[Cite as *State v. Rayner*, 2016-Ohio-3161.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2015CA00105
	:	
ALYSSA J. RAYNER	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Canton Municipal Court, Case No. 2014 TRD 07017
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	May 9, 2016

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOSEPH MARTUCCIO CANTON LAW DIRECTOR CHRISTY M. DONNELLY 218 Cleveland Ave. SW P.O. Box 24218 Canton, OH 44701-4218	JOHN VARIOLA 306 Market Ave. North, #1024 Canton, OH 44702

Delaney, J.

{¶1} Appellant Alyssa J. Rayner appeals from the January 23, 2015, February 25, 2015, and April 30, 2015 Judgment Entries of the Canton Municipal Court convicting her upon one count of failure to yield while turning left. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

The Crash: Testimony of the Participants

{¶2} Around 3:56 p.m. on September 14, 2014, Linda Twyman drove her Ford Explorer eastbound on West Main Street in Louisville, Ohio. Twyman's husband Jerry was in the front passenger seat.

{¶3} West Main Street is a three-lane road; one lane is eastbound, one is westbound, and the center lane is a common turn lane.

{¶4} Jerry Twyman briefly noticed a red car in the turn lane ahead of them starting its turn into their path and thought, "I hope that car's going to stop." The car turned into the path of the Twymans' Explorer and a collision occurred. Both vehicles were heavily damaged.

{¶5} Jerry and Linda Twyman testified she was driving at or slightly above the speed limit of 35 M.P.H.; she drove entirely within her lane of travel; and she had no time to brake or take other evasive action to avoid the crash.

{¶6} The red car was a Chevy Cobalt operated by appellant; her passenger was her boyfriend, Randy Royer. Appellant and Royer testified they intended to make a left turn into a shopping-plaza parking lot to turn around. Both testified appellant stopped long enough for several cars to pass before starting to turn left. Appellant testified she first noticed the Twymans' Explorer at the crest of a small hill, then said she only saw it

when Royer called out to her as she was about to turn left. She thinks she slammed on her brakes but is not sure.

The Speed of the Vehicles: Testimony of the Expert

{¶7} A crash reconstructionist testified on appellant's behalf; he acknowledged he was asked to perform an "issue-specific" reconstruction focused on the speed of the two vehicles. He used the crash report, police photos, vehicle dimensions, and visits to the crash scene to arrive at his opinion that the Twymans' Explorer was traveling 46 to 54 M.P.H. He acknowledged there is "not enough data" about the crash to determine an exact speed and that his calculations are accurate only if the numbers input into his formula are correct.

An Unbiased Eyewitness: Testimony of Gladys Hamilton

{¶8} Immediately prior to the crash, Gladys Hamilton was driving westbound behind appellant's red Cobalt; her destination was a pizza shop in the same plaza appellant intended to turn into. Hamilton observed appellant enter the center turn lane and Hamilton pulled into the turn lane behind her. To Hamilton's horror, she observed that appellant "didn't even come to a complete stop, she just kept going" despite the blue Explorer traveling eastbound into her path. Hamilton testified she screamed and stopped immediately.

{¶9} Hamilton reiterated that appellant slowed slightly as she turned but did not stop, and as soon as she crossed the lane line she collided with the Explorer. In Hamilton's estimation, the driver of the Explorer had no time to react.

Investigator's Conclusion: Appellant at Fault

{¶10} Ptl. Brenda Jordan of the Louisville Police Department investigated the crash and took witness statements. Jordan testified that based upon the evidence at the scene and the witness statements, the impact occurred in the eastbound lane, and appellant caused the crash by failing to yield to Twyman upon turning left. Jordan noted that as she was gathering evidence, appellant's parents appeared on the scene and suggested Twyman was speeding, but they were not present during the crash and Jordan found no evidence during her investigation to corroborate the theory that Twyman was speeding.

{¶11} Appellant was charged by Uniform Traffic Ticket (U.T.T.) with one count of failure to yield the right of way, a minor misdemeanor, pursuant to Louisville City Ordinance 331.18. The U.T.T. was later amended to reflect a violation of Louisville City Ordinance 331.17, "right of way while turning left." Appellant entered a written plea of not guilty and the matter was scheduled for bench trial before a magistrate.

{¶12} The matter proceeded to bench trial and appellant was found guilty as charged on January 23, 2015. The magistrate imposed a fine of $30 plus court costs.

{¶13} Appellant requested findings of fact and conclusions of law and objected to the report of the magistrate on February 4, 2015. Appellant argued the magistrate failed to consider her argument that the other driver gave up the right of way due to excessive speed "as shown by [appellant's] expert."

{¶14} Both parties filed proposed findings of fact and conclusions of law; the magistrate adopted those of appellee in the Report of the Magistrate dated February 25, 2015.

{¶15} Appellant filed a "Brief" on April 6, 2015. On April 30, 2015, the trial court overruled appellant's objections and approved and adopted the findings of the magistrate.

{¶16} Appellant now appeals from the trial court's Judgment Entry of April 30, 2015.

{¶17} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶18} "I. THE COURT BELOW ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT IN FAILING TO CONSIDER WHETHER THE OTHER PARTY INVOLVED IN THE ACCIDENT HAD GIVEN UP HER RIGHT OF WAY BY FAILING TO PROCEED IN A LAWFUL MANNER BY PROCEEDING AT AN EXCESSIVE SPEED. IF THE OTHER PARTY IN THE ACCIDENT GAVE UP THE RIGHT OF WAY, DEFENDANT/APPELLANT COULD NOT THEREFORE VIOLATE HER RIGHT OF WAY."

ANALYSIS

{¶19} In her sole assignment of error, appellant argues the trial court should not have found her guilty of failure to yield upon a left turn because the driver of the Ford Explorer was not operating her vehicle in a lawful manner. We disagree.

{¶20} Appellant was found guilty upon one count of "right of way while turning left" pursuant to Louisville City Ordinance 331.17(a), which states: **"**The operator of a vehicle intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right of way to any vehicle approaching from the opposite direction, whenever the approaching vehicle is within the intersection or so close to the intersection, alley, private road or driveway as to constitute an immediate hazard." This section is

similar to R.C. 4511.42. Louisville City Ordinance 301.32(a) defines "right of way" as "[t]he right of a vehicle or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle or pedestrian approaching from a different direction into its or the individual's path."

{¶21} The pertinent law regarding the right-of-way is described in *In re Neill*, 3rd Dist. Logan No. 8-04-08, 160 Ohio App.3d 439, 2005-Ohio-1696, 827 N.E.2d 811:

> Accordingly, a driver with the right of way has an absolute right to proceed uninterruptedly in a lawful manner, and other drivers must yield to him. [*State v. Bush*, 2d Dist. No. 17671, 1999 WL 960582 (July 30, 1999), citing *Vavrina v. Greczanik*, 40 Ohio App.2d 129, 135, 69 O.O.2d 146, 318 N.E.2d 408 (1974).] Conversely, the driver with the right of way forfeits this preferential status over other drivers if he or she fails to proceed in a lawful manner. Id. However, because the law presumes that a vehicle that ostensibly has the right of way is proceeding lawfully, the state is not required to prove lawful operation as an element of proving a violation of 4511.44(A), failure to yield. [*State v. Harris*, 12th Dist. No. CA91–06–012, 1991 WL 278245 (Dec. 30, 1991). Rather, a defendant who asserts that an opposing driver's right of way has been forfeited "is required to present evidence rebutting the presumption of lawful operation." Id. "A driver proceeds in a lawful manner by complying with Ohio traffic laws." *Bush,* supra, citing *Vavrina,* supra, 40 Ohio App.2d at 136, 69 O.O.2d 146, 318 N.E.2d 408.

* * * *.

> [If the trial court was] presented with evidence tending to rebut the presumption that [the other driver] was proceeding in a lawful manner, the trial court herein was obligated to resolve the issue whether [the other driver] forfeited his right of way. *Harris,* supra; see, also, *State v. Neff* (1975), 41 Ohio St.2d 17, 18, 70 O.O.2d 82, 322 N.E.2d 274; *Upper Arlington v. Streets* (Dec. 20, 1994), 10th Dist. No. 94APC04–534, 1994 WL 714609.
>
> *In re Neill*, 3rd Dist. Logan No. 8-04-08, 160 Ohio App.3d 439, 2005-Ohio-1696, 827 N.E.2d 811, ¶¶ 10-12.

{¶22} Appellant argues the magistrate and trial court should have given more weight to the opinion of the expert crash reconstructionist. A trier of fact is not required to accept an expert's opinion even if it is uncontroverted. *State v. Houser*, 4th Dist. Pike No. 92CA500, 1994 WL 64307, *4 (Feb. 17, 1994), citing *State v. Caldwell*, 79 Ohio App.3d 667, 680, 607 N.E.2d 1096 (4th Dist.1992).

{¶23} The instant case differs from *Neill*, supra, because here, the magistrate did not find the evidence tended to rebut the presumption that Linda Twyman was proceeding in a lawful manner. Contrary to appellant’s assertions, the expert’s testimony was not uncontroverted. The magistrate found the testimony of eyewitness Gladys Hamilton to be more compelling.

{¶24} Appellant argues Twyman did not have the right-of-way because she was not proceeding lawfully: she was allegedly speeding. The magistrate considered this issue, however, but found appellant had the duty to yield because Twyman was close

enough to constitute an immediate hazard and had the right-of-way. (T. III, 194). And despite the testimony of the crash reconstructionist, the testimony of eyewitness Gladys Hamilton was simply more credible:

> * * * *.
>
> But the second part that really gets ya * * * but that eyewitness, and I listened to her and she's behind you and she says * * * she sees it all unfolding before her eyes, and she sees you going right in front of that car and she wants to stop you and she wants to yell * * * but she can't and she sees it happen. Even though the expert's the expert, he wasn't there. And this person was. And she wasn't—she was very credible. She was. And based on her testimony, and the passengers, where she said she was going right around the speed limit, I'm not trying to discredit the expert in any way, but he wasn't there and the eyewitness was and if you didn't have an eyewitness, I'd be finding you not guilty, but you do, and I don't know how to discredit her because she was not discredited.
>
> * * * *.
>
> T. III, 195.

{¶25} We have reviewed the record of the trial and cannot find the decision of the court below is against the manifest weight or credibility of the evidence. The weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79. In this

case, the trier of fact found the straightforward account of the eyewitness to be the most credible.

{¶26} Appellant's sole assignment of error is overruled.

CONCLUSION

{¶27} The appellant's sole assignment of error is overruled and the judgment of the Canton Municipal Court is affirmed.

By: Delaney, J. and

Gwin, P.J.

Wise, J., concur.