

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 09AP-1199
 : (C.P.C. No. 08CR-11-7901)
 Khufu T. Curtis, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on June 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Clark Law Office, and *Toki Michelle Clark*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Khufu T. Curtis ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, entered following a bench trial in which the trial judge found appellant guilty of operating a motor vehicle while under the influence of alcohol. For the following reasons, we affirm that judgment.

{¶2} On September 7, 2008, appellant, who was driving a red Jeep Cherokee, struck a motorcyclist who was stopped at a traffic light at the intersection of Morse and Stelzer roads, in Franklin County, Ohio. The accident occurred at approximately 1:36 a.m. A witness observed the accident and called 911. Columbus police were

dispatched to the scene. An officer spoke with appellant, who admitted to rear-ending the motorcycle. The officer detected a strong odor of alcohol coming from appellant. One of the officers administered three field sobriety tests to appellant. After the third test, appellant was arrested. Appellant refused a breath test, so officers obtained a warrant for a blood draw.

{¶3} Appellant was subsequently indicted on two counts of operating a vehicle under the influence of alcohol or drugs. Both offenses are felonies of the fourth degree and alleged that appellant had been convicted of or pled guilty to three or more violations of operating a vehicle under the influence of alcohol and/or a drug of abuse within six years of the instant offense. On November 17, 2008, appellant entered pleas of not guilty. The matter was later scheduled for trial.

{¶4} On July 27, 2009, appellant signed a waiver of his right to a trial by jury and agreed to be tried by the judge. Trial commenced immediately following the filing of the waiver. During trial, the State of Ohio introduced the testimony of Jamie Chiero, Officer Robert J. Griffin, Officer James Murawski, and forensic scientist Angela Farrington.

{¶5} Just prior to the accident, Mr. Chiero was driving home from work, heading east on Morse Road, when he observed appellant driving ahead of him in the adjacent lane. Mr. Chiero observed appellant slam on his brakes at an intersection where the traffic light was red. Appellant's vehicle appeared to be going too fast to stop at the intersection. Mr. Chiero testified he noticed appellant's vehicle had crossed the white stop bar and was stopped approximately one-third to one-half of the way through the intersection.

{¶6} When the traffic light turned green, Mr. Chiero observed appellant take off quickly. Mr. Chiero also accelerated and observed that the next light at the intersection ahead, which was Morse and Stelzer roads, was red. Appellant's vehicle swerved into Mr. Chiero's lane and then swerved back and struck the motorcyclist stopped at the traffic light.

{¶7} Mr. Chiero called 911 upon witnessing the accident. Mr. Chiero testified he asked appellant to turn his engine off several times before appellant complied. As appellant opened the door to his Jeep Cherokee, Mr. Chiero observed appellant remove a green beer bottle from the front seat and place it in the back under the passenger seat. After appellant exited his vehicle, Mr. Chiero observed appellant walking fairly normally but in a slightly wobbly manner. However, Mr. Chiero testified appellant did not appear to be injured.

{¶8} At trial, Mr. Chiero positively identified appellant as the person who was driving the red Jeep Cherokee on the night of the accident.

{¶9} Officer Robert J. Griffin ("Officer Griffin") testified he was dispatched to Morse and Stelzer roads on September 7, 2008 on the report of an injury accident. Upon arrival, he observed an accident involving a motorcycle and a red Jeep. The operator of the motorcycle was laying face down on the pavement at the intersection, the driver of the Jeep was standing next to his vehicle, and there were several witnesses nearby. The motorcyclist was eventually removed from the scene by the medic squad.

{¶10} Officer Griffin spoke to appellant, who admitted that he had been driving the Jeep and that he had rear-ended the motorcycle. While standing approximately three to four feet away from appellant, Officer Griffin noticed a strong odor of alcohol coming from

appellant. Officer Griffin also testified appellant's speech was mumbled and indistinct and appellant appeared to be swaying slightly while he was speaking with him.

{¶11} Believing appellant to be under the influence, Officer Griffin placed appellant in the rear of his cruiser and conducted further investigation. Officer Griffin spoke to Mr. Chiero and then conducted a visual sweep of appellant's vehicle, where he observed an empty Heineken beer bottle and an empty can of Bud Light.

{¶12} Officer Griffin then administered three field sobriety tests to appellant. He first administered the horizontal gaze nystagmus ("HGN") test which tests for nystagmus, or an involuntary jerking, of the eyes. Officer Griffin described his administration of the HGN test and testified he observed four out of six clues with respect to this test. During the course of testimony, the trial judge announced he was going to give very little weight to this test. Later, after additional testimony on cross-examination revealed that there were three police cruisers with flashing red and blue lights in the area at the time the HGN test was administered, and after Officer Griffin testified that intense flashing lights can exacerbate nystagmus, the trial judge announced it would give "no weight whatsoever" to the HGN test. (Tr. 68.)

{¶13} Officer Griffin testified he administered the walk-and-turn test after verifying that appellant did not have any leg or back problems. Officer Griffin detected six out of eight clues indicating impairment. These clues were: difficulty maintaining balance, failing to touch heel to toe on each step, stopping during the course of taking the steps, difficulty walking on a straight path, raising his arms above six inches off his sides to maintain balance, and improperly executing the turn. Officer Griffin testified the presence of four out of eight clues indicates an individual is under the influence.

{¶14} Officer Griffin also administered the one-leg stand test. He observed three out of four clues indicating appellant was under the influence. These clues were: having difficulty maintaining balance, being unable to keep his foot up during the test, and raising his arms to maintain balance. Officer Griffin testified the presence of two out of four clues indicates the individual is under the influence.

{¶15} Following the completion of the third test, Officer Griffin believed appellant was under the influence and thus placed appellant under arrest. Appellant refused to consent to a breath test, so Officer Griffin contacted his sergeant in order to obtain a search warrant to draw blood. The warrant was obtained and appellant was transported to Riverside Hospital where a phlebotomist drew a blood sample and directed it into glass vials from a prepared kit maintained by the Columbus police. Officer Griffin labeled the tubes and prepared the blood sample packet. He noted the time as 4:45 a.m. He then took appellant to the county jail prior to submitting the sample to the Columbus police property room for analysis.

{¶16} Officer James Murawski ("Officer Murawski") testified that he completed the accident report, which included a sketch of the intersection where the crash took place, and also inventoried and impounded appellant's vehicle. During the inventory of the vehicle, Officer Murawski made note of one empty beer can, one empty beer bottle, and one unopened bottle of Heineken. He also verified that the VIN number of the vehicle matched the VIN obtained from LEADS for appellant's vehicle.

{¶17} Angela Farrington ("Ms. Farrington"), a forensic scientist employed at the Columbus police crime laboratory, testified she had been trained in alcohol analysis and was required to complete annual proficiency and competency tests to maintain her

license. She testified she analyzed one of the vials of blood submitted to the laboratory on September 7, 2008 for alcohol concentration. She described the testing procedure used, which involved the use of a chromatograph instrument. Based on her findings, she determined the substance in the tube contained .184 grams percent weight of ethanol.

{¶18} Ms. Farrington also testified as to the procedural process by which blood samples are submitted to the crime lab for analysis, which included the chain of custody for the blood sample at issue. As part of this testimony, Ms. Farrington identified State's exhibit No. 10 as a copy of the envelope which contained the blood sample and which bore the chain of custody form.

{¶19} Following the testimony of the State's witnesses, counsel for appellant objected to the admission of the blood alcohol sample. Finding that the sample had been obtained outside the three-hour time frame set forth in R.C. 4511.19(D)(1)(b), the trial court held that it was excluding the blood evidence as it related to the specific amount of alcohol, but it would allow the blood evidence for the limited purpose of simply showing the presence of alcohol in appellant's blood. As a result, the trial court dismissed count two of the indictment, the count which charged appellant with a "per se" violation.

{¶20} The State of Ohio also introduced State's exhibit No. 8, a certified copy of records from the bureau of motor vehicles pertaining to appellant for the purpose of proving appellant's three prior convictions for offenses related to operating a motor vehicle while under the influence. The State argued that the use of such evidence to prove appellant's convictions were permissible pursuant to R.C. 2945.75(B)(2). Appellant, however, disputed the use of such evidence, arguing that because appellant allegedly committed this offense approximately three weeks prior to the enactment of the

legislation, and because he believed the amended statute was not intended to be retroactive due to its substantive nature, State's exhibit No. 8 could not be used to prove the prior convictions.

{¶21} The trial court, however, admitted the evidence, finding that the amended statute involved simply a procedural change. The trial court determined that even if the offense was allegedly committed prior to the enactment of the statute, it did not affect the admissibility of the evidence, as long as the requirements of the statute were met.

{¶22} Appellant did not present any witnesses or introduce any evidence in his case-in-chief.

{¶23} The trial court found appellant guilty of operating a motor vehicle under the influence of alcohol as charged in count one, the "impaired" offense. Furthermore, the trial court determined that appellant had previously been convicted of three similar offenses within the six years prior to the commission of the instant offense.

{¶24} On September 16, 2009, the trial court imposed a sentence of 30 months of incarceration at the Ohio Department of Rehabilitation and Correction, with one year of the sentence being a mandatory sentence. The trial court also imposed a 15-year driver's license suspension. It is from this judgment that appellant has appealed and asserts four assignments of error for our review:

ASSIGNMENT OF ERROR NO. 1:

A TRIAL COURT COMMITS REVERSIBLE ERROR WHEN IT CONVICTS A DEFENDANT OF OVI, IN VIOLATION OF R.C. SECTION 4511.19, WHERE THE EVIDENCE FOR CONVICTION IS BASED ONLY UPON TWO FIELD SOBRIETY TESTS AND UNRELIABLE BLOOD EVIDENCE.

ASSIGNMENT OF ERROR NO. 2:

A TRIAL COURT COMMITS REVERSIBLE ERROR WHERE IT RULES THAT BLOOD EVIDENCE IN AN OVI CASE IS INADMISSIBLE, YET DETERMINES DEFENDANT'S GUILT, IN PART, BASED ON THE PRESENCE OF ALCOHOL IN THAT BLOOD EVIDENCE.

ASSIGNMENT OF ERROR NO. 3:

A CRIMINAL DEFENDANT'S RIGHT TO PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW IS BREACHED, IN VIOLATION OF THE OHIO AND THE UNITED STATES CONSTITUTIONS, WHERE THE STATE DOES NOT HAVE TO PROVE ALL ELEMENTS OF AN OFFENSE BEYOND A REASONABLE DOUBT.

ASSIGNMENT OF ERROR NO. 4:

THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶25} For ease of discussion, we shall address some of appellant's assignments of error out-of-order, as well as jointly.

{¶26} In his second assignment of error, appellant argues the trial court erred in admitting the blood evidence to show the presence of alcohol after it had already determined that such evidence was inadmissible to prove the precise concentration of alcohol in appellant's system. Appellant argues this was error because: (1) the blood was drawn after the three-hour time limit set forth in R.C. 4511.19(D)(1)(b); (2) the chain of custody with respect to the blood evidence had been breached; (3) the blood was not properly refrigerated; and (4) the blood was not tested by a certified laboratory. Appellant further argues the trial court erred in relying on such evidence to find appellant guilty of the "impaired" offense. We disagree.

{¶27} An offender charged with operating a motor vehicle under the influence of alcohol or drugs who does not challenge the admissibility of chemical test results via a pre-trial motion to suppress waives the requirement on the prosecution to lay a foundation for the admissibility of the results at trial. *State v. French*, 72 Ohio St.3d 446, 1995-Ohio-32, paragraph one of the syllabus. As a result of the failure to file a pre-trial motion to suppress, chemical test results are admissible at trial without the prosecution demonstrating that: the bodily substance was withdrawn within the time frame specified in the statute; the bodily substance was analyzed in accordance with the methods approved by the Ohio Department of Health; and the analysis was conducted by a qualified individual holding a permit issued by the Ohio Department of Health. *Id.* See also *State v. Mayl*, 106 Ohio St.3d 207, 2005-Ohio-4629, ¶42, citing *French* at 449 ("A defendant who does not file a motion to suppress test results on the basis that the state did not comply with the [Ohio Administrative Code] procedures may not object to the admissibility of the test results at trial on those grounds"); *State v. Coyle* (Mar. 15, 2000), 4th Dist. No. 99 CA 2480, citing *French* at 451 ("pursuant to Crim.R. 12(B)(3), a defendant waives his challenge to the state's compliance with statutes and regulations governing alcohol testing if he fails to file a motion to suppress the test results"); *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶24, quoting *French* at 451 ("The defendant must first challenge the validity of the alcohol test by way of a pretrial motion to suppress; failure to file such a motion 'waives the requirement on the state to lay a foundation for the admissibility of the test results' "); and *State v. Wang*, 5th Dist. No. 2007CAC090048, 2008-Ohio-2144, ¶11 (an accused must file a motion to suppress in order to contest the admissibility of test results on foundational grounds related to compliance with the Ohio

Department of Health regulations; failure to do so will result in admission of the results without the requirement that the state lay a foundation on these issues).

{¶28} Based upon the foregoing, we find appellant waived these claims by failing to raise them in a pre-trial motion to suppress. However, even if we ignore this procedural bar, appellant's claims still fail.

{¶29} First, we address appellant's challenge to the admission of blood evidence that was withdrawn outside of the three-hour time limit set forth in R.C. 4511.19(D)(1)(b). Here, despite the fact that appellant did not file a pre-trial motion to suppress the blood evidence on the grounds it was obtained more than three hours after the offense, the trial court held that evidence of the specific concentration of alcohol in appellant's blood would be excluded, and as a result, the trial court dismissed the "per se" violation. However, we note the State has not challenged this finding on appeal, and as a result, we need not address any potential error on appeal here.

{¶30} Nevertheless, with respect to the three-hour time limit set forth in R.C. 4511.19(D)(1)(b) and referenced by appellant, we point out that this requirement is set forth in the statutory provision that addresses offenses involving "per se" violations. Yet, the issue in the instant case involves an "impaired" violation as set forth in R.C. 4511.19(D)(1)(a). Furthermore, the Supreme Court of Ohio has held a blood sample taken outside of the three-hour time limit set forth in R.C. 4511.19(D)(1)(b) is admissible under R.C. 4511.19(D)(1)(a) to prove that a person is under the influence of alcohol as proscribed by R.C. 4511.19(D)(1)(a), where there has been substantial compliance with the administrative requirements of R.C. 4511.19(D) and expert testimony is offered. *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, ¶2, 19.

{¶31} In *Hassler*, the Supreme Court of Ohio essentially adopted the determination previously reached in *Newark v. Lucas* (1988), 40 Ohio St.3d 100. In *Newark*, the court found where the test results are not dispositive to a determination of guilt or innocence, such as in a situation involving an alleged "impaired" violation, the fact that the blood was withdrawn outside the statutory time frame does not diminish the probative value of the results in a prosecution for an "impaired" violation. See also *Mason v. Murphy* (1997), 123 Ohio App.3d 592, 597 (the specific amount of alcohol found pursuant to chemical testing of bodily substances "is of secondary interest" in a proceeding charging impaired driving, and if probative, the test results are simply considered in addition to all other evidence demonstrating impaired driving).

{¶32} Additionally, we note that appellant did not object to Ms. Farrington's testimony regarding her conclusion that appellant's blood sample contained .184 grams percent weight of ethanol.

{¶33} Therefore, we find the trial court did not abuse its discretion in admitting the blood evidence for purposes of determining the presence of alcohol, despite the fact that it was obtained outside the three-hour time limit.

{¶34} Next, appellant cites to Ohio Adm.Code 3701-53-05(F), arguing the record contains evidence to support the position that the blood was not properly refrigerated while not in transit, and thus the trial court erred in relying upon the blood evidence. Additionally, appellant cites to Ohio Adm.Code 3701-53-06(A), which requires that a chain of custody be maintained, and argues that the chain of custody was breached here because the chain of custody form (State's exhibit No. 10) does not demonstrate who

picked up the blood evidence from the property room or when that evidence was picked up and removed.

{¶35} As noted by the State of Ohio, appellant seems to assert that the State was required to demonstrate strict compliance with Ohio Adm.Code 3701-53-05 and 06. Again, these issues are ones which would have been properly litigated in a motion to suppress. However, they were not. Nevertheless, when an accused challenges the admissibility of a chemical test based upon a failure to comply with an Ohio Department of Health regulation, the state need only demonstrate substantial compliance, rather than strict compliance, with that regulation. *State v. Burtch*, 10th Dist. No. 09AP-635, 2010-Ohio-259, ¶17, citing *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 3. See also *State v. Luke*, 10th Dist. No. 05AP-371, 2006-Ohio-2306, and *French*. Moreover, once the state has demonstrated substantial compliance, the burden shifts back to the accused to show that he was prejudiced by less than strict compliance. *State v. Plummer* (1986), 22 Ohio St.3d 292, 295.

{¶36} For chain of custody and refrigeration purposes, appellant appears to challenge the specific time frame between 4:45 a.m. on September 7, 2008, the date and time at which the blood was drawn, and 9:00 a.m. on September 10, 2008, the date and time at which Larry Beatty placed the samples in the toxicology refrigerator. However, the testimony of Officer Griffin and Ms. Farrington establishes the chain of custody and the refrigeration of the blood sample.

{¶37} Officer Griffin testified as to the procedure for obtaining the blood draw, including the process by which the phlebotomist collected the blood in the tubes he provided from the police evidence packet. Officer Griffin also testified that he sealed and

labeled the tubes and took them to the Columbus police property room after leaving the hospital and transporting appellant to the county jail. The chain of custody form indicates the blood sample arrived at the property room at 6:35 a.m., less than two hours after the blood was drawn.

{¶38} Ms. Farrington testified she was responsible for the daily supervision of the drug identification and alcohol analysis sections of the lab and was familiar with the procedures for receiving evidence from the Columbus police. Over objection from appellant's counsel, Ms. Farrington testified that, based upon the chain of custody form, Officer Griffin submitted the blood sample to the Columbus property room on September 7, 2008. Per procedure, Ralph Gilliam would have accepted the sample and placed it in the police property room freezer at 6:35 a.m. Then, on September 10, 2008, Mr. Beatty, a property room employee who regularly transports evidence between the property room and the crime lab, brought the evidence to the crime lab's toxicology freezer. Ms. Farrington testified she then removed the sample from the toxicology freezer for testing on September 11, 2008.

{¶39} This testimony is sufficient to establish substantial compliance with the regulations for refrigeration and chain of custody. The Supreme Court of Ohio has previously determined that a period of a few hours where the sample was not refrigerated was still sufficient to constitute substantial compliance. See *Plummer*, and *Mayl*. Thus, we find the trial court did not err in admitting this evidence.

{¶40} Finally, appellant has argued the blood sample was not properly tested, pursuant to Ohio Adm.Code 3701-53-06(B), claiming the crime lab was not properly certified to test for the presence of alcohol. However, this claim is refuted by the

testimony of Ms. Farrington, who explained she had been trained in alcohol analysis and was required to complete annual proficiency and competency tests to maintain her license. She further testified that the crime lab was required to participate in an annual proficiency test conducted by the Ohio Department of Health.

{¶41} For all of the reasons set forth above, appellant's second assignment of error is overruled.

{¶42} In his third assignment of error, appellant contends his procedural and substantive due process rights were violated by the State's use of only a certified bureau of motor vehicle record (State's exhibit No. 8), pursuant to R.C. 2945.75(B)(2), to prove his three prior convictions. On appeal, appellant submits R.C. 2945.75(B)(2) is unconstitutional because it shifts the burden of proof and relieves the prosecution of its burden of proving all of the elements of appellant's prior convictions beyond a reasonable doubt. As a result, appellant argues this subsection violates procedural and substantive due process.

{¶43} We begin our analysis of this assignment of error by noting that appellant did not previously challenge the constitutionality of R.C. 2945.75(B)(2) on the grounds that it impermissibly shifted the burden of proof by allowing the State to present prima facie evidence of prior convictions using records from an administrative agency.¹ The failure to challenge the constitutionality of a statute or its application at the trial court level, when the issue is apparent at the time of trial, waives the issue and departs from Ohio's orderly procedure. *State ex rel. O'Brien v. Messina*, 10th Dist. No. 10AP-37, 2010-Ohio-

¹ In the trial court, appellant argued R.C. 2945.75(B)(2) was unconstitutionally retroactive, claiming this statutory subsection was enacted after appellant committed the alleged offense. However, we note that subsection (B)(2) was added and became effective on April 4, 2007 with the enactment of H.B. No. 461. The offense at issue was committed in September 2008.

4741, ¶28. As a result, the issue therefore need not be heard for the first time on appeal. *Id.* See also *In re D.T.*, 10th Dist. No. 07AP-853, 2008-Ohio-2287, ¶19; and *In re N. W.*, 10th Dist. No. 07AP-590, 2008-Ohio-297, ¶37, citing *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

{¶44} Nevertheless, even if we address the merits of appellant's due process claim he still cannot prevail.

{¶45} "The ability to invalidate legislation is a power to be exercised only with great caution and in the clearest of cases. That power, therefore, is circumscribed by the rule that laws are entitled to a strong presumption of constitutionality and that a party challenging the constitutionality of a law bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶16, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. Thus, we begin our analysis under the strong presumption that the statute is constitutional. *State ex rel. O'Brien v. Heimlich*, 10th Dist. No. 08AP-521, 2009-Ohio-1550, ¶24.

{¶46} The Supreme Court of Ohio has determined "[t]he 'due course of law' clause of Section 16, Article I of the Ohio Constitution, has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment." *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 544. Therefore, in the absence of an argument that our analysis under the state and federal constitutions should be different, we shall construe these provisions similarly. *Heimlich* at ¶23.

{¶47} A court uses one of two tests in assessing the constitutionality of a statute under the due process clause: (1) strict scrutiny or (2) rational basis review. *Heimlich* at

¶25. Legislation which infringes upon fundamental rights is reviewed under a strict scrutiny test and is upheld only when it is "narrowly tailored to serve a compelling state interest." Id. at ¶25, quoting *Reno v. Flores* (1993), 507 U.S. 292, 302, 113 S.Ct. 1439, 1447. If there is no fundamental right at issue, courts use rational basis review. Id. at ¶25, citing *Washington v. Glucksberg* (1997), 521 U.S. 702, 117 S.Ct. 2258. Under rational basis review, the statute will be upheld if it is reasonably related to a legitimate governmental interest. Id. at ¶25, citing *Am. Assoc. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 1999-Ohio-248.

{¶48} In conducting a substantive due process analysis, we must determine whether appellant has invoked a "fundamental" liberty interest, which would then trigger "strict scrutiny" review. As stated above, under strict scrutiny review, a law will be invalidated unless the state demonstrates that the law is narrowly tailored to serve a compelling state interest. In the instant case, appellant has failed to identify the "fundamental" interest he asserts has been violated by R.C. 2945.75(B)(2). Thus, we analyze this under a "rational basis" review.

{¶49} Appellant has not presented an argument as to how this subsection of the statute would fail under a rational basis review and we fail to see how R.C. 2945.75(B)(2) implicates appellant's constitutional rights. Like R.C. 2945.75(B)(1), which appellant has not challenged, R.C. 2945.75(B)(2) permits the State to make a prima facie showing as to appellant's prior convictions. However, it does not relieve the State of its burden of proof nor shift the burden of proof to the accused. See *Cleveland v. Keah* (1952), 157 Ohio St. 331, paragraph two of the syllabus ("A prima facie case is one in which the evidence is sufficient to support but not to compel a certain conclusion and does no more than furnish

evidence to be considered and weighed but not necessarily to be accepted by the trier of the facts"). Furthermore, it allows the accused the opportunity to rebut the record, which appellant did not do here. In fact, appellant did not argue there was a mistake in the records as to his identity or that the convictions were erroneous. Yet, it was still up to the trier of fact to determine whether or not the State met its burden. The trial court determined that it had and we find no error in that determination.

{¶50} Accordingly, we overrule appellant's third assignment of error.

{¶51} In his first and fourth assignments of error, appellant appears to argue that appellant's conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. We disagree.

{¶52} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396. In cases involving a bench trial, " 'the trial court assumes the fact-finding function of the jury.' " *State v. Banks*, 10th Dist. No. 09AP-13, 2009-Ohio-4383, ¶9, quoting *Cleveland v. Welms*, 169 Ohio App.3d 600, 2006-Ohio-6441, ¶16.

{¶53} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*,

paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶54} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶55} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence following a bench trial, the appellate court must

review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the trier of fact clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also *Banks* at ¶14, citing *Welms* at ¶16.

{¶56} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, a reviewing court must typically give great deference to the fact finder's determination of credibility. *State v. Swanson*, 10th Dist. No. 10AP-502, 2011-Ohio-776, ¶11.

{¶57} In the case sub judice, there is compelling evidence to support appellant's conviction. It is undisputed that appellant was driving the vehicle which struck the motorcyclist at Morse and Stelzer roads. The point of contention is whether the State proved beyond a reasonable doubt that appellant was under the influence of drugs or alcohol. We find the trial court properly determined that the State met its burden of proof and appellant's conviction is neither against the manifest weight of the evidence nor lacks sufficient evidence to support it, based upon the testimony and evidence presented at the trial.

{¶58} The civilian witness, Mr. Chiero, testified as to appellant's poor driving prior to the accident. Mr. Chiero also saw appellant attempt to hide a beer bottle after the accident. Two empty alcohol containers as well as a full, unopened beer were later found in appellant's vehicle.

{¶59} Officer Griffin noted a strong odor of alcohol about appellant's person and witnessed appellant swaying slightly while he was speaking with him. Officer Griffin also perceived appellant's speech to be mumbled and indistinct. In addition to these observations are the results of the field sobriety tests. While only the observations and results of two of the tests were admitted into evidence, both tests produced sufficient clues to indicate appellant was under the influence. Officer Griffin observed six out of eight clues on the walk-and-turn test, and three out of four clues on the one-leg stand test.

{¶60} Additionally, the laboratory analysis of appellant's blood also supported the conclusion that appellant was under the influence of alcohol. While the evidence as to the precise concentration of alcohol in his blood was excluded, there was evidence of the presence of alcohol in appellant's blood and we have determined that admission of this evidence was proper.

{¶61} Thus, in considering all of the evidence as a whole, which includes appellant's erratic driving prior to the accident, the strong odor of alcohol on his person, his poor performance on two of the field sobriety tests, the presence of beer bottles/cans in his vehicle, and the presence of alcohol in his blood, his conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. While appellant attempts to attack the credibility of the testimony and the evidence (such as the reliability of the officer in administering the walk-and-turn test and the one-leg stand test) and/or offers an alternative explanation for his poor performance on the field tests (i.e.: he was "shaken up" and "traumatized" after the accident), two witnesses testified that appellant was not injured. Furthermore, the trial court, as the trier of fact, was in the best

position to assess the evidence and to weigh the credibility of the witnesses, and the trial court chose to find the State's evidence was credible.

{¶62} Lastly, with respect to the issue of the proof demonstrating appellant's three prior convictions within the six-year period prior to the instant offense, appellant's challenge fails here as well. R.C. 2945.75(B)(2) permits prior convictions to be established through use of a certified record from the bureau of motor vehicles. The State submitted such a document here, and that document provided prima facie evidence of three prior convictions for under the influence offenses within the requisite time period. Appellant did not dispute the accuracy of the record or his convictions. And, we have already determined that the trial court did not err in admitting that evidence, as appellant has failed to demonstrate that the use of such evidence violates due process. Therefore, we find no error in the trial court's determination that appellant had three prior convictions.

{¶63} As a result, we find appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Accordingly, we overrule appellant's first and fourth assignments of error.

{¶64} In conclusion, we overrule appellant's first, second, third, and fourth assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, J., concurs.
FRENCH, J., concurs in judgment only.
