[Cite as *State v. Smith*, 2016-Ohio-5374.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA2
vs.	:	
DAVID K. SMITH,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy P. Gleeson, Gleeson Law Office, Logan, Ohio, for appellant

David K. Smith, Gallipolis, Ohio, Ohio, Pro Se[1]

Adam R. Salisbury, Gallipolis City Solicitor, Gallipolis, Ohio, for appellee

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CRIMINAL APPEAL FROM MUNICIPAL COURT
DATE JOURNALIZED: 8-2-16
ABELE, J.

{¶ 1} This is an appeal from a Gallipolis Municipal Court judgment of conviction and sentence. A jury found David K. Smith, defendant below and appellant herein, guilty of having physical control over a motor vehicle while intoxicated, in violation of Section 333.01D2 of the Codified Ordinances of the City of Gallipolis. Appellant's counsel states that he has reviewed the record and discerns no meritorious issue to pursue on appeal. Thus, pursuant to *Anders v.*

[1]On October 23, 2015, the Gallipolis Municipal Court Clerk received a six page "correspondence" from appellant. Although we treat this "correspondence" as appellant's pro se Anders brief, it does not set forth any assignments of error as App.R. 16(A)(3) requires.

California (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), counsel requests, and we hereby grant, leave to withdraw.

{¶ 2} Appellate counsel does, however, direct our attention to three potential assignments of error, although he did not believe that they formed the basis of "a meritorious appellate claim."

> FIRST POTENTIAL ASSIGNMENT OF ERROR:
>
> "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."
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> SECOND POTENTIAL ASSIGNMENT OF ERROR:
>
> "THE MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE SMITH WAS ARRESTED PRIOR TO THE DEVELOPMENT OF PROBABLE CAUSE."
>
> THIRD POTENTIAL ASSIGNMENT OF ERROR:
>
> "THE REQUESTED MISTRIAL SHOULD HAVE BEEN GRANTED BECAUSE THE JURY WAS IRREPARABLY TAINTED BY A POTENTIAL JUROR'S COMMENT DURING VOIRE DIRE."

{¶ 3} On May 31, 2014, between 4:30 and 5 PM, workers at "Zanzis" pizzeria contacted police to report someone that they thought to be under the influence of alcohol attempting "to get a pizza." Several officers arrived at the scene and made contact with appellant. After appellant failed to complete several field sobriety tests, the police arrested appellant and charged him with a violation of the aforementioned ordinance.

{¶ 4} At the jury trial, John Sipple, the manager of Zanzi's Pizza, testified that after appellant made obscene comments to several women at the establishment, he concluded that appellant was under the influence of alcohol and he called 911. Officers Adam Barrett, Casey

Clarey and Matt Champlin all testified that after they arrived at the scene, they found appellant with varying indicia of being under the influence of alcohol including an odor of alcohol, slurred speech and bloodshot eyes. Officer Barrett also testified that appellant had in his pick-up truck, within his reach, one half a bottle of "Southern Comfort" and "30 count natural light."

{¶ 5} Appellant gave a very different account of his encounter with police. Appellant testified that he was not driving his truck that day, but instead someone named Ronnie Lyde was driving and he was merely a passenger. Appellant also testified that he walked into Zanzi's to pick-up a pizza and he walked to his truck when officers approached. As for Sipple's testimony and the three police officers who contradicted appellant, appellant characterized their testimony as a criminal conspiracy or collaboration.

{¶ 6} After hearing the evidence, the jury found appellant guilty of the charge. The trial court ordered appellant, inter alia, to serve two days in jail (with credit for two days served) as well as other sanctions. This appeal followed.

I

{¶ 7} Appellate counsel's first potential assignment of error is that his client's conviction is against the manifest weight of the evidence. In particular, counsel cites his client's testimony that he was neither driving the vehicle, nor had physical control of the vehicle, when police approached.

{¶ 8} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence and all reasonable inferences, and consider the witness credibility. State v. Dean, 2015-Ohio-4347, ¶151, citing Thompkins, 78 Ohio St.3d at 387. A reviewing court must bear in

mind, however, that credibility generally is an issue for the trier of fact to resolve. State v. Issa, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); State v. Murphy, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" Barberton v. Jenney, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶20, quoting State v. Konya, 2nd Dist. Montgomery No. 21434, 2006–Ohio–6312, ¶6, quoting State v. Lawson, 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the court explained in Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Id. at ¶21, quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact-finder, as long as a rational basis exists in the record for its decision. State v. Picklesimer, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶24; accord State v. Howard, 4th Dist. Ross No. 07CA2948, 2007–Ohio–6331, ¶6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 9} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in

evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" Thompkins, 78 Ohio St.3d at 387, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). If the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. E.g., State v. Eley, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, superseded by state constitutional amendment on other grounds in State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). Accord Eastley at ¶12, quoting Thompkins, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th ed.1990) (explaining that a judgment is not against the manifest weight of the evidence when "'"the greater amount of credible evidence"'" supports it). Furthermore, "'"[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony."'" State v. Cooper, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶17, quoting State v. Mason, 9th Dist. No. 21397, 2003-Ohio-5785, 2003 WL 22439816, ¶17, quoting State v. Gilliam, 9th Dist. No. 97CA006757, 1998 WL 487085 (Aug. 12, 1998). Moreover, a conviction is not against the manifest weight of the evidence even if the "evidence is subject to different interpretations." State v. Adams, 2d Dist. Greene Nos. 2013CA61, 2013-CA-62, 2014-Ohio-3432, 2014WL3887215, ¶24. Instead, a reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the conviction.'" Thompkins, 78 Ohio St.3d at 387, quoting Martin, 20 Ohio App.3d at 175. Accord State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 10} Appellant's argument is apparently contingent on whether the jury believed his account of the encounter, or whether the jury opted to believe the accounts of Sipple and Officers Barrett, Clarey and Champlin. Generally, the weight of evidence and credibility of witnesses are issues that the trier of fact must decide. See *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998); *State v. Ballew*, 76 Ohio St.3d 244, 249, 667 N.E.2d 369 (1996). The jury, sitting as the trier of fact, is in the best position to view each witness and to observe their demeanor, gestures and voice inflection, and to use those observations to weigh witness credibility. See *Myers v. Garson*, 66 Ohio St.3d 610, 615, 614 N.E.2d 742 (1993); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). Thus, the jury, as trier of fact, may choose to believe all, part or none of the testimony of each witness. *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 80 (4th Dist.1993); *State v. Caldwell*, 79 Ohio App.3d 667, 679, 607 N.E.2d 1096 (4th Dist. 1992).

{¶ 11} Obviously, in the case sub judice the trier of fact found the accounts of Sipple and the three officers more credible than appellant's account. Moreover, our review of the evidence reveals ample competent, credible evidence to support the jury's verdict with respect to each element of the offense.

{¶ 12} Accordingly, we hereby overrule the first potential assignment of error.

II

{¶ 13} Appellant's second potential assignment of error asserts that the trial court erred by overruling his motion to suppress evidence. Again, we find no merit to this contention.

{¶ 14} The uncontroverted testimony is that Officers Clary and Champlin found appellant intoxicated at the time he tried to get a pizza from Zanzi's Pizza. Officer Clary

testified that appellant demonstrated slowed, slurred speech, and an odor of alcohol. Clary further testified that appellant failed the "walk and turn" test as well as the "horizontal gaze nystagmus test." Clary reiterated that he asked appellant to take a urine test, but appellant refused. Also, Officer Matt Champlin's testimony corroborated Officer Clary's. No testimony was offered to rebut the officers' accounts.

{¶ 15} Generally, appellate review of a trial court decision on a motion to suppress involves mixed questions of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (1998); *State v. Norman*, Ross App. Nos. 08CA3059 and 08CA3066, 2009-Ohio-5458, 2009 WL 3261258, at ¶24. In hearing and deciding such motions, trial courts assume the role of the trier of fact and are in the best position to resolve factual disputes and to evaluate witnesses credibility. *In re A.J.S.*, 120 Ohio St.3d 185, 2008-Ohio-5307, 897 N.E.2d 629, at ¶50; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶8. Appellate courts will accept a trial court's factual findings if supported by competent and credible evidence. See *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, at ¶100; also see *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist. 1996). However, appellate courts review de novo a trial court's application of law to those facts. See *State v. Williams*, 86 Ohio App.3d 37, 41, 619 N.E.2d 1141 (4th Dist.1993); *State v. Angelo*, Summit App. No. 24751, 2009-Ohio-6966, (9th Dist.2009), at ¶7.

{¶ 16} In its October 21, 2014 entry that overruled the motion to suppress, the trial court relied primarily on Officer Clary's testimony that he smelled alcohol, and found alcohol in appellant's vehicle, and performed sobriety tests poorly, to conclude that the officer had reasonable suspicion to believe that appellant was under the influence of alcohol. We find

nothing in the record to support a reversal of the trial court's conclusion that the officers' testimony was credible.

{¶ 17} Again, because the trial court judge viewed the witness and observed their gestures, manner and voice inflection, we decline to second-guess the trial court on issues of credibility.

{¶ 18} Therefore, we hereby overrule appellant's second potential assignment of error.

III

{¶ 19} Appellant's third potential assignment of error appears to be directed toward a comment made by a member of the jury pool during voir dire:

> "I do know [appellant] has a drinking problem from where I've encountered with working at the church at Grace United Methodist Church and I know he has a problem with that, but I will to listen to the evidence and be fair with that."

{¶ 20} This member of the jury pool was not seated as a juror, but appellant nevertheless moved for a mistrial. The trial court denied his motion and he argues that this constitutes error.

{¶ 21} The decision to grant a mistrial lies in the trial court's discretion and should not be reversed absent an abuse of that discretion. See *State v. Ahmed*, 103 Ohio St.3d 27, 813 N.E.2d 637, 2004-Ohio-4190,at ¶92; *State v. Brown*, 100 Ohio St.3d 51, 796 N.E.2d 506, 2003-Ohio-5059, at ¶42. An abuse of discretion implies that the court's attitude was unreasonable, arbitrary or unconscionable. See *State v. Clark*, 71 Ohio St.3d 466, 470, 644 N.E.2d 331 (1994); *State v. Moreland*, 50 Ohio St.3d 58, 61, 552 N.E.2d 894 (1990); *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. See *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254

(1995).

{¶ 22} Here, the trial court individually questioned each juror as to whether that comment influenced them. All replied in the negative, and several appeared to agree with the premise that this comment concerning appellant was inappropriate.

{¶ 23} Additionally, appellant requested curative instructions and, before the jury received the case, the trial court instructed them that "if you heard any comments of one of the jurors who was subsequently excused today that you are to disregard those comments and not to consider that juror's comments for any reason." Juries are presumed to follow curative instructions. See *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, at ¶30; *State v. Trainer*, 4th Dist. Pickaway No. 14CA21, 2015-Ohio-2548 at ¶17. These curative instructions would be sufficient to reject this potential assignment of error. However, the trial court's meticulous questioning of each individual juror as to whether the comment may have prejudiced them certainly supports the conclusion that no error occurred denying the motion for mistrial. In fact, the trial court judge's actions in this matter provide an example of the manner in which this type of problem should be handled.

{¶ 24} Thus, we hereby overrule appellant's third proposed assignment of error.

IV

{¶ 25} We now turn to appellant's pro se brief. Generally, courts afford pro se litigants considerable leeway. See *Besser v. Griffey*, 88 Ohio App.3d 379, 382, 623 N.E.2d 1326 (4th Dist.1993); *State ex rel. Karmasu v. Tate*, 83 Ohio App.3d 199, 206, 614 N.E.2d 827 (4th Dist.1992). Limits do exist, however. Leniency does not mean that we are required "to find substance where none exists, to advance an argument for a pro se litigant or to address issues not

properly raised." *State v. Headlee*, 4th Dist. Washington No. 08CA6, 2009-Ohio-873, at ¶6; *State v. Nayar*, 4th Dist. Lawrence No. 07CA6, 2007-Ohio- 6092, at ¶28. Nevertheless, to the best of our ability we will attempt to make sense of appellant's pro se brief.

{¶ 26} The first page of appellant's letter to the clerk sets out a number of alleged errors. The second and third pages appears to argue evidence that the jury should have found more persuasive.

{¶ 27} For example, appellant argues that was walking to his truck with a pizza when he encountered the police. However, the jury found the State's witnesses credible and we will not second-guess their determination.

{¶ 28} This is also true with respect to appellant's assertions that he has never been "convicted of any crime involving injury to a fellow human being" and that he is "a 32 degree Mason, [a] Shriner, a former Boy Scout Leader, and Junior Warden of the Church." Although appellant fails to cite to us that this information was elicited during the trial court proceedings, this information involves the issue of credibility. The jury, once again, found the State's witnesses more credible and we will not reverse that finding.

{¶ 29} Appellant also claims that a police officer punched him unconscious. However, even if true, that issue would go to a civil rights claim rather than this criminal charge. Being "punched" does not negate the fact that the jury found appellant guilty of the offense.

{¶ 30} Appellant further claims at several points in his pro se brief that he did not receive effective assistance from trial counsel. Criminal defendants have a right under the United States Constitution to the effective assistance from counsel. *McCann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *State v. Lytle*, 4th Dist. Ross App. No. 96CA2182 (Mar.

10, 1997). To establish constitutionally ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); also see *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). Both prongs of the *Strickland* test need not be analyzed, however, if the ineffective assistance claim can be resolved under one prong. See *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). Also, to establish the latter element, i.e. the existence of prejudice, a defendant must show that a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus (1998).

{¶ 31} It is not entirely clear why appellant believes that he suffered from ineffective assistance of counsel. Even if we assume, arguendo, that appellant did point to specific examples of deficient performance, he has not shown how that performance prejudiced him. John Sipple's uncontroverted testimony, as well as the testimony of Officers Barrett, Clary and Champlin, is that appellant was in the driver's seat of his vehicle and under the influence of alcohol. Nothing in appellant's letter shows that, but for whatever arguable errors counsel may have committed, the result of the proceedings would have been otherwise. We thus find no merit to the issues appellant raises in his pro se brief as well as the arguments advanced in appellant's "pro se brief" to the best of our ability to understand them, we agree with counsel that there are no meritorious issues for us to review on appeal.

{¶ 32} Accordingly, based upon the foregoing reasons, we hereby affirm the trial court's

judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee to recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallipolis Municipal Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.