[Cite as *State v. James,* 2018-Ohio-4989.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 18-CA-51
JESSE JAMES	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Municipal Court, Case No. 18TRD06322
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 6, 2018

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
J. MICHAEL KING Assistant Law Director 40 West Main Street, 4th Floor Newark, OH 43055	KEVIN GALL 33 West Main Street Suite 106 Newark, OH 43055

Gwin, P.J.

{¶1} Defendant-appellant Jesse James [“James” appeals his conviction and sentence after a bench trial in the Licking County Municipal Court.

Facts and Procedural History

{¶2} On May 23, 2018, at approximately 9:45 A.M., Officer Stevens of the Newark Police Department was directing traffic at an automobile accident on Central Avenue in the City of Newark. He knew James from an investigation about one month before, and had spent several hours with him. On the date in question, a SUV pulled up to the crash scene. Officer Stevens indicated that he waived the vehicle through, and it passed within 20 feet of him, at a speed of less than 15 M.P.H. Officer Stevens said there was "zero doubt" that James was driving, and that Karrie Rice was in the passenger's seat and waived to him. The officer testified that he knew Ms. Rice because he had been a felony probation officer, and she had worked for the City's probation office. Based upon his earlier contact with James, Officer Stevens believed James was operating the vehicle while under suspension. He confirmed that with his dispatcher, and then tried to locate the vehicle.

{¶3} While trying to catch up, the James’ vehicle took various routes, and other officers provided additional sightings. Officer Stevens again caught sight of the vehicle from about 75 feet away, and again identified James as the driver. Officer Stevens then tried to get behind the vehicle by going around a building; however, the officer lost sight of the vehicle. When he next observed the vehicle, the vehicle was parked on the roadway with the driver side door standing wide-open. Ms. Rice was exiting the passenger side and walking to the driver's door. Officer Stevens could not be entirely

certain when he approached Ms. Rice if he used James' name, but he did ask where "he" went. Rice mentioned that due to the injury to her left shoulder, she should not be driving, so "what was I supposed to do?" Ms. Rice testified at trial that the driver had fled, and that his name was "John." Ms. Rice stated that she did not know why "John" had fled, just that he does not like police officers. Rice never told Officer Stevens who had been driving her vehicle on the date in question, and it was only on cross examination that she gave the driver's last name. She also testified on cross-examination that even though James called her on her cell phone, she did not go looking for James. Although Rice testified she went to a store, Officer Stevens was driving around looking for James, it appeared to him Rice was doing the same. When shown a photo of "John," Officer Stevens said he was not the driver.

{¶4} After searching for James for about 20 minutes, Officer Stevens proceeded to James' residence, which was about two miles away from where the vehicle had stopped and the driver fled. The Officer made contact with James, who appeared sweaty and out of breath. When he asked James why he ran, he was not very responsive, only saying he had been walking. Officer Stevens had "zero doubt" James had been driving, and issued him a citation for driving under the ALS/OVI suspension.

{¶5} James testified on his own behalf, and denied driving. James further testified that he could not run because of "pins" or "screws" in both feet. James testified that he walked to an appointment, scheduled for 8:00 A.M., a one-way distance of 5 and 1/2 miles, one way. James testified he left his appointment around 9:00-9:10 A.M. and walked back to his residence, stopping along the way to video two houses on Country Club Drive, about three miles away from his residence. He further testified he covered

that distance in about thirty minutes, even though the entire one-way trip of five and one-half miles took one hour and twenty minutes. He showed no interest in the identity of the driver as testified to by Rice.

{¶6} The trial court found James guilty of operating a motor vehicle under an OVI suspension. James was sentenced to 180 days, 160 days suspended with credit for one day, a fine of $1,000.00 with $500.00 suspended, a one-year license suspension and two years' probation.

ASSIGNMENT OF ERROR

{¶7} James raises one assignment of error,

{¶8} "I. THE DEFENDANT-APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

LAW AND ANALYSIS

STANDARD OF APPELLATE REVIEW.

A. Sufficiency of the Evidence.

{¶9} The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each of the material elements of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. __, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013); *Hurst v. Florida,* 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016). The test for the sufficiency of the evidence involves a question of law for resolution by the appellate court. *State v. Walker*, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶30. "This naturally entails a review of the elements

of the charged offense and a review of the state's evidence." *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶13.

{¶10} When reviewing the sufficiency of the evidence, an appellate court does not ask whether the evidence should be believed. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Walker*, at ¶30. "The relevant inquiry is whether, after viewing the evidence in the 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." *Jenks* at paragraph two of the syllabus. *State v. Poutney*, 153 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶19. Thus, "on review for evidentiary sufficiency we do not second-guess the jury's credibility determinations; rather, we ask whether, 'if believed, [the evidence] would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Murphy*, 91 Ohio St.3d 516, 543, 747 N.E.2d 765 (2001), *quoting Jenks* at paragraph two of the syllabus (emphasis added); *Walker* at ¶31. We will not "disturb a verdict on appeal on sufficiency grounds unless 'reasonable minds could not reach the conclusion reached by the trier-of-fact.'" *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 94, *quoting State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997); *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶74.

ISSUE FOR APPEAL

Whether, after viewing the evidence in the light most favorable to the prosecution, the evidence, "if believed, would convince the average mind of the defendant's guilt on each element of the crimes beyond a reasonable doubt."

{¶11} James was convicted of Driving under an OVI suspension. R.C. 4510.14 provides,

> (A) No person whose driver's or commercial driver's license or permit or nonresident operating privilege has been suspended under section 4511.19, 4511.191, or 4511.196 of the Revised Code or under section 4510.07 of the Revised Code for a conviction of a violation of a municipal OVI ordinance shall operate any motor vehicle upon the public roads or highways within this state during the period of the suspension.

{¶12} In the case at bar, James' driving record from the Ohio Bureau of Motor Vehicles was entered into evidence at his trial as Plaintiff's Exhibit 1. Officer Stevens testified that James' driver's license was under an OVI driver's license suspension on the date of the stop.

{¶13} Viewing the evidence in the case at bar in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that James was driving under an OVI suspension. We hold, therefore, that the state met its burden of production regarding driving under an OVI suspension and accordingly, there was sufficient evidence to support James' conviction.

B. Manifest Weight of the Evidence.

{¶14} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses. *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997–Ohio–355.

The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶ 31. Because the trier of fact sees and hears the witnesses and is particularly competent to decide whether, and to what extent, to credit the testimony of particular witnesses, the appellate court must afford substantial deference to its determinations of credibility. *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶ 20, *superseded by statute on other grounds as stated in In re Z.E.N., 4th Dist. Scioto No. 18CA3826, 2018-Ohio-2208, ¶27* .

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
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> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer,* 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶ 24.

{¶15} Once the reviewing court finishes its examination, an appellate court may not merely substitute its view for that of the jury, but must find that " '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, supra*, 78 Ohio St.3d at 387, *quoting State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." Id.

ISSUE FOR APPEAL

Whether the trier of fact court clearly lost her way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶16} James argues that his evidence is more credible and persuasive that the state's evidence concerning the identity of the person driving the vehicle on the date in question.

{¶17} The trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the trier of fact may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP–739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP–604, 2003–Ohio–958, ¶ 21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP–1238, 2003–Ohio–2889,

citing State v. Caldwell, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks,* 61 Ohio St.3d 259, 272, 574 N.E.2d 492 (1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102 at n. 4, 684 N.E.2d 668 (1997).

{¶18} In the case at bar, the judge heard the witnesses, viewed the evidence and heard James' arguments and explanations about Officer Stevens and the evidence presented by the state. The judge was able to see for himself Officer Stevens, Rice and James subject to cross-examination. Thus, a rational basis exists in the record for the Judge's decision.

{¶19} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386–387, 678 N.E.2d 541 (1997), *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. Based upon the foregoing and the entire record in this matter we find James' conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the judge appears to have fairly and impartially decided the matters before him. The judge heard the witnesses, evaluated the evidence, and was convinced of James' guilt. The judge neither lost his way nor created a miscarriage of justice in convicting James of driving under an OVI suspension.

{¶20} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the offense for which James was convicted.

{¶21} James' First Assignment of Error is overruled.

{¶22} The judgment of the Licking County Municipal Court is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Baldwin, J., concur