there by the way he acted."

{¶ 34} The majority cites two cases that support the proposition that knowledge can be inferred based on circumstantial evidence. Both of these cases are differentiated from the case at bar. In *Bass*, there was ample evidence introduced to show that appellant was actively concealing a person wanted for another crime. *Bass* at *1-2. In that case, reasonable inferences could easily be drawn that her active concealment of that person proved her knowledge that she was harboring someone who was wanted by the police. *Id*. In *Rowland*, there was eyewitness testimony that appellant was the only person in the car, he admitted to being in the car, and he changed his story on numerous occasions. *Rowland* at *2-3. Again, there was ample circumstantial and direct evidence to prove not just that the crime occurred, but that Rowland had knowledge of it. The case at bar includes no such evidence of knowledge. The evidence introduced in this case only allows a reasonable mind to infer that the accident occurred and was caused by the tow truck, not that Barnett had knowledge of that accident. To infer that Barnett had knowledge of the accidence based on the inference that it was his tow truck that caused the accident would be to impermissibly

stack inference upon inference.

{¶ 35} The majority seems to find that the occurrence of the accident alone provides sufficient circumstantial evidence that Barnett knew of the accident. To make such an inference, supported by no further evidence, is to remove knowledge as an element of the crime altogether. If knowledge can be inferred simply by proving the other elements of the crime, then we have usurped the legislature and rendered this offense a strict liability crime.

{¶ 36} Finally, the majority relies on the trial court having weighed the credibility of appellant's testimony as to his knowledge of the accident. However, the state presented insufficient evidence of his knowledge and therefore should have granted appellant's Crim.R. 29 motion at the conclusion of the state's case. In turn, the testimony the majority believes the court could have relied on in making a credibility assessment as to appellant's knowledge of the accident should never have been heard.

{¶ 37} In light of the foregoing, having found that reasonable minds could only conclude that the evidence failed to prove an essential element of the crime, specifically Barnett's knowledge of the accident, I respectfully dissent from the majority's decision as it relates to his conviction for failure to stop after a nonpublic road accident and would find the trial court erred in finding there was sufficient evidence to support a conviction on that crime.