[Cite as *State v. Beechler*, 2010-Ohio-1900.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-54
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CR-72
v.	:	
	:	(Criminal Appeal from
DANA BEECHLER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 30th day of April, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Dana Beechler appeals from his conviction and sentence for Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs, in violation of R.C. 4511.19(A)(2), having previously been convicted of a felony violation of R.C. 4511.19(A), with a specification under R.C. 2941.1413 that

Beechler had at least five prior convictions for OMVI within the past twenty years.

{¶ 2} Beechler contends that the trial court erred by overruling his motion to suppress evidence upon the ground that it was obtained as a result of an unlawful traffic stop; that the trial court erred by overruling his motion to suppress evidence upon the ground that it was obtained as a result of an unlawful arrest, without probable cause; that the trial court committed plain error in allowing the prosecutor, without objection, to comment concerning the facts that no one was hurt because Beechler was stopped before he had the opportunity to hurt anyone and that Beechler's not taking the breath test is evidence of his guilt; that the conviction is against the manifest weight of the evidence; and that the trial court abused its discretion by imposing maximum, five-year sentences for the offense and for the specification, which, by statute, must be served consecutively.

{¶ 3} We conclude that the police officer had probable cause to stop Beechler for a marked-lane violation. We conclude that Beechler's slurred speech, glassy eyes, admission that he had been drinking, the strong odor of an alcoholic beverage coming from inside the vehicle, and Beechler's performance on a horizontal gaze nystagmus test, a walk-and-turn test, and a one-legged stand test, gave the officer probable cause to arrest Beechler for an OMVI violation. We conclude that the prosecutor's remarks, during closing argument, that: "nobody was hurt * * * but that's just because we are lucky * * * the defendant was caught before he was able to hurt anyone," and "he's under the influence of alcohol. He refused the test that would have proven otherwise, which it wouldn't have in this case had he taken it. He knew that. That's why he didn't take the test," were not improper. We conclude

that Beechler's conviction for Operating a Motor Vehicle While Under the Influence is not against the manifest weight of the evidence. Finally, we conclude that the maximum sentences of five years for the offense and five years for an habitual offender specification, to be served consecutively, while harsh, do not constitute an abuse of discretion in this case, where Beechler had seven prior OMVI convictions since 1993, three of which were felony OMVIs, and the offense in this case was committed while Beechler was on community control for another OMVI.

{¶ 4} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} Beechler came to the attention of Sergeant Robert Tate, of the Springfield Police Division, at about 2:00 a.m. on January 20, 2009. Both Beechler and Tate were stopped at a red light. Tate had prior knowledge that Beechler's driver's license was under suspension. Tate was behind Beechler. When the light turned green, Beechler pulled into the intersection to the left of center. When Beechler's car reached the other side of the intersection, where the double yellow line resumed, at least half of Beechler's car was over the double yellow line.

{¶ 6} Beechler pulled back to the right of the double yellow line, positioning his car correctly in the lane. Beechler moved into a right-turn lane and began to turn right at an intersection, but did not signal his turn until after he began turning.

{¶ 7} At this point, Tate confirmed that Beechler's driver's license was suspended, and checked the license plates on the car Beechler was driving. Tate determined that the license plates were issued for a Cadillac, but Beechler was

driving an Oldsmobile. Tate initiated a traffic stop. There were two passengers in Beechler's car, one in the front passenger seat, and one in the back.

{¶ 8} Tate described what happened thereafter as follows:

{¶ 9} "Q. What did you observe about the defendant?

{¶ 10} "A. In speaking with the defendant I noted that he had displayed slurred speech, glassy eyes. As I stood outside the driver's door, through the open door I could easily detect the odor – actually a strong odor of an alcoholic beverage coming from inside the vehicle. The defendant admitted that he was suspended and that he had been drinking.

{¶ 11} "Q. Did you observe anything inside the vehicle?

{¶ 12} "A. I did observe a twelve pack or a cardboard container for Budweiser beer and several beer cans on the floor.

{¶ 13} " * * * *

{¶ 14} "Q. When he was asked out of the vehicle, did you observe anything about him?

{¶ 15} "A. He was not uncooperative but slightly agitated. We moved to the back of the cruiser – or the back of his vehicle and spoke a little bit and then he was placed in the cruiser.

{¶ 16} "Q. And why was he placed in the cruiser?

{¶ 17} "A. He was placed in the cruiser because he was placed under arrest for D.U.S. In speaking with him I informed him that I believed that he had been drinking and possibly had too much to drink. I gave him the option of – I requested field sobriety tests.

{¶ 18} "I gave him the option of performing them at that location or going downtown to get undercover and out of the elements and conduct them at a more friendly environment.

{¶ 19} " * * * *

{¶ 20} "Q. How did you specifically perform the field sobriety tests? Just take us through step-by-step what you did, please.

{¶ 21} "A. First, we did the HGN test and then the walk-and-turn and then the one-legged stand.

{¶ 22} "Q. The HGN, what did you do? What clues did you observe?

{¶ 23} "A. I observed six of the six possible clues on that test. All six.

{¶ 24} "[There then ensued an extended discussion of the DVD, or CD-ROM, made from the cruiser video camera, which showed the field sobriety tests, among other things, and which was ultimately admitted in evidence.]

{¶ 25} "Q. Sergeant, can you please describe in detail how you performed the horizontal gaze nystagmus test on the defendant on that evening?

{¶ 26} "[Tate then described in detail how he performed the HGN test.]

{¶ 27} "Q. Please tell us how you performed the walk-and-turn test on the defendant and what you observed from him.

{¶ 28} "[Tate then described in detail the instructions for the walk-and-turn test.]

{¶ 29} "Q. How did the defendant perform on that test and what did you observe during that test?

{¶ 30} "A. For the specific clues that were noted that night I would have to

see my form that I filled out – the impaired driver report.

{¶ 31} "Q. Let's move onto [sic] the one-legged-stand test for now. Can you please describe how you performed that test that night and what you observe from the defendant?

{¶ 32} "[Tate then described in detail his instructions for the one-legged-stand test.]

{¶ 33} "Q. Do you remember how the defendant performed that test and what you observed?

{¶ 34} "A. I do remember that I did see enough clues to indicate to me that he was impaired, but I don't remember specifically what clues were noted.

{¶ 35} "[The impaired driver report was identified and marked, and Tate reviewed it.]

{¶ 36} "Q. Having reviewed that impaired driver report, is your memory now refreshed as to what you observed?

{¶ 37} "A. Yes.

{¶ 38} "Q. Can you tell me what you observed from the defendant that evening?

{¶ 39} "A. On?

{¶ 40} "Q. On the walk-and-turn test.

{¶ 41} "A. He was unable to maintain the instructional position which is –

{¶ 42} "(And, thereupon, a DVD was played in open court in the presence of

the defendant.)[1]

{¶ 43} "Q. Again, can you please tell us what you observed from the defendant on the walk-and-turn test that evening?

{¶ 44} "A. He was unable to maintain the instructional position as I gave the instructions. He was unable to keep his left foot, heel-to-toe behind his right foot. When he was instructed to begin the test, he failed to count the steps out loud.

{¶ 45} "Going forward he crossed his left foot over his right foot on the third step, meaning he did not stop with his left foot directly in front of his right foot. Going forward he took ten steps forward instead of the instructed nine, which also means that when he stopped, his right foot was forward, which means that when he made his turn, he turned incorrectly because he turned to his left not to the forward foot side.

{¶ 46} "He did not pivot three steps. He spun. He then stopped and asked if he was supposed to go back. He was told he was supposed to return. Again, he took ten steps instead of nine and he stopped and spun.

{¶ 47} "(And, thereupon, a DVD was played in open court in the presence of the defendant.)

{¶ 48} "Q. Can you please tell us what you observed from the defendant on the one-legged-stand test?

{¶ 49} "A. The subject chose to raise his left foot. When he did so, he

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[1]It appears that an unsuccessful attempt had been made to play the DVD at an earlier point during the hearing, which perhaps explains the abrupt interruption of Tate's testimony to play the DVD after mechanical difficulties in the playing of the DVD had been overcome.

dropped it back to the ground before he was even able to complete the first count. He didn't count as instructed as one thousand one, one thousand two. He just counted one, two and so on.

{¶ 50} "At count three he raised his arms. He did not look at his foot or point his foot as instructed. He reached to count nineteen and dropped his foot. He then re-lifted his left foot and immediately dropped it before counting again. When he did begin counting again, he didn't start where he left off. He restarted at one. He raised his arms again and was finally told to stop by count ten.

{¶ 51} "Q. Based on your observations of the defendant and the standard field sobriety tests you performed, did you form an opinion as to whether the defendant was intoxicated that evening?

{¶ 52} "A. Yes. The excessive on the clues [sic] indicated to me that the subject was impaired or under the influence of alcohol and/or drugs.

{¶ 53} "Q. Was he placed under arrest at that time?

{¶ 54} "A. Yes."

{¶ 55} Beechler exercised his statutory right to decline to take the breath test.

{¶ 56} He was indicted on one count of OMVI in violation of R.C. 4511.19(A)(1)(a), having previously been convicted of a violation of division (A) of R.C. 4511.19, and one count of OMVI in violation of R.C. 4511.19(A)(2), having previously been convicted of a violation of division (A) of R.C. 4511.19. Each count included a specification that Beechler had, within twenty years of the offense, been previously convicted of five or more violations of R.C. 4511.19(A) or (B), or other equivalent offenses.

{¶ 57} Beechler moved to suppress the evidence, contending that it was the result of an unlawful search and seizure. Following a hearing, his motion to suppress was overruled.

{¶ 58} Beechler was tried to a jury, which found him guilty of both offenses and specifications. The convictions were merged, and the State elected to proceed on the second count of the indictment, which alleged a violation of R.C. 4511.19(A)(2).

{¶ 59} The conviction carried a possible sentence of one, two, three, four or five years. So did the specification. By statute, the two sentences must be served consecutively. R.C. 2929.13(G)(2). The trial court imposed the maximum, five-year sentence on the offense, and the maximum, five-year sentence on the specification, to be served consecutively. From his conviction and sentence, Beechler appeals.

II

{¶ 60} As a preliminary matter, the State cites *State v. Adams* (1980), 62 Ohio St.2d 151, 157, and *State v. Bowshier*, Clark App. No. 08-CA-57, 2009-Ohio-3429, ¶¶ 5-6, for the familiar maxim that "the term 'abuse of discretion' connotes more than an error of law or judgment." Although it does not affect the outcome of this appeal, we take issue with the proposition that a trial court may, without abusing its discretion, commit an error of law.

{¶ 61} We have traced this offensive formulation – that abuse of discretion means more than an error of law – as far back as *Steiner v. Custer* (1940), 137 Ohio St. 448, 450, which, in turn, cites Black's Law Dictionary (2 Ed.), 11 as authority. The definition of "abuse of discretion" in Black's Law Dictionary, Eighth Edition

(2004), at 11, offers no support for the offensive formulation:

{¶ 62} "1. An adjudicator's failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence."

{¶ 63} Interestingly, the definition of "abuse of discretion" in Black's Law Dictionary, Fourth Edition (1968), which was the edition of Black's Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

{¶ 64} " 'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion. * * * * . *It is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances*. * * * * . And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is that [sic] clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; *an error of law*. * * * * .

{¶ 65} "A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. * * * * . Unreasonable departure from considered precedents and settled judicial custom, *constituting error of law*. * * * * . The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court and is said by some authorities to imply not

merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. * * * * . Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. * * * * . Difference in judicial opinion is not synonymous with 'abuse of discretion' as respects setting aside verdict as against evidence. * * * * ." (Citations omitted; emphasis added.)

{¶ 66} We can only speculate that the origins of the offending formulation lay in an attempt to make the following point too succinctly:

{¶ 67} When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error.[2] By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.

{¶ 68} We know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But we are not aware of any Ohio appellate decisions in which it is declared, as part of the *holding,* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 69} The author of this opinion will admit that, on numerous occasions, he has been too lazy to delete a quotation or paraphrase of the offending formulation

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[2]Of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review.

from a staff attorney's draft. We are confident, however, that in none of those opinions is it part of the *holding* that a trial court may, in the exercise of its discretion, commit an error of law.

{¶ 70} No court – not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.[3]

III

{¶ 71} Beechler's First Assignment of Error is as follows:

{¶ 72} "THE TRIAL COURT ERRED IN FINDING THE OFFICER HAD PROBABLE CAUSE TO INITIATE A TRAFFIC STOP OF THE DEFENDANT."

{¶ 73} Tate testified that before he initiated a traffic stop of Beechler, he had observed a marked-lane violation, in that Beechler had driven his car more than a half its width left of the double yellow line, and also had determined that Beechler was driving under a suspension. The trial court evidently credited Tate's testimony, and there seems to be no good reason why it would not.

{¶ 74} A marked-lane violation is, by itself, justification to initiate a traffic stop, even without the added fact that an officer has confirmed that the driver is under a license suspension. *State v. Mays*, 119 Ohio St.3d 406, 2008 Ohio 4539; *State v. Nelson*, Montgomery App. No. 22718, 2009-Ohio-2546.

{¶ 75} Beechler's First Assignment of Error is overruled.

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[3]This does not, of course, obviate the existence of frequent and lively disagreements between courts and individual judges as to what the law is.

IV

{¶ 76} Beechler's Second Assignment of Error is as follows:

{¶ 77} "THE TRIAL COURT ERRED IN FINDING PROBABLE CAUSE TO ARREST THE APPELLANT."

{¶ 78} Beechler argues that Tate's observations, including Beechler's performance on the field sobriety tests, were insufficient to give Tate probable cause to arrest Beechler for OMVI. This argument does not affect Tate's probable cause to have arrested Beechler for Driving Under a Suspension, but by itself, this would not have justified Tate in requiring Beechler either to take the breath alcohol test, or to suffer the consequences of a refusal.

{¶ 79} In his argument, Beechler concentrates on the one-legged-stand test, contending that Tate was not in strict compliance with the National Highway Traffic Safety Administration manual because he, Tate, did not count out thirty seconds during the test.

{¶ 80} The cruiser video of this test being performed is in our record, and we have viewed it. We have used a stop watch to time the events during the one-legged test. Taking 0.0 seconds as the start of the test, when Beechler first raises his left leg, the significant events occur as follows:

{¶ 81} 1. Beechler lowers his leg to the ground (2.6 seconds).

{¶ 82} 2. Beechler raises his left leg again (4.3 seconds).

{¶ 83} 3. Tate tells Beechler to count and Beechler starts counting by integers, not by thousands, as originally instructed (6.8 seconds).

{¶ 84} 4. Beechler raises his hands from his sides, up into the air (8.9

seconds).

{¶ 85} 5. Beechler puts his leg down again (26.3 seconds).

{¶ 86} 6. Beechler raises his left leg again (34.8 seconds).

{¶ 87} 7. Beechler is told to stop (44.1 seconds).

{¶ 88} On cross-examination, Tate explained the significance of the thirty-second time-frame for the one-legged-stand test:

{¶ 89} "I know the requirements are that – where it states that even an impaired person can usually hold their foot up for twenty-five seconds but rarely beyond thirty."

{¶ 90} On direct examination, Tate described his observation of the one-legged-stand test as follows:

{¶ 91} "The subject chose to raise his left foot. When he did so, he dropped it back to the ground before he was even able to complete the first count. He didn't count as instructed as one thousand one, one thousand two. He just counted one, two and so on.

{¶ 92} "At count three he raised his arms. He did not look at his foot or point his foot as instructed. He reached to count nineteen and dropped his foot. He then re-lifted his left foot and immediately dropped it before counting again. When he did begin counting again, he didn't start where he left off. He restarted at one. He raised his arms again and was finally told to stop by count ten."

{¶ 93} With the exception of Beechler's final leg lift, and Tate's instruction to stop, all of these events during the one-legged-stand, which Tate presumably considered significant, occurred within the first thirty seconds of the test. Neither

Beechler's final leg lift, nor Tate's instruction to stop, can be considered evidence of failure on Beechler's part. Thus, all of the events evidencing Beechler's impairment occurred within the first thirty seconds of the test. Therefore, the fact that the test was allowed to continue more than thirty seconds after Beechler first lifted his leg is immaterial, and the test was performed in substantial compliance with the NHTSA manual.

{¶ 94} Beechler's only other complaints about the field sobriety tests go to Tate's credibility. But the trial court had an audiovisual record of the tests to corroborate Tate's credibility, and so do we. The trial court chose to credit Tate's testimony concerning the tests. We find no error in the trial court's decision to do so.

{¶ 95} The results of the field sobriety tests were corroborated by Beechler's slurred speech, glassy eyes and his admission that he had been drinking. Tate had probable cause to arrest Beechler for OMVI.

{¶ 96} Beechler's Second Assignment of Error is overruled.

V

{¶ 97} Beechler's Third Assignment of Error is as follows:

{¶ 98} "THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO INCLUDE TWO MISLEADING STATEMENTS IN CLOSING ARGUMENTS."

{¶ 99} Neither of the statements of which Beechler now complains was the subject of an objection in the trial court. Therefore, this assignment of error is governed by the plain-error standard of appellate review.

{¶ 100} During the voir dire of the jury, defense counsel brought out, in two colloquys, that Beechler had not been involved in an accident and no one was hurt:

{¶ 101} "What if I told you that there was no accident in this case? Nobody went to the hospital. Does that comfort you at all or give you more peace of mind about being able to be a juror in this case?

{¶ 102} " * * * *

{¶ 103} "[To a different prospective juror] Does it give you any comfort or peace of mind that there is no accident in this case? That no one went to the hospital?"

{¶ 104} In closing argument, the prosecutor alluded to this:

{¶ 105} "But there was a comment made when we were picking the jury about there not being an accident in this case. There was not an accident. The defendant does not seem to have been driving all that far. Nobody is really hurt. But that's just because we are lucky. The defendant was caught before he was able to hurt anyone. Keep that in mind. * * * * ."

{¶ 106} Beechler argues that in making this comment, the prosecutor was expressing his "personal belief that in the future, [Beechler] will drive and harm somebody," in an improper attempt to appeal to the emotions of the jurors. We do not read the prosecutor's comment as making a prediction, but as simply noting that Beechler, an impaired driver, was caught before an accident could occur. There was evidence that Beechler was impaired, and he had not yet, at the time of his apprehension, caused an accident. We see nothing improper in commenting on these facts, which find support in the evidence in the record. In general, a

prosecutor, in an attempt to avoid the possibility of jury nullification, may point out to a jury, in closing argument, that the offense with which the defendant is charged bears a serious risk of harm, and is therefore not trivial, even though that risk of harm did not materialize in the particular case.

{¶ 107} The second prosecutorial comment of which Beechler now complains was a comment on his refusal to take the test:

{¶ 108} "And very important in all of this is that the defendant refused that breath test. On the one hand, it's an element of one of the offenses you are required to find. And also it's evidence that he knows he was under the influence of alcohol that night. He had the opportunity to prove he was not under the influence of alcohol, and he did not take it. Instead, he refused that test.

{¶ 109} "If he wasn't drinking, he could have taken the test. He could have offered – He could have taken the breath test and proved that he was not under the influence of alcohol and he did not do that. * * * * .

{¶ 110} " * * * *

{¶ 111} "He's under the influence of alcohol. He refused the test that would have proven otherwise, which it wouldn't have in this case had he taken it. He knew that. That's why he didn't take the test."

{¶ 112} Beechler contends that the fact that he refused the test does not support a reasonable inference that he was under the influence of alcohol. The Supreme Court of Ohio has held otherwise:

{¶ 113} "Therefore, where a person has been arrested for driving while under the influence of alcohol and is requested by a police officer to submit to a chemical

test of his or her breath but he or she refuses to take the test, and the reason given for the refusal is conditional, unequivocal, or a combination thereof, we approve the following jury instruction as set forth in 4 Ohio Jury Instructions (1993) 405, Section 545.25(10): 'Evidence has been introduced indicating the defendant was asked but refused to submit to a chemical test of his [or her] breath to determine the amount of alcohol in his [or her] system, for the purpose of suggesting that the defendant believed he [or she] was under the influence of alcohol. If you find the defendant refused to submit to said test, you may, but are not required to, consider this evidence along with all the other facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol.' " *Maumee v. Anistik*, 69 Ohio St.3d 339, 344, 1994-Ohio-157. (Bracketed material in original.)

{¶ 114} Beechler's Third Assignment of Error is overruled.

VI

{¶ 115} "APPELLANT'S CONVICTION OF OPERATING A VEHICLE WHILE UNDER THE INFLUENCE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 116} Beechler cites *State v. Thompkins* (1997), 78 Ohio St.3d 380, for the proposition that when an appellate court undertakes a review of the evidence to determine whether a conviction is against the manifest weight of the evidence, the court must "determine whether 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."

{¶ 117} Beechler presented the testimony of his mother and his uncle. His mother testified that he had been at home since 7:00 p.m., about seven hours before he left home and was stopped, and that he had not been drinking during that time. His uncle, who was the front-seat passenger in the car, testified that he, Beechler's uncle, was the source of the Budweiser 12-can carton found in Beechler's car, and that he did not see Beechler drinking. Beechler's uncle had not been with Beechler for very long before the stop. He woke Beechler up to ask for a ride.

{¶ 118} Beechler's mother's testimony was reasonably exculpatory; his uncle could only deflect the adverse inference represented by the beer cans in Beechler's car. A reasonable jury could choose not to credit a mother's exculpatory testimony.

{¶ 119} Against this, the State had impressive evidence that Beechler was under the influence. The actual marked-lanes violation was not especially inculpatory, since a wide turn could happen to anyone, intoxicated or not, at an early morning hour of a bitterly cold night. But upon confronting Beechler, the officer saw glassy eyes, heard slurred speech, smelled a strong odor of an alcoholic beverage coming from the car, saw the beer cans, and heard Beechler's admission that he had been drinking. After Beechler got out of his car, the officer could tell that a "strong" odor of an alcoholic beverage "was coming directly from his breath."

{¶ 120} The jury also had the audiovisual recording from the cruiser, which showed Beechler in the back seat while he was transported to the police station, where he underwent field sobriety tests inside the garage, as well as the field sobriety tests, themselves. We have watched this recording. Beechler's demeanor in the back seat of the cruiser, while not especially damning, is at least consistent

with his having been under the influence of alcohol.

{¶ 121} The visual recording of the heel-to-toe walk and turn and the one-legged stand is evidence from which a reasonable jury could find that Beechler was under the influence, even without the officer's accompanying testimony. Although the horizontal gaze nystagmus test is also on the recording, there is no way that a person watching the recording could evaluate Beechler's performance; officer Tate is blocking the camera's view of Beechler's face. But Tate testified concerning the test, and the fact that Beechler evidenced six out of the possible six clues for being under the influence of alcohol.

{¶ 122} Finally, Beechler's refusal to take the breath test is evidence from which a reasonable jury could infer guilt.

{¶ 123} We conclude that this is not the exceptional case in which a jury has lost its way, and a manifest miscarriage of justice has occurred. Beechler's Fourth Assignment of Error is overruled.

VII

{¶ 124} Beechler's Fifth Assignment of Error is as follows:

{¶ 125} "THE TRIAL COURT ERRED IN IMPOSING MAXIMUM, CONSECUTIVE SENTENCES UPON APPELLANT."

{¶ 126} The trial court was required, by R.C. 2929.13(G)(2), to order that the sentences for the offense and for the specification be served consecutively. The trial court could have imposed a sentence of one, two, three, four, or five years for the offense. Similarly, the trial court could have imposed a sentence of one, two,

three, four, or five years for the specification. It chose to impose the maximum, five-year sentence for both the offense and for the specification.

{¶ 127} Beechler points out that the trial court did not, at the sentencing hearing, state that it had considered the purposes and principles of felony sentencing under the Ohio Revised Code. But, as the State points out, the trial court, which is rebuttably presumed to have followed the law, did state that it considered the statutory purposes and principles of Ohio felony sentencing in its judgment entry.

{¶ 128} At the sentencing hearing, the State gave its reasons for asking for a maximum sentence, and the trial court indicated its endorsement of that reasoning:

{¶ 129} "[By the State] This defendant had a lengthy criminal history beginning since he turned eighteen, convictions in '89, '91, '93, '94, '95, 2000, '03, '04, '06, '07, '08. I'm sorry. The one in '08 was dismissed; that was complicity to escape. He's done six months. One year, eighteen months. That's just his criminal history.

{¶ 130} "His driving record is extensive. Several OVIs. Since 1993 he's had seven OVIs, not counting the one he was convicted of on Wednesday. He has three prior felony OVIs. He's currently on community control.

{¶ 131} "In '05, felony OVIs in this Court. Defense counsel stated that Dana [Beechler] cares for himself and his family, but he obviously has no care or concern for this community and its safety as demonstrated by his behavior and continuing to drink and drive. He puts the entire community at risk. Also from his criminal history it's clear rehabilitation is not likely in this case.

{¶ 132} "The only way to protect the community, to promote respect for the law, to deter him from committing crimes for as long as possible, and to deter similar

people from committing similar crimes is for this Court to impose the maximum possible punishment in this case. Thank you, Your Honor.

{¶ 133} "THE COURT: I am looking at the presentence investigation report prepared by Ron Woolf of the adult probation department that was prepared in Case #05-CR-1041.

{¶ 134} "I believe that's the most recent presentence investigation report that has been prepared with respect to Mr. Beechler, and it does have prior convictions and the prior juvenile record. I am going to order that that report be made part of the record in this case.

{¶ 135} "Upon reviewing that report, the defendant's prior criminal record, the facts and circumstances of the case, the fact that the defendant does have six – well, seven prior DUI type offenses plus some other offenses that are DUI related, a hit and run in '93, and a physical control while intoxicated in '94, and now this most recent OVI offense that was committed while the defendant was on community control for OVI. Based on all of those factors I am going to impose the following sentence: I am going to impose a sentence of five years in the Ohio State Penitentiary, a $10,500 fine, a lifetime driver's license suspension and court costs.

{¶ 136} "For the specification I'm going to impose an additional five-year sentence in the Ohio State Penitentiary and by law that will run consecutively to the underlying five years for a total sentence of ten years in the Ohio State Penitentiary."

{¶ 137} When Beechler was in the police cruiser, on the way to the police station for field sobriety testing, he was asked if he had been drinking. He responded, "I drink every time I want to drink." With that attitude, we find it easy to

see why the trial court, in sentencing Beechler, a serial drunk driver with an extensive history of convictions, some of them felonies, decided to keep Beechler in the penitentiary and off the roads for the longest possible time. We find no abuse of discretion.

{¶ 138} Beechler's Fifth Assignment of Error is overruled.

VIII

{¶ 139} All of Beechler's assignments of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

DONOVAN, P.J., concurs.
GRADY, J., concurs in judgment only.

Copies mailed to:

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Hon. Douglas M. Rastatter