[Cite as *Columbus v. Wolfe*, 2012-Ohio-3649.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 11AP-972
v.	:	(M.C. No. 2011 TRC-124420)
James A. Wolfe,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 14, 2012

Richard C. Pfeiffer, Jr., City Attorney, and *Orly Ahroni*, for appellee.

Yeura R. Venters, Public Defender, and *Timothy E. Pierce*, for appellant.

APPEAL from the Franklin County Municipal Court.

FRENCH, J.

{¶ 1} Defendant-appellant, James A. Wolfe ("appellant"), appeals the judgment of the Franklin County Municipal Court convicting him of operating a vehicle under the influence of alcohol ("OVI") and failing to maintain a continuous lane of travel. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} Appellant was charged with OVI and failing to maintain a continuous lane of travel after a traffic stop. He pleaded not guilty to the charges, and a trial

commenced. A jury was empanelled for the OVI charge, and the trial court was to consider the latter charge.

{¶ 3} At trial, Columbus Police Officer Dana Hess testified as follows. Hess is trained to detect whether a driver is under the influence of alcohol, and she has dealt with intoxicated individuals on a nightly basis. She was patrolling a freeway on April 11, 2011, when she saw appellant driving in a "jerking motion." (Tr. Vol. II, 121.) He started to exit the freeway, but then he "shot across to the center lane and then back into the right lane without signaling." (Tr. Vol. II, 121.)

{¶ 4} Hess stopped appellant and approached him in his car. His eyes were glassy and bloodshot, and his speech was slurred. She also smelled alcohol on his breath, and he admitted to drinking beer at a bar. When she asked him for his driver's license, he was slow to retrieve his wallet, and he handed her his credit card. Hess asked him to exit his car for field sobriety tests. While outside the car, he was swaying and "having a hard time maintaining his balance." (Tr. Vol. II, 124.)

{¶ 5} Hess first performed the horizontal gaze nystagmus ("HGN") test on appellant. She looked for "involuntary jerking" in his eyes because that would be a sign that he was impaired from alcohol. (Tr. Vol. II, 125.) A person fails the test if he displays a minimum of four out of six clues of impairment. Appellant displayed all six clues.

{¶ 6} Next, Hess asked appellant to perform the walk-and-turn. Appellant claimed that he injured his right knee, but he did the test anyway because he said he could still walk. A person fails the test if he displays a minimum of two out of eight clues of impairment. Appellant displayed six clues.

{¶ 7} The last test appellant performed was the one-leg stand. This test required appellant to stand on one foot for 30 seconds. Appellant stood on the leg that was not injured. A person fails the test if he displays a minimum of two out of four clues of impairment. Appellant displayed three clues.

{¶ 8} Hess concluded that appellant was under the influence of alcohol, and she arrested him. While filling out the citation, Hess asked appellant for his zip code, but he

could not remember it. She also asked if appellant wanted to take a breath test, and he refused.

{¶ 9} After the prosecutor rested his case-in-chief, appellant testified as follows. Appellant injured his right knee when he was on full-time military duty, and he injured that knee again during a martial arts performance in February 2011. His knee was hurting on the day of the traffic stop, and it continues to bother him.

{¶ 10} On the day of the traffic stop, appellant reported for duty with his military reserve unit. He worked on computers and moved equipment. Later, he picked up his friend and drove to a bar. He drank beer at the bar, and he stayed there for five hours. Appellant was tired when he was driving his friend home, and he had trouble pushing the gas pedal because of his injured knee. He was also not used to the car he was driving because he had recently purchased it. And, he was unfamiliar with the freeway. When he drove toward an exit ramp that he thought he was supposed to take, his friend told him he needed to stay on the freeway. He was veering away from the ramp when Hess stopped him.

{¶ 11} On cross-examination, appellant acknowledged that he never had surgery on his right knee. He also admitted to being able to walk around the college he was attending. In addition, he said that he was attempting to re-enlist in full-time military service, and he preferred to be assigned to field duty.

{¶ 12} Next, appellant's wife, Insuk Wolfe, testified. She indicated that appellant cannot run or play ball with his sons because of his knee injury. Appellant's mother, Ruby Wolfe, also testified. She said that appellant has problems with stairs and that "anything that has to do with the stress on the knee, he's limited." (Tr. Vol. III, 219.)

{¶ 13} During closing argument, defense counsel claimed that appellant's knee injury affected the walk-and-turn. The prosecutor contended that appellant's knee did not interfere with his ability to perform the test. He noted that appellant walked to and from the witness stand. Appellant objected on grounds that his ability to walk during trial was not evidence, and the court overruled the objection. Afterward, the jury found appellant guilty of OVI, and the court found him guilty of failing to maintain a continuous lane of travel.

II. ASSIGNMENTS OF ERROR

{¶ 14} Appellant filed a timely notice of appeal and assigns the following as error:

> [I.] There was insufficient competent, credible evidence to support the jury's verdict, thereby, denying Appellant due process under the state and federal Constitutions.
>
> [II.] The guilty verdicts were against the manifest weight of the evidence, thereby, depriving Appellant of his due process protections under the state and federal Constitutions.
>
> [III.] The trial court erred in permitting the prosecutor to encourage the jury to consider Appellant's manner of walking to the witness stand at trial as evidence of the condition of his knee on the evening of the offense (six months earlier) and to rebut claims that Appellant's knee injury affected his ability to perform the field sobriety tests.

III. DISCUSSION

A. First Assignment of Error: Sufficiency of the Evidence

{¶ 15} In his first assignment of error, appellant argues that his OVI conviction is based on insufficient evidence. We disagree.

{¶ 16} 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. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 192. 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 the essential elements of the crime. *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34. 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). In determining whether a conviction is based on sufficient evidence, we do not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *State v. Lindsey*, 190 Ohio App.3d 595, 2010-Ohio-5859, ¶ 35 (10th Dist.). *See also State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim).

{¶ 17} Appellant was convicted of OVI pursuant to Columbus City Code 2133.01(A)(1)(a), which states that "[n]o person shall operate any vehicle * * * under the influence of alcohol." It is undisputed that Hess observed appellant driving on April 11, 2011. We must determine, however, whether the evidence establishes that appellant was under the influence of alcohol.

{¶ 18} Hess saw appellant drive erratically and unlawfully cross multiple lanes on the freeway. During the traffic stop, Hess smelled alcohol on appellant's breath, and, in fact, he admitted to drinking beer while at a bar for five hours. He had glassy, bloodshot eyes and slurred speech. He could not remember his zip code, and he handed Hess his credit card when she asked for his driver's license. Also, he could not keep his balance, and he failed all three field sobriety tests. This evidence, construed in a light most favorable to the state, was sufficient to prove that appellant was under the influence of alcohol. *See State v. Allen*, 10th Dist. No. 09AP-853, 2010-Ohio-4124, ¶ 24-25; *State v. Caldwell*, 10th Dist. No. 02AP-576, 2003-Ohio-271, ¶ 26. In addition, appellant's refusal to take a breath test is evidence of his guilt. *See Allen* at ¶ 32. Accordingly, we conclude that appellant's conviction for OVI is based on sufficient evidence. We overrule appellant's first assignment of error.

B. Second Assignment of Error: Manifest Weight of the Evidence

{¶ 19} In his second assignment of error, appellant contends that his OVI conviction is against the manifest weight of the evidence. We disagree.

{¶ 20} When presented with a manifest weight challenge, we weigh the evidence to determine whether 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 220. The trier of fact is afforded great deference in our review. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 26. We reverse a conviction on manifest weight grounds for only the most exceptional case in which the evidence weighs heavily against a conviction. *Lang* at ¶ 220.

{¶ 21} Appellant asserts that the result of the walk-and-turn is unreliable because of his knee injury, but it was reasonable for the jury to conclude that appellant did not have a knee injury or that his injury was not severe enough to affect the walk-and-turn.

Appellant never had surgery on his knee, and he was able to walk around the college he was attending. He was attempting to re-enlist in full-time military service, and he preferred to be assigned to field duty. He had no problem walking to and from the witness stand. And, hours before the traffic stop, he was physically active while on reserve duty. According to Hess, before he performed the test, appellant admitted that he could walk.

{¶ 22} Nevertheless, even if the jury questioned the walk-and-turn, it was able to consider the one-leg stand because appellant stood on the knee that he claimed was not injured. Also, the jury was able to consider the HGN given that it did not require appellant to move or use his knees.

{¶ 23} Lastly, appellant argues that the weight of the evidence shows he had trouble driving because he was fatigued and unfamiliar with his car and the freeway. Hess provided in-depth testimony indicating that appellant was under the influence of alcohol, however, and it was within the province of the jury to accept that testimony given her training and experience. *See Allen* at ¶ 31.

{¶ 24} For all these reasons, we conclude that appellant's OVI conviction is not against the manifest weight of the evidence. We overrule appellant's second assignment of error.

C. Third Assignment of Error: Closing Argument

{¶ 25} In his third assignment of error, appellant claims that we must reverse his convictions because the prosecutor noted during closing argument that he could walk during trial. We disagree.

{¶ 26} An abuse of discretion standard applies to a trial court's rulings about closing argument. *State v. J.G.*, 10th Dist. No. 08AP-921, 2009-Ohio-2857, ¶ 23. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 27} Here, appellant objected to the prosecutor's comment on grounds that it was not based on the evidence. A defendant's body is physical evidence, however, and a prosecutor may comment in closing argument on a defendant's appearance and actions

at trial. *State v. Brown*, 38 Ohio St.3d 305, 317 (1988), citing *State v. Lawson*, 64 Ohio St.3d 336, 347 (1992). Accordingly, we conclude that the trial court did not abuse its discretion by overruling his objection.

{¶ 28} Next, appellant argues that his ability to walk during trial was irrelevant. Because appellant did not raise this issue at trial, he forfeited all but plain error. *See State v. M.B.*, 10th Dist. No. 08AP-169, 2009-Ohio-752, ¶ 18. Plain error exists when there is error, the error is an obvious defect in the trial proceedings, and the error affects the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *Id*.

{¶ 29} Here, appellant cannot show plain error. At trial, appellant contended that his injured knee affected the walk-and-turn. To emphasize his point, he claimed that his knee injury was so severe that it continued to bother him. The fact that appellant had no problem walking during trial was relevant, therefore, because it refuted his claim about the severity of his knee injury. To be sure, appellant walked during trial under different conditions than the walk-and-turn. But the jury was able to consider that issue when deciding how much weight to give the evidence. *See State v. Scott*, 10th Dist. No. 10AP-174, 2010-Ohio-5869, ¶ 17.

{¶ 30} Consequently, we need not disturb the trial court's decision to allow the prosecutor to comment on appellant's ability to walk during trial. We overrule appellant's third assignment of error.

IV. CONCLUSION

{¶ 31} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.