[Cite as *State v. Rochowiak*, 2009-Ohio-2550.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2008 CA 12
v.	:	T.C. NO. 2008 TRD 03846
STEPHEN A. ROCHOWIAK	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 29th day of May, 2009.

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WOLFF, J. (by assignment)

{¶ 1} Stephen A. Rochowiak appeals from his conviction and sentence in Miami County Municipal Court for operating an overloaded vehicle in violation of R.C. 5577.04 and crossing marked lanes in violation of R.C. 4511.33.

{¶ 2} Rochowiak advances two assignments of error on appeal. First, he challenges the

legal sufficiency and manifest weight of the evidence to support his conviction for violating R.C. 5577.04. Second, he challenges the legal sufficiency and manifest weight of the evidence to support his conviction for violating R.C. 4511.33.

{¶ 3} After he was charged, Rochowiak's case proceeded to a bench trial in May 2008. The only witnesses were trooper Timothy Mularcik and inspector Jeffrey Keaser, both of the Ohio State Highway Patrol. Mularcik testified that he observed Rochowiak driving a commercial truck with a double trailer on southbound Interstate 75 in Miami County. He watched the truck weave slightly within its lane and then "cross outside of its lane[.]" As he moved closer to initiate a traffic stop for a marked-lanes violation, Mularcik became suspicious that the vehicle was over the legal weight limit. He noticed movement of the suspension and observed that the trailers had no arc, which indicated a heavy load. After he pulled the truck over for a marked-lanes violation, Mularcik also observed that the truck's tires were bulging, indicating a potentially overweight vehicle.

{¶ 4} Mularcik proceeded to obtain Rochowiak's shipping papers, log book, and registration. The shipping papers indicated that the truck's cargo alone weighed nearly 100,000 pounds. Without a special permit, which Rochowiak did not have, Mularcik testified that the legal weight limit was 80,000 for the truck and loaded trailers. As a result, Mularcik had Rochowiak move a little over a mile to exit 69 at the intersection of Donn Davis Way and County Road 25-A. There he met inspector Keaser and a portable scales team. Mularcik watched as Keaser weighed the truck and loaded trailers. The total weight was 140,400 pounds. Mularcik cited Rochowiak for being 60,400 pounds over the legal weight and for a marked-lanes violation.

{¶ 5} For his part, Keaser testified and confirmed being called to the scene. He provided some details about the weighing process, which included using a flat surface and "zeroing out" the scales prior to weighing. He also explained that the scales he used had been calibrated and sealed by the Ohio Department of Agriculture. He provided the trial court with affidavits, which were admitted into evidence, to verify this fact. Keaser further testified that Rochowiak's truck and loaded trailers weighed a combined total of 140,400 pounds and that the legal weight limit was 80,000 pounds. He explained that he obtained this weight by placing a separate scale on each side of the vehicle's seven axles, requiring the use of fourteen scales in all.

{¶ 6} After overruling a Crim.R. 29 motion from defense counsel, the trial court found Rochowiak guilty of the overloaded-vehicle and marked-lane charges and sentenced him accordingly. The trial court stayed the sentence, and this appeal followed.

{¶ 7} Rochowiak's first assignment of error states:

{¶ 8} "The Trial Court Committed Prejudicial Error Finding the Defendant Guilty of Violating ORC 5577.04 when the state had failed to make a prima facie case or in the alternative when the state had failed to prove the Appellant guilty beyond a reasonable doubt. (The record demonstrates an absence of evidence to support the judgment.)"

{¶ 9} In essence, Rochowiak challenges the legal sufficiency and manifest weight of the evidence to support his conviction for violating R.C. 5577.04. When a defendant challenges the sufficiency of the evidence, he is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471. "An appellate court's function when reviewing the sufficiency of the

evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 10} Our analysis is different when reviewing a manifest-weight argument. When a conviction is challenged on appeal as being against the weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. A judgment should be reversed as being against the manifest weight of the evidence "only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 11} Although Rochowiak purports to challenge the sufficiency and weight of the State's evidence, he fails to argue these two challenges separately. In any event, the specific arguments he raises go more to the legal sufficiency of the State's evidence. He first contends the State failed to prove that the scales used by inspector Keaser had appropriate seals affixed to them when his vehicle was weighed. This argument implicates R.C. 4513.33, which provides in part:

{¶ 12} "Any police officer having reason to believe that the weight of a vehicle and its

load is unlawful may require the driver of said vehicle to stop and submit to a weighing of it by means of a compact, self-contained, portable, sealed scale specially adapted to determining the wheel loads of vehicles on highways[.] * * * All scales used in determining the lawful weight of a vehicle and its load shall be annually compared by a municipal, county, or state sealer with the state standards or standards approved by the state and such scales shall not be sealed if they do not conform to the state standards or standards approved by the state."

{¶ 13} In order to establish an overweight violation, the State must "prove that the scale used in weighing [a defendant's] vehicle had affixed to it the type of official seal customarily employed by municipal, county, or state sealers in the performance of their duties[.]" *State v. Gribble* (1970), 24 Ohio St.2d 85, 88. In *Gribble*, the Ohio Supreme Court found inadequate an officer's testimony that the scales in question "had a seal and a wire through them that they had been checked[.]" Id. at 89. The *Gribble* court added, however, "that all that need be shown by the prosecution on this point is that the seal affixed to the scale is official and is of the type customarily used by the sealers enumerated in R.C. 4513.33. If the seal is as thus described, the law rebuttably presumes that the sealer performed his statutory duties in accordance with the requirements of that section." Id.

{¶ 14} In *State v. Myers* (1990), 63 Ohio App.3d 765, 776 n.5, we opined that "affidavits certifying that the scales used had been properly sealed in conformance with legal requirements" were sufficient to satisfy *Gribble*. In *Myers*, "the prosecution offered as evidence certified copies of affidavits from the Ohio Department of Agriculture indicating that the scales used by the State Highway Patrol had been accurately calibrated within the limits set forth by the National Bureau of Standards and the Ohio Revised Code." Id. at 776. The scales had been

tested within the previous one year, and the State presented testimony that the scales referred to in the affidavits offered as evidence included the scales used to weigh the appellants' vehicles. Id.

{¶ 15} In the present case, inspector Keaser testified that the scales he used had been checked for accuracy in January. He added that the scales were sealed, and he described the seals as being "metal, small wise uh pea size." As in *Myers*, he also presented the trial court with fourteen affidavits, one for each portable scale he used to weigh Rochowiak's vehicle. Keaser identified the affidavits, which were admitted into evidence, as being from the Ohio Department of Agriculture, and as applying to the particular scales he used on Rochowiak's vehicle. The affidavits established that the scales were tested and sealed within one year of Rochowiak's citation. The affidavits indicated that the scales were "found to be appropriate for the intended use [and] to be accurate within the tolerance set forth by the National Institute of Standards and Technology (NIST), United States Department of Commerce." The affidavits further stated that the inspector "has been properly trained and is duly qualified to perform the accuracy test and seal the device as being accurate and correct." Based on inspector Keaser's testimony and the affidavits, the evidence supports a finding that the scales he used had the appropriate seals affixed to them when he weighed Rochowiak's vehicle. We find no merit in Rochowiak's first argument.

{¶ 16} Rochowiak next claims the State failed to prove that his vehicle was weighed within three miles of where trooper Mularcik initially stopped it. This argument is equally unpersuasive. Under R.C. 4513.33, Mularcik was permitted to move Rochowiak up to three mile to have his vehicle weighed. *State v. Shepherd* (1980), 61 Ohio St.2d 328, 331. Rochowiak

contends "[t]here is no evidence in the record as to where [his] vehicle was actually weighed." According to Rochowiak, inspector Keaser "indicated that the vehicle was taken to some safe location where it could be weighed, but there was no indication how far this safe location was in relation to the point of stopping."

{¶ 17} The record does not support Rochowiak's allegations. The evidence persuades us that Rochowiak's vehicle was weighed within three miles of where it was stopped. Trooper Mularcik testified that he first observed the vehicle on southbound Interstate 75. After observing a marked-lanes violation, he came closer and initiated a traffic stop. The only reasonable inference from this testimony is that he stopped the vehicle on southbound Interstate 75. During the stop, he became suspicious about the vehicle's weight. As a result, he called a portable scales team and directed Rochowiak to move his vehicle to a safe location to be weighed. At trial, Mularcik responded to questions from the prosecutor about the move as follows:

{¶ 18} Q: "And did you direct the Defendant to uh move his vehicle at that point?"

{¶ 19} A: "Uh after making contact and getting the confirmation from my portable scales team was coming[,] for safety, um I moved to an area that I'm familiar with them doing the portable scales weight check at. I moved them from approximately a little over a mile to Exit 69 um near the Circle K BP at the intersection of Donn Davis Way and County Road 25-A."

{¶ 20} Q: "And as [sic] you meet uh Load Inspector Keaser at that point?"

{¶ 21} A: "I did. * * *."

{¶ 22} For his part, inspector Keaser testified that he made contact with Rochowiak's vehicle on "Park Davis Way," where he arrived to weigh it. The trial court reasonably could have concluded that Keaser's reference to *Park* Davis Way was an inadvertent misstatement.

There is absolutely nothing in Mularcik's testimony to suggest that, after moving Rochowiak to Donn Davis Way to be weighed, he proceeded to move Rochowiak again to a street named Park Davis Way. Therefore, the trial court reasonably could have concluded that Rochowiak's vehicle was weighed at the intersection of Donn Davis Way and County Road 25-A, as Mularcik indicated.

{¶ 23} We also reject Rochowiak's claim that Mularcik moved the portable scales team a little over a mile, rather than Rochowiak's vehicle. As set forth above, Mularcik discussed the move in response to a question about moving Rochowiak's vehicle to be weighed. He stated that he moved to an area he was familiar with for safety. He then added: "I moved them from approximately a little over a mile to Exit 69 um near the Circle K BP at the intersection of Donn Davis Way and County Road 25-A." Mularcik appears to have been explaining, perhaps inartfully, that he had the portable scales team come to his new location, which was a little over a mile from where he made the traffic stop. Nothing in the record suggests that he relocated the portable scales team after it arrived on the scene. The only relevant distance at trial was the distance Mularcik moved Rochowiak's vehicle. Based on the evidence presented, the trial court reasonably could have concluded that this distance was less than three miles.

{¶ 24} Finally, Rochowiak contends the State failed to prove that his vehicle had pneumatic tires and, therefore, failed to establish a violation of R.C. 5577.04. For its part, the State first contends Rochowiak waived his argument about a lack of sufficient evidence on the pneumatic-tire issue by failing to raise it in the Crim.R. 29 motion below. We have recognized, however, that "a not-guilty plea alone is sufficient to preserve a sufficiency-of-the-evidence argument for appeal, even where the issue is not raised at

trial." *State v. Osterfeld*, Montgomery App. No. 20677, 2005-Ohio-3180, at ¶8, citing *State v. Jones*, 91 Ohio St.3d 335, 346, 2001-Ohio-57, and *State v. Carter*, 64 Ohio St.3d 218, 223, 1992-Ohio-127. Moreover, even if a defendant could waive a challenge to the sufficiency of the evidence by failing to raise the issue at trial, it would remain subject to plain-error analysis. *Osterfeld*, supra, at ¶19 (reasoning that it would constitute plain error for a trial court to enter a conviction based on legally insufficient evidence). Therefore, we will proceed to the merits of Rochowiak's argument.

{¶ 25} We examined the need for the prosecution to prove the type of tires in *State v. Thompson* (1999), 135 Ohio App.3d 164. In that case, which also involved an alleged violation of R.C. 5577.04, we reasoned as follows:

{¶ 26} "The Ohio General Assembly has identified two types of vehicle tires: pneumatic and solid. See R.C. 4501.01 (R) and (S). 'Pneumatic tires' are defined as 'tires of rubber and fabric or tires of similar material that are inflated with air,' while 'solid tires' are defined as 'tires of rubber or similar elastic material that are not dependent upon confined air for support of the load.' Id. R.C. 5577.04 sets forth weight limitations for 'pneumatic tired vehicles.' R.C. 5577.041 sets forth limitations for 'solid-tired vehicles.'

{¶ 27} "It is clear from a reading of these statutes that they are specific and apply only to vehicles equipped with certain, and different, types of tires. The essence of the offense entails a determination of the type of tire used in order to determine which statute has been violated and under which statute a defendant may be convicted.

{¶ 28} "From our review, we must agree that the record is devoid of any proof as

to the type of tire on Thompson's vehicle. The only testimony regarding the tires was that Trooper Lewis observed them to be bulging; testimony that falls short of establishing the type of tire. The state appears to concede that there was a failure of proof as to this element of the charge. However, the state argues that this was harmless error because the vehicle was overweight for either type of tire. We cannot agree. The state charged a violation of R.C. 5577.04, and has failed to prove an essential element of that offense. It is immaterial that the alternative factual scenario, the use of solid tires, would be an element of proof of a different statutory violation * * *." Id. at 167-168.

{¶ 29} Citing *Thompson*, Rochowiak contends the State failed to prove an essential element under R.C. 5577.04 because the record lacks evidence about the type of tires on his vehicle. We disagree. While no one explicitly stated that Rochowiak's vehicle had pneumatic tires, the trial court reasonably could have drawn such an inference from the testimony of Mularcik and Keaser. Under Ohio law, the weight of a vehicle and load with pneumatic tires cannot exceed 80,000 pounds. R.C. 5577.04(E). The weight of a vehicle and load with solid rubber tires cannot exceed eighty-percent of the permissible weight of a vehicle and load with pneumatic tires. R.C. 5577.041. Trooper Mularcik and inspector Keaser testified, without any objection, that the weight limit for Rochowiak's vehicle was 80,000 pounds. Given that only pneumatic-tired vehicles have an 80,000 pound weight limit, this was another way of saying, albeit indirectly, that Rochowiak's vehicle had pneumatic tires. As it is presumed to know the law, including the weight limits for the two types of tires, the trial court reasonably could have inferred from the testimony of Mularcik and Keaser that

Rochowiak's vehicle had pneumatic tires. Therefore, for the reasons set forth above, Rochowiak has failed to demonstrate that his conviction under R.C. 5577.04 is based on legally insufficient evidence or is against the weight of the evidence. His first assignment of error is overruled.

{¶ 30} Rochowiak's second assignment of error states:

{¶ 31} "The trial court committed prejudicial error finding the defendant guilty of a violation of ORC 4511.33 when the state had failed to present a prima facie case or in the alternative absent proof beyond a reasonable doubt. (The record demonstrates an absence of evidence to support the judgment.)"

{¶ 32} In other words, Rochowiak challenges the legal sufficiency and manifest weight of the evidence to support his conviction for violating R.C. 4511.33, which provides in part:

{¶ 33} "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

{¶ 34} "(1) A vehicle or trackless trolley shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶ 35} "* * *

{¶ 36} "(3) Official signs may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular

direction regardless of the center of the roadway, or restricting the use of a particular lane to only buses during certain hours or during all hours, and drivers of vehicles and trackless trolleys shall obey the directions of such signs."

{¶ 37} Rochowiak's entire argument regarding his conviction for violating R.C. 4511.33 is as follows:

{¶ 38} "The Defendant was observed in 'Concord Township Miami County, Ohio,' not a municipal corporation. The state offered no evidence of the number of lanes or that the lanes on Interstate 75 were 'clearly marked' or if it was or was not practicable for the Defendant to operate his vehicle within a single lane. Moreover the state offered no proof that the Defendant moved his vehicle from any single lane without ascertaining if he could do so in safety. (Apparently the movement was accomplished in safety, because there was no claim that it was not.) No proof was offered as to the placement of official signs restricting the use of any lane of travel.

{¶ 39} "The best that can be said for the state's proof on this issue is that the driving by the Defendant irritated the trooper which hardly rises to the level of proof of a criminal offense beyond a reasonable doubt."

{¶ 40} Upon review, we find no merit in the foregoing argument, which addresses the sufficiency and weight issues together. As an initial matter, we reject the State's argument that Rochowiak waived his challenge to the sufficiency of the evidence to support a conviction under R.C. 4511.33 by failing to raise the issue in his Crim.R. 29 motion below. As we noted above, a not-guilty plea adequately preserves a sufficiency-of-the-evidence argument for appeal and, in any event, a conviction based on legally insufficient evidence would constitute plain error. *Osterfeld*, supra.

Nevertheless, Rochowiak has failed to establish that his marked-lanes violation is based on legally insufficient evidence or is against the weight of the evidence.

{¶ 41} The State's failure to prove that Rochowiak's offense occurred within a municipal corporation is irrelevant. As the State points out, R.C. 4511.33 applies "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic, *or* wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction[.]" (Emphasis added). Trooper Mularcik stopped Rochowiak after observing his vehicle "cross outside of its lane" on Interstate 75. Mularcik testified that the stop was made for a "marked lanes violation." Therefore, the trial court reasonably could have inferred the existence of at least two clearly marked lanes on Interstate 75.

{¶ 42} As for Rochowiak's other arguments, the State had no burden to prove that it was practicable for him to drive entirely within a single lane or that he failed to ascertain the safety of leaving his lane before drifting. The Ohio Supreme Court recently addressed a similar argument in *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539. Although *Mays* involved the constitutionality of a traffic stop for violating R.C. 4511.33, we find its analysis to be instructive. In relevant part, the *Mays* court reasoned:

{¶ 43} "Appellant argues that his actions in this case—twice driving across the white edge line—are not enough to constitute a violation of R.C. 4511.33. He claims that 'R.C. 4511.33(A) does not prohibit leaving one's lane' and that 'absolute observance of the lane markings is not required.'

{¶ 44} "*Appellant's argument is not persuasive. R.C. 4511.33 requires a driver*

to drive a vehicle entirely within a single lane of traffic. When an officer observes a vehicle drifting back-and-forth across an edge line, the officer has a reasonable and articulable suspicion that the driver has violated R.C. 4511.33.

{¶ 45} "Appellant further argues that the stop was unjustified because there was no reason to suspect that he had failed to first ascertain that leaving the lane could be done safely or that he had not stayed within his lane 'as nearly as [was] practicable,' within the meaning of R.C. 4511.33(A)(1). R.C. 4511.33 does provide for certain circumstances in which a driver can cross a lane line without violating the statute. However, the question of whether appellant might have a *possible defense to a charge* of violating R.C. 4511.33 is irrelevant in our analysis of whether an officer has a reasonable and articulable suspicion to initiate a traffic stop. An officer is not required to determine whether *someone who has been observed committing a crime might have a legal defense* to the charge.

{¶ 46} "R.C. 4511.33(A)(1) provides that a driver must remain within the lane markings 'as nearly as is practicable' and that a driver shall not move from a lane 'until the driver has first ascertained that such movement can be made with safety.' The phrase 'as nearly as is practicable' does not give the driver the option to remain within the lane markings; rather, the phrase requires the driver to remain within the lane markings unless the driver cannot reasonably avoid straying.

{¶ 47} "* * *

{¶ 48} "* * * [W]hen an officer could reasonably conclude from a person's driving outside the marked lanes that the person is violating a traffic law, the officer is justified in stopping the vehicle.

{¶ 49} "* * *

{¶ 50} "In this case, the trooper observed the appellant twice cross the white edge line, and he was reasonable in concluding that the appellant's driving was in violation of R.C. 4511.33. Therefore, the trooper not only had a reasonable and articulable suspicion to stop appellant's vehicle, he also had probable cause." Id. at ¶15-18, 20, 24 (Emphasis added).

{¶ 51} *Mays* admittedly involved the existence of articulable suspicion and probable causeto justify a traffic stop for violating the marked-lanes statute, whereas the present appeal challenges the legal sufficiency and manifest weight of the evidence to sustain a conviction. The Ohio Supreme Court nevertheless made clear in *Mays* that "R.C. 4511.33 requires a driver to drive a vehicle entirely within a single lane of traffic." Id. at ¶16. Therefore, Rochowiak's failure to drive entirely within a single lane of traffic violated the statute unless it was impracticable for him to do so and he first ascertained that movement from his lane could be made safely. Id. at ¶18. Notably, the *Mays* court twice referred to this exception to the single-lane requirement as a potential "defense" to a charge of violating R.C. 4511.33. Id. at ¶17.

{¶ 52} We are inclined to agree that R.C. 4511.33 obligates a defendant to establish, as a defense to a charge, that it was impracticable to stay within his lane and that he ascertained his ability to move safely before straying. Indeed, it is unreasonable to expect an officer to anticipate and negate every exigent circumstance that might cause a driver to stray from his lane. It also is impossible for an officer to know whether a driver affirmatively ascertained his ability to move safely beforehand, as the statute requires, or whether the driver strayed without looking and simply got

lucky in not hitting another vehicle.

{¶ 53} Our conclusion that Rochowiak bore the burden of proof on the foregoing issues is consistent with R.C. 2901.05(D)(1), which defines an "affirmative defense" to include "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence." The statute further provides that "[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." R.C. 2901.05(A).

{¶ 54} In the present case, trooper Mularcik testified that he observed Rochowiak's truck "cross outside of its lane[.]" Absent evidence of any exigency that compelled Rochowiak to stray from his lane, Mularcik's testimony established a violation of the marked-lanes statute. In light of Mularcik's testimony, Rochowiak has failed to demonstrate that his conviction for violating R.C. 4511.33 is based on legally insufficient evidence or is against the manifest weight of the evidence.

{¶ 55} Finally, Rochowiak's argument about a lack of evidence concerning official signs restricting the use of any lane of travel is misplaced. His argument implicates R.C. 4511.33(A)(3), which provides that "[o]fficial signs may be erected directing specified traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway, or restricting the use of a particular lane to only buses during certain hours or during all hours, and drivers of vehicles and trackless trolleys shall obey the directions of such signs." This provision has no applicability in the present case because Rochowiak was not charged with failing to obey a sign. His second assignment of error is overruled.

{¶ 56} The judgment of the Miami County Municipal Court is affirmed.

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GRADY, J., and FROELICH, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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