

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

CITY OF BROOK PARK,	:	
	:	
Plaintiff-Appellee,	:	No. 107542
	:	
v.	:	
	:	
DAVID GANNON,	:	
	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: June 6, 2019

Criminal Appeal from the Berea Municipal Court
Case No. 14TRC05872-3

Appearances:

Peter A. Sackett, *for appellee.*

Christine A. Russo, *for appellant.*

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, David Gannon, appeals his convictions. He raises four assignments of error for our review:

1. The trial court erred in finding the appellant guilty of operating a motor vehicle under the influence of alcohol as there was insufficient evidence to support the conviction.

2. The trial court erred in finding the appellant guilty of operating a motor vehicle under the influence of alcohol as it was against the manifest weight of the evidence.

3. The trial court erred in finding the appellant guilty of failure to control.

4. The trial court erred in denying the appellant his right of confrontation as guaranteed by the United States and Ohio Constitutions.

{¶ 2} Finding no merit to his appeal, we affirm.

I. Procedural History and Factual Background

{¶ 3} In October 2014, Gannon was charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), driving under suspension in violation of R.C. 4510.21, leaving the scene of an accident in violation of R.C. 4549.021(A), and failure to control in violation of R.C. 4511.202. Gannon pleaded not guilty to the charges.

{¶ 4} On August 24, 2015, the court issued a capias for Gannon's arrest because he failed to appear for a change of plea hearing. Gannon was not arrested on the capias until November 2017. The matter proceeded to a bench trial in March 2018. Before the trial began, Gannon stipulated that he was driving under a suspended license. The following evidence was presented to the court.

{¶ 5} Gregory Kustra testified that he lives on Sandfield Drive in Brook Park. Kustra stated that in 2014, he worked for AT&T as a salesperson. Kustra testified that in the evening of October 5, 2014, around 5:00 or 6:00 p.m., he had just pulled into his driveway when he saw a car speeding "down a side street" near his house. The side street was Southway Drive. Kustra stated that as the car drove

out of his sight, he heard tires “screech” and then heard a crash. Kustra got back into his vehicle and drove to the crash. Kustra testified that the driver of the car that he saw speeding, later identified to be Gannon, had crashed into a tree on a tree lawn in front of a house. The front of Gannon’s vehicle “was against the tree.”

{¶ 6} When Kustra reached the accident, he explained:

I asked if everybody was okay. He got out of the car. The female that was in the car was out of the car already, and I asked was everybody okay, did anybody need an ambulance, and then I said I was going to call the police to report the accident. At that time, they both entered the vehicle again, Mr. Gannon in the driver’s side, the young lady in the passenger side, and they left.

{¶ 7} Kustra testified that he got into his vehicle and followed Gannon to get the license plate number of the vehicle. Once he got the license plate, which was near the “railroad tracks that go over Smith Road into Middleburg Heights,” he stopped following them and called the police. “About 30, 35 minutes” later, police came to Gannon’s house to pick him up and take him to a sports bar where they had found Gannon. The sports bar was less than a quarter of a mile from where Gannon hit the tree. Kustra identified Gannon at the sports bar as the man who had been speeding and then hit the tree on Southway Drive. Kustra stated that he did not smell alcohol on Gannon when he spoke to him at the accident scene.

{¶ 8} Officer Mark Nikodym of the Brook Park Police Department testified that he was working the afternoon shift on October 5, 2014. Officer Nikodym responded to the scene of the damaged tree. Officer Nikodym saw the damaged tree and damage to the tree lawn. Officer Nikodym took a photo of the damage to the

tree and tree lawn and identified it in court. There were also “parts of a vehicle in front of the tree.” Officer Nikodym also identified three other photos showing damage to the vehicle that Gannon had been driving. The photos showed that the driver’s, front passenger’s, and one of the rear air bags had deployed.

{¶ 9} Officer Nikodym recalled having a conversation with Gannon, but he could not remember anything that was said. He agreed that his conversation with him was “very minimal.” Officers James Farrell and Brian Kelly assisted Officer Nikodym with the investigation.

{¶ 10} Officer Farrell testified that he responded to the sports bar with Officer Nikodym. Police found Gannon in the restroom of the bar. Officer Farrell first had contact with Gannon in the parking lot of the sports bar. He stated that when Gannon was brought outside to his vehicle, Officer Farrell testified that he “could smell a strong odor of alcoholic beverage emanating from him, while he was still actually trying to maintain his balance, actually standing over by us, he was swaying.” By “swaying,” Officer Farrell stated that he meant, “[k]ind of like a front-back, side to side kind of swaying. At the same time he’s still trying to maintain his balance.” Officer Farrell further explained that Gannon “had an issue actually just walking.” Officer Farrell stated that Gannon also “had red and watery, glossy eyes” and fresh wounds that were bleeding on his hands.

{¶ 11} Officer Farrell testified that he asked Gannon if he had been drinking. Gannon told him that he had a few beers and two shots at the sports bar. Later in

the conversation, Gannon told Officer Farrell that he had three “firebomb shots and some Jager, even though he did not like Jager.”

{¶ 12} Officer Farrell said that at first Gannon admitted that he had been driving the vehicle because he told the officers that he had driven his son “back to his son’s mother’s house.” Later, Gannon told police that he had not been driving and did not know what had happened to the vehicle. Gannon was placed under arrest and transported to the police station. Gannon refused to submit to field sobriety tests and the alcohol-breath test.

{¶ 13} Officer Farrell agreed that he stated in his report that both Gannon’s and the female passenger’s skin looked like it was “peeling.” He agreed that it could have been from the airbags. He further agreed that he did not evaluate Gannon for the possibility of a concussion.

{¶ 14} Officer Farrell stated that from the time that Gannon hit the tree until officers arrived at the sports bar was “not as long as [Kustra] stated * * * because by the time [Kustra] got brought back was after we already had initial contact with the suspect.”

{¶ 15} The city rested, and Gannon moved for a Crim.R. 29 acquittal regarding Gannon’s charges for OVI and leaving the scene of an accident. The trial court denied Gannon’s motion. The trial court explained that the OVI evidence was “thin,” but that there was “enough testimony here.”

{¶ 16} Gannon testified that he had been visiting with his son prior to hitting the tree. After he dropped his son off at his son’s mother’s house, Gannon’s

girlfriend, who was in the car with him, got angry with him and started “getting irate, more or less kicking at [him].” Gannon said that is what made him hit the tree. Gannon denied that he had been drinking before he hit the tree. After he hit the tree, he drove to the sports bar. He testified that is where he drank the two “fireballs, and three Jagers and a couple of beers.” Gannon further testified that he had been a “little dazed” from the accident. Gannon stated that he did not tell the officers that his girlfriend caused the accident because he did not want to get her in trouble. Gannon further testified that the car that he had been driving was his girlfriend’s car. He said that he had been driving it because she was too intoxicated to drive. Gannon agreed that he had some cuts on his face after the accident and that the skin on his hands was peeling from the accident.

{¶ 17} The trial court found Gannon guilty of the OVI, driving under suspension, and failure to control, but not guilty of leaving the scene of an accident.¹ The trial court explained that although there was only circumstantial evidence of OVI, the officers did “a good job” considering that Gannon refused to submit to field sobriety and alcohol-breath tests.

{¶ 18} The trial court sentenced Gannon to 20 days in jail for the OVI but suspended 15 of those days. It also imposed a \$750 fine for the OVI and suspended Gannon’s license for two years. It also placed Gannon on two years of basic probation for the OVI. For failure to control, the trial court sentenced Gannon to a

¹ The trial court did not immediately issue its decision on Gannon’s charge of leaving the scene of an accident because it held it in abeyance while it researched the issue of whether Gannon had 24 hours to report the fact that he hit the tree.

\$10 fine. For driving under suspension, the trial court sentenced Gannon to a \$10 fine. The trial court stayed the sentence pending appeal. It is from this judgment that Gannon now appeals.

II. Sufficiency of the Evidence

{¶ 19} In his first and third assignments of error, Gannon argues that the city failed to present sufficient evidence of OVI and failure to control.

{¶ 20} “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *Black’s Law Dictionary* 1433 (6th Ed.1990). When an appellate court reviews a record upon a sufficiency challenge, “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, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

A. OVI

{¶ 21} OVI under R.C. 4511.19(A)(1)(a) provides that “[n]o person shall operate any vehicle * * * if, at the time of the operation * * * [t]he person is under the influence of alcohol.”

{¶ 22} Gannon maintains that there was “absolutely no evidence that [he] had consumed alcohol prior to hitting the tree” or that he was impaired at the time of the accident.

{¶ 23} Gannon is correct that there is no direct evidence that he had consumed alcohol before hitting the tree or that he was impaired when he hit the tree. The city, however, presented circumstantial evidence of both.

{¶ 24} “Proof of guilt may be made by circumstantial evidence, real evidence, and direct evidence, or any combination of the three, and all three have equal probative value.” *State v. Zadar*, 8th Dist. Cuyahoga No. 94698, 2011-Ohio-1060, ¶ 18, citing *State v. Nicely*, 39 Ohio St.3d 147, 529 N.E.2d 1236 (1988). Direct evidence exists when “a witness testifies about a matter within the witness’s personal knowledge such that the trier of fact is not required to draw an inference from the evidence to the proposition that it is offered to establish.” *State v. Cassano*, 8th Dist. Cuyahoga No. 97228, 2012-Ohio-4047, ¶ 13. In contrast, “circumstantial evidence requires the drawing of inferences that are reasonably permitted by the evidence.” *Id.*; see also *State v. Hartman*, 8th Dist. Cuyahoga No. 90284, 2008-Ohio-3683, ¶ 37 (“Circumstantial evidence is the proof of facts by direct evidence from which the trier of fact may infer or derive by reasoning other facts in accordance with the common experience of mankind.”).

{¶ 25} Circumstantial evidence and direct evidence inherently possess the same probative value. *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus. “Although there are obvious differences between direct and circumstantial evidence, those differences are irrelevant to the probative value of the evidence — circumstantial evidence carries the same weight as direct evidence.” *Cassano* at ¶ 13, citing *State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001).

“Since circumstantial evidence and direct evidence are indistinguishable so far as the * * * fact-finding function is concerned, all that is required of the [factfinder] is that it weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt.” *Jenks* at 272. “Circumstantial evidence is not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.” *State v. Hawthorne*, 8th Dist. Cuyahoga No. 96496, 2011-Ohio-6078, ¶ 9, quoting *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 81 S.Ct. 6, 5 L.Ed.2d 20 (1960).

{¶ 26} The city presented evidence in this case that Gannon was speeding down a road, hit a tree, and left the scene. He then drove to a bar, where police found him. Police officers investigating the case testified that when they found Gannon at the sports bar and made him come outside, it was less than 30 minutes after he had hit the tree. One of the officers testified that Gannon smelled strongly of alcohol, had “red, watery and glossy eyes,” could not maintain his balance, needed assistance walking, and was swaying back and forth as he tried to walk. Although Gannon stated that he did not start drinking until he got to the bar, police testimony established that they found him less than 30 minutes after he hit the tree. This evidence, if believed, is sufficient circumstantial evidence to prove beyond a reasonable doubt that Gannon was impaired when he hit the tree and drove to the bar.

B. Failure to Control

{¶ 27} Failure to control under R.C. 4511.202 provides that “[n]o person shall operate a motor vehicle * * * on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle[.]”

{¶ 28} Gannon contends that the city failed to present any evidence that he “lost control of his vehicle.” We disagree. Although he told police that he had not been driving, he admitted during his trial testimony that he hit the tree. One does not hit a tree when they are in control of his or her vehicle. Gannon simply blamed his girlfriend for kicking him and causing him to hit the tree. If Gannon’s girlfriend was kicking him from the passenger seat of the vehicle, he could have easily stopped the car before wrecking it into a tree. Kustra also stated that Gannon was speeding as well. This may have made it more difficult to stop his car once his girlfriend started kicking him, but this only supports his conviction of failure to control even more. The state’s evidence was sufficient evidence to prove beyond a reasonable doubt that Gannon lost control of his vehicle.

{¶ 29} Gannon further argues that evidence of him hitting the tree was not sufficient because that would turn the statute into a strict liability statute, which it is not. He maintains that because the statute is not a strict liability offense, “[a] defense of sudden emergency is a defense” to failure to control, and that the trial court failed to consider this defense after he testified that his girlfriend kicked him, causing him to hit the tree. Essentially, Gannon argues that because he had no

control over his girlfriend kicking him, he did not have the required mens rea to commit failure to control.

{¶ 30} Gannon’s argument that a “sudden emergency” caused him to lose control, however, is an affirmative defense. *State v. Houston*, 7th Dist. Noble No. 17NO0455, 2018-Ohio-2788, ¶ 18. An affirmative defense includes “a defense involving an excuse or justification peculiarly within the knowledge of the accused, which the accused can fairly be required to adduce supporting evidence.” *Id.*, citing R.C. 2901.05(D)(1). Further, “[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.” *Id.*, citing R.C. 2901.05(A). Thus, a sufficiency of evidence review does not apply to affirmative defenses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 37, citing *Caldwell v. Russell*, 181 F.3d 731 (6th Cir.1999). We will therefore address this argument under a manifest weight of the evidence standard of review, rather than sufficiency of the evidence.

{¶ 31} Gannon’s first and third assignments of error are overruled.

III. Manifest Weight of the Evidence

{¶ 32} In his second assignment of error, Gannon maintains that his OVI conviction is against the manifest weight of the evidence. We will also address Gannon’s argument regarding his defense of “sudden emergency” to his failure to control conviction because, as we stated, that question goes to the weight of the evidence.

{¶ 33} Gannon argues that his OVI conviction was against the manifest weight of the evidence because the trier of fact should have considered the fact that when police found him, he had been drinking at a bar for 35 to 40 minutes. Thus, he argues that the fact that he appeared intoxicated at that point does not prove that he was intoxicated when he was driving. He further argues that the trial court failed to consider the effects that the accident may have had on him. Finally, he contends that Kustra, the only person who saw him at the time he was driving and hit the tree, did not smell alcohol on him.

{¶ 34} Unlike sufficiency of the evidence, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955).

{¶ 35} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a “thirteenth juror.” *Id.* In doing so, it must review 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence and

ordering a new trial should be reserved for only the “‘exceptional case in which the evidence weighs heavily against the conviction.’” *Id.*, quoting *Martin*.

{¶ 36} Gannon contends that his testimony showed that he had been drinking at the bar for 35 to 40 minutes before police arrived. The trial court, however, heard evidence from the officers that they found Gannon 30 minutes or less after he hit the tree. The trial court clearly believed the officers over Gannon. Besides, even if Gannon is correct that it was closer to 35 to 40 minutes, we still would not find that his OVI conviction was against the manifest weight of the evidence. One would be hard pressed to believe that Gannon could have become so drunk in that short amount of time such that he was swaying, losing his balance, and “had red and watery, glossy eyes.”

{¶ 37} Gannon further argues that the only person who came in close contact with him was Kustra, who did not smell alcohol on him. We disagree that Kustra was the only person who came in close contact with him; the officers certainly did as well. Further, Kustra’s interaction with Gannon was extremely short, and Kustra was a lay person who was not trained to look for signs of alcohol impairment. After review, we cannot say that Gannon’s OVI conviction was against the manifest weight of the evidence.

{¶ 38} We will now turn to Gannon’s argument regarding the defense of sudden emergency to his failure to control conviction. Again, Gannon maintains that because failure to control is not a strict liability offense, “[a] defense of sudden emergency is a defense” to this offense and that the trial court failed to consider this

defense after he testified that his girlfriend kicked him, causing him to hit the tree. Essentially, Gannon argues that because he had no control over his girlfriend kicking him, he did not have the required mens rea to commit failure to control.

{¶ 39} In support of his argument, Gannon cites *State v. Lett*, 5th Dist. Ashland No. 02COA049, 2003-Ohio-3366, and *State v. Gabriel*, 9th Dist. Medina No. 14CA0005-M, 2014-Ohio-5387, in support of his argument.

{¶ 40} In *Lett*, the defendant lost consciousness as a result of a mini-stroke, lost control of his vehicle, and was involved in a single car accident. He was convicted of failure to control. On appeal, he argued that the trial court improperly found the offense to be a strict liability offense, which denied him the right to present the defense of “sudden emergency” because of his mini-stroke. The trial court had found that the sudden-emergency defense only applied to negligence actions. The Fifth District disagreed with the trial court, stating:

[T]he code states no person shall operate a motor vehicle without “reasonable and ordinary control.” In other words, the city code has incorporated and/or adopted the ordinary standard of negligence as the requisite proof of culpability within its failure to control ordinance.

Id. at ¶ 12, citing *State v. Jones*, 10th Dist. Franklin No. 88AP-920, 1989 Ohio App. LEXIS 1475 (Apr. 25, 1989). The Fifth District further stated in *Lett*:

Further, while we understand the doctrine of sudden emergency is usually applicable only to negligence cases, this court has also found the defense of sudden emergency to be viable for certain motor vehicle safety statutes. In *State v. Hitchings*, (Sept. 23, 1996), Stark App. No. 95CA00379, 1996 Ohio App. LEXIS 4490, we found “an operator of a motor vehicle is excused from complying with a safety statute if, without fault on his part, and because of circumstances over which he had no control, he was confronted by a sudden unforeseeable emergency which made compliance with the statute impossible,” citing *Stonerock*

v. Miller Brothers Paving, Inc. (1991), 72 Ohio App.3d 123 at 135, 594 N.E.2d 94.

Id. at ¶ 13.

{¶ 41} The Fifth District reversed Lett’s conviction and remanded to the trial court for further proceedings because the trial court erred when it determined that failure to control was a strict liability offense and refused to consider Lett’s defense of sudden emergency.

{¶ 42} In *Gabriel*, 9th Dist. Medina No. 14CA0005-M, 2014-Ohio-5387, the police officer found a car in the ditch and the driver of the car walking along the side of the road. The driver told the officer that he swerved his vehicle to avoid hitting a deer and ended up in the ditch. The defendant argued that his failure-to-control conviction was against the manifest weight of the evidence because the trial court failed to consider his “sudden emergency defense.” The Ninth District explained the following:

“[U]nder Ohio law, a driver may, under circumstances, avoid a violation of a traffic statute that regulates the operation of motor vehicles if the motorist can show that something over which she had no control, or an emergency not of her own making, made it impossible to comply with the statute’s requirements. For example, a driver proceeding lawfully in her lane of travel, suddenly struck by a motorist that ignored a stop sign, and as a result of the collision forced to veer or travel to the left of the center line should not be held to have violated the driving left of center statute.”

Id. at ¶ 18, quoting *State v. Davis*, 4th Dist. Pickaway No. 04CA1, 2004-Ohio-5680.

{¶ 43} The Ninth District held, however, that Gabriel’s failure-to-control conviction was not against the manifest weight of the evidence because he failed to prove that he actually swerved to hit a deer. *Id.* at ¶ 18-19.

{¶ 44} Reviewing the evidence in this case, we cannot say that Gannon’s conviction for failure to control was against the manifest weight of the evidence. Even if Gannon’s girlfriend was kicking him, that fact would not make this case analogous to the facts in *Lett* (where the defendant had a mini-stroke) or *Gabriel* (where the defendant claimed he hit a deer, even though the trial court found that he did not prove it). Thus, we cannot say that the trial court erred when it failed to apply the defense of sudden emergency because it does not apply to the facts in Gannon’s case.

{¶ 45} In sum, we conclude that Gannon’s convictions for OVI and failure to control convictions are not against the manifest weight of the evidence. After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of witnesses, we do not agree with Gannon that the trier of fact clearly lost its way and created such a manifest miscarriage of justice such that he is entitled to a new trial. This is simply not the “exceptional case in which the evidence weighs heavily against the conviction[s].” *Thompkins* at 387, quoting *Martin*.

{¶ 46} Gannon’s second assignment of error is overruled.

IV. Confrontation

{¶ 47} In his fourth assignment of error, Gannon argues that he was denied his right to confrontation because he could not cross-examine “the state’s only witness * * * whom was educated in OVI detection and accidents.” Gannon’s fourth assignment of error is summarily overruled because the record before us establishes that Gannon’s defense counsel thoroughly cross-examined all three of the state’s witnesses.

{¶ 48} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the Berea Municipal Court to carry this judgment into execution. The defendant’s conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

EILEEN T. GALLAGHER, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR