

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
VAN WERT COUNTY**

STATE OF OHIO

CASE NUMBER 15-05-07

PLAINTIFF-APPELLEE

v.

OPINION

GREGORY A. MITCHENER

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal Appeal from Municipal Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: December 5, 2005

ATTORNEYS:

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For Appellee.**

CUPP, PJ.

{¶1} Defendant-appellant, Gregory A. Mitchener (hereinafter “Mitchener”), appeals the judgment of the Van Wert Municipal Court which found him guilty of driving under the influence.

{¶2} On October 2, 2004, Sergeant Doug Weigle (hereinafter “Sergeant Weigle”), a member of the Van Wert City Police Department, stopped a pick-up truck on an unlined county road in Van Wert, Ohio, at approximately 2:46 a.m. Sergeant Weigle did so after he witnessed the driver, Mitchener, make a right-hand turn, cross into the opposite lane of travel, “jerk” the vehicle back into the appropriate lane, and drift onto a stone berm running adjacent to the right side of the road.

{¶3} After approaching the vehicle, Sergeant Weigle smelled the odor of alcohol coming from the interior of the truck and noticed Mitchener’s eyes were bloodshot and glassy. Upon questioning, Mitchener denied that he had been drinking. Mitchener recited the alphabet without difficulty but refused to perform any other field sobriety tests. Ultimately, Sergeant Weigle concluded Mitchener was intoxicated, cited him for operating a motor vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), and arrested him.

{¶4} Since his vehicle was not equipped to transport Mitchener, Sergeant Weigle contacted another member of the Van Wert City Police Department,

Officer Joseph Motycka (hereinafter “Officer Motycka”). Officer Motycka subsequently transferred Mitchener to the nearest Ohio State Highway Patrol Post. While at the post, Mitchener refused to undergo a Breath Alcohol Content (BAC) test or sign a form acknowledging the consequences of this decision. Moreover, Mitchener refused to sign his citation. Thereafter, the police officers released Mitchener to his girlfriend, Gabrielle Chavarria (hereinafter “Chavarria”).

{¶5} On October 4, 2004, Mitchener pled “not guilty.” On February 15, 2005, the case proceeded to a jury trial. The jury found Mitchener “guilty,” and the trial court entered judgment on the verdict.

{¶6} It is from this decision that Mitchener appeals and sets forth two assignments of error for our review.

ASSIGNMENT OF ERROR NO. 1

The trial court committed abuse of discretion by allowing the admission of rebuttal testimony.

{¶7} In his first assignment of error, Mitchener argues the trial court erred in permitting Officer Motycka to testify as a rebuttal witness. Particularly, Mitchener asserts Sergeant Weigle testified to smelling alcohol on Mitchener’s breath during the prosecution’s case-in-chief and Officer Motycka’s rebuttal testimony served no purpose other than to corroborate that account.

{¶8} After reviewing the transcript of the trial proceedings, we are unable to locate any specific objection to Officer Motycka’s rebuttal testimony. Thus,

Mitchener did not properly preserve his objection and thereby waived it for purposes of appeal. See *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043, citing *State v. Moreland* (1990), 50 Ohio St.3d 58, 62, 552 N.E.2d 894. Consequently, Mitchener's assertion is reviewed under a plain error standard. See Crim.R. 52(B).

{¶9} We recognize plain error “ ‘with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.’ ” *State v. Landrum* (1990), 53 Ohio St.3d 107, 111, 559 N.E.2d 710, quoting *State v. Long* (1978) 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. Under the plain error standard, an appellant must demonstrate that the outcome of his trial would clearly have been different but for the trial court's errors. *Waddell*, 75 Ohio St.3d at 166, citing *Moreland*, 50 Ohio St.3d at 63.

{¶10} During the prosecution's case-in-chief, Sergeant Weigle testified to smelling alcohol on Mitchener's breath. However, Chavarria testified during the defense's case-in-chief that the only odor she smelled on Mitchener's breath when she picked him up following his arrest was that of cigarette smoke. In rebuttal, Officer Motycka testified: he smelled alcohol on Mitchener's breath; he did not smell any cigarette smoke on Mitchener; and he did not observe Mitchener smoke a cigarette at any time.

{¶11} Since rebutting evidence is given to explain or refute new facts introduced by the adverse party, the scope of such evidence is limited. *State v. McNeil* (1998), 83 Ohio St.3d 438, 446, 700 N.E.2d 596. Although Sergeant Weigle and Officer Motycka both testified to smelling alcohol on Mitchener's breath, Officer Motycka's statements were within the scope of rebuttal testimony as they directly refuted new facts asserted by Chavarria and could not have been raised in the prosecution's case-in-chief. See *id.* Nevertheless, even assuming the trial court erred in permitting Officer Motycka's rebuttal testimony, we are unable to conclude that the outcome of the trial would clearly have been different but for that error.

{¶12} Accordingly, Mitchener's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

The jury verdict is not supported by sufficient evidence and is against the manifest weight of the evidence.

{¶13} In his second assignment of error, Mitchener asserts that the evidence was both insufficient to support a conviction under R.C. 4511.19(A)(1)(a) and that his conviction was against the manifest weight of the evidence.¹ For the reasons that follow, we find Mitchener's second assignment of error lacks merit.

¹ R.C. 4511.19(A)(1)(a) prohibits a person from operating a motor vehicle under the influence of alcohol, drugs, or a combination of the two.

{¶14} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Jenks* (1981), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, superseded by state constitutional amendment on other grounds in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668. When reviewing the sufficiency of the evidence to support a criminal conviction, “[t]he 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.” *Id.*

{¶15} By contrast, in determining whether a conviction is against the manifest weight of the evidence, a reviewing court must examine the entire record, “ ‘[weigh] the evidence and all reasonable inferences, consider the credibility of witnesses and [determine] 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. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Because the trier of fact is in a better position to observe the demeanor of the witnesses and weigh their credibility, such

matters are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212.

{¶16} In the case sub judice, Sergeant Weigle testified at trial that he witnessed Mitchener make a right-hand turn, cross into the opposite lane of travel, “jerk” the vehicle back into the appropriate lane, and drift onto a stone berm running adjacent to the right side of the road. Sergeant Weigle further testified Mitchener’s limited driving ability evinced that the Mitchener’s coordination was slow. Sergeant Weigle also noted that, after stopping the vehicle and approaching it, he smelled the odor of alcohol coming from the interior of the truck and noticed Mitchener’s eyes were bloodshot and glassy. Additionally, although Sergeant Weigle acknowledged that Mitchener recited the alphabet without difficulty, he stated that he smelled a strong odor of alcohol coming from Mitchener’s breath when Mitchener performed the field test.

{¶17} In addition to Sergeant Weigle’s testimony, Officer Motycka testified that, after he transported Mitchener to the nearest Ohio State Highway Patrol Post, he too noticed a strong odor of alcohol was coming from Mitchener’s breath. Officer Motycka also testified on cross-examination that the odor of alcohol intensified when Mitchener spoke.

{¶18} Although the evidence against Mitchener may have been circumstantial in nature, it is widely accepted that circumstantial and direct

evidence have the same probative value. See *Jenks*, 61 Ohio St.3d 259, paragraph one of the syllabus. Viewing the circumstantial evidence in a light most favorable to the prosecution, we do not find Mitchener's conviction was based upon insufficient evidence because the evidence presented, if believed, could convince a rational trier of fact of Mitchener's guilt beyond a reasonable doubt.

{¶19} In opposition to the testimony of Sergeant Weigle and Officer Motycka, Mitchener presented several exhibits showing other vehicles driving in the middle of the unlined county road. Mitchener introduced several other exhibits to show that he had not drifted onto a stone berm, but rather simply drove over stones that collected along the right side of the road.

{¶20} Furthermore, five witnesses testified on Mitchener's behalf: Chavarria; Mitchener's mother, Linda Prowse (hereinafter "Prowse"); Mitchener's friends, James Hernandez (hereinafter "Hernandez") and Mark Polling (hereinafter "Mark"); and Mark's son, Zach Polling (hereinafter "Zach"). All of the witnesses stated they had contact with Mitchener during the evening of October 1, 2004 and the early morning hours of October 2, 2004. All of the witnesses further testified they did not provide any alcohol to Mitchener, see Mitchener drink alcohol, or observe Mitchener act as though he were intoxicated.

{¶21} Notably, Mark and Zach testified Mitchener stopped at their auto-repair shop late in the evening on October 1, 2004 to fix the rear window of his

truck, which broke several hours earlier.² Zach and Mark further stated that, after covering the broken window with plastic, Mitchener volunteered to assist in replacing an engine in another truck. While doing so, Mitchener accidentally knocked an open, half-full bottle of beer on himself that had been sitting in the shop for approximately two days. After completing the job, Mitchener left the shop at approximately 2:15 a.m.

{¶22} Giving appropriate discretion to the trier of fact on matters relating to the weight of the evidence and the credibility of the witnesses, we find the jury could reasonably conclude based on the evidence presented at trial that Mitchener operated the truck while under the influence of alcohol. Accordingly, we cannot say that the jury clearly lost its way, and must, therefore, conclude Mitchener's conviction was not against the manifest weight of the evidence.

{¶23} Mitchener's second assignment of error is overruled.

{¶24} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT and ROGERS, JJ., concur.

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² Earlier in the evening, Mitchener and Hernandez moved a large air compressor from Prowse's home by placing it in the back of Mitchener's truck. While in transit, the air compressor slid forward and shattered the back window.