[Cite as *State v. Barnhart*, 2011-Ohio-2693.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio	Court of Appeals No. H-10-005
Appellee	Trial Court No. 09TRC09051A 09TRC09051B 09TRC09051C 09TRC09051D
v.	
Skip Barnhart	**DECISION AND JUDGMENT**
Appellant	Decided: June 3, 2011

* * * * *

T. Douglas Clifford, Assistant Law Director, for appellee.

Geoffrey A. Kudlo, for appellant.

* * * * *

YARBROUGH, J.

{¶1} Defendant-appellant, Skip Barnhart ("Barnhart"), appeals his judgment of conviction entered by the Norwalk Municipal Court on several charges arising from his operation of a motorcycle while under the influence of alcohol. As gleaned from the suppression hearing and trial testimony, and the various documents in the record, the pertinent facts are as follows.

{¶2} On November 28, 2009, a motorcycle crash occurred on Zenobia Road near the intersection of Derussey Road and Fitchville River Road in Huron County, Ohio. The crash was reported to the Ohio State Highway Patrol at 6:33 p.m. Trooper Wlodarsky was sent to investigate and arrived at the crash site at 6:49 p.m. Once there, though it was dark, he discovered a 38-foot "skid mark" beginning just west of the railroad tracks that crossed Zenobia Road. Farther down from that, he saw a "big long scrape" apparently created where the motorcycle slid on its side after impact. There was shattered glass on the road, along with splotches of oil and smeared blood. He saw "blue and black" plastic debris across the road and along the berm, but found no motorcycle. The only person present when Wlodarsky arrived was Robert Cordle, who reported the crash, but did not observe it. Cordle also did not know who the driver was. He told Wlodarsky that two men had just loaded a damaged motorcycle into a black pick-up truck and driven away. He gave Wlodarsky the truck's license number from which the Trooper identified the truck's owner and learned his home address.

{¶3} Wlodarsky then went to the owner's home, about a mile away. There he found the two men, who initially denied having any motorcycle. Wlodarsky described them as evasive and "hostile." Then they admitted having it, but stated "some guy who was bleeding" told them to "take care of his motorcycle." After further discussion, the men, who were later identified as Barnhart's grandfather and cousin, led the Trooper into a garage where he found a severely damaged Suzuki motorcycle, blue in color. This

model had a rear passenger seat. There were pieces missing from the right side and the Trooper saw "deer hair" impacted on the fender. The windshield, headlight and mirror were shattered. It had dirt and road debris on it and was leaking oil. All the damage appeared fresh and Wlodarsky photographed its condition. Barnhart was not present, but he did reside there.

{¶4} At some point, Wlodarsky left the home and returned to the accident scene. He took measurements and more photographs, made field sketches and assembled his report. Earlier the trooper had arranged for the local emergency medical facility to contact him if anyone with injuries from a traffic accident was admitted for treatment. While completing his report at the accident site, Wlodarsky was notified that medical personnel at the Fisher-Titus Medical Center in Norwalk were treating a man for injuries sustained in an apparent vehicular collision. According to his accident report, as well as his trial and suppression hearing testimony, Wlodarsky cleared the accident scene at "8:08 p.m." He then proceeded to the Medical Center, arriving there, he testified, at "8:03 p.m." When questioned at trial, the Trooper conceded this discrepancy, indicating that the distance to the Medical Center ordinarily would take "16 minutes" to drive.

{¶5} Once there, Wlodarsky found Barnhart in a room being treated by three nurses. His injuries included a head laceration with copious bleeding, a broken clavicle, several fractured ribs, a broken wrist, and multiple cuts and contusions. Wlodarsky got close enough to Barnhart to smell an odor of alcohol. Barnhart appeared "awake," "alert"

and "responsive" to questions, but his eyes were glassy and bloodshot, and his speech slurred. Wlodarsky questioned him directly about the crash, but Barnhart responded that he "wasn't on a bike," that "he didn't know what happened [and] that he wasn't driving" the motorcycle. Barnhart denied knowing who the driver was, but admitted to having "a few drinks."[1]

{¶6} From a review of the witnesses' testimony, it appears that before Cordle's arrival, Barnhart had been taken by his cousin from the crash site to his sister-in-law's house. This occurred about 6:15 p.m. After "five minutes" there, she drove him to the Medical Center, while the cousin and grandfather returned for the motorcycle. The treating nurses indicated that Barnhart arrived between 6:30p.m. and 6:45 p.m. One of the nurses who first saw Barnhart testified that his breath smelled of alcohol. Barnhart told her that he had "wrecked his motorcycle" and "hit a deer." She testified that he appeared "under the influence of alcohol." Barnhart's sister-in-law identified the "bluish" motorcycle as the one he "rides around all the time," while Barnhart's brother acknowledged, "it's his bike." It was not disputed that the motorcycle was located at Barnhart's home, nor that its damaged condition was consistent with having struck an animal, nor that the damaged parts matched exactly the debris found at the accident site. At Barnhart's trial, Cordle testified that he later found a dead deer 30 yards away in a ditch opposite from where the motorcycle had been laying.

[1]Trooper Wlodarsky did not read the *Miranda* Warnings to Barnhart.

{¶7} From Trooper Wlodarsky's investigation of the accident scene, the physical evidence of the damaged motorcycle, the location where he found it, and the various statements he obtained from the nurses, Barnhart's family and Barnhart himself, Wlodarsky concluded that Barnhart had been driving the motorcycle while alcohol-impaired when he collided with the deer. Then at 8:31p.m., Wlodarsky read Barnhart the so-called implied consent refusal warning contained on Bureau of Motor Vehicles ("BMV") Form 2255. He then asked Barnhart to consent to the taking of a blood test in order to ascertain the amount of alcohol in his system. He refused, stating he was not the driver.

{¶8} Barnhart was afterward charged with operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a); refusal of a chemical test for alcohol with prior conviction (his third offense within six years), in violation of R.C. 4511.19 (A)(2); driving while under a license suspension in violation of R.C. 4510.16(A); and operating a motorcycle without a valid endorsement in violation of R.C. 4510.12 (A)(2). Following a two-day jury trial, Barnhart was convicted on all charges. The trial court thereafter sentenced him to a term of imprisonment, suspended his license, and established conditions of probation after release. This appeal followed. For the following reasons, we affirm.

{¶9} Barnhart assigns four errors for our review, the first of which states:

{¶10} "The trial court erred in failing to suppress the evidence of appellant's alleged refusal as the BMV-2255 form was not read within two hours of the incident and appellant was not knowingly, intelligently and voluntarily able to refuse a blood test."

{¶11} On appeal, suppression rulings present mixed questions of law and fact. *State v. Burnside*, 100 Ohio St. 3d.152, 2003-Ohio-5372, ¶ 8. An appellate court independently reviews a challenged suppression ruling to determine whether, given the established facts, the ruling meets the appropriate legal standard. No deference is afforded the trial court's conclusions of law. Id. See, also, *State v. Curry* (1994), 95 Ohio App. 3d 93, 96.

{¶12} In pursuing this assignment, Barnhart makes two arguments for error in the trial court's denial of his motion to suppression. First, he contends that evidence of his refusal should have been excluded because Form 2255 was not provably read to him within two hours of the actual time of the crash. Second, he maintains that unless the prosecution can demonstrate that he was capable of a "knowing, intelligent and voluntary" refusal of the requested blood test, the trial court was obligated to suppress the fact that he refused. Barnhart bases this second argument on the nature and extent of his injuries and his alleged "admission" to consuming alcohol *after* the crash. Neither argument finds support in the law.

{¶13} Barnhart cites R.C. 4511.192(A), which states in relevant part:

{¶14} "Except as provided in division (A)(5) of section 4511.191 of the Revised Code, the arresting law enforcement officer shall give advice in accordance with this section to any person under arrest for a violation of division (A) or (B) of section 4511.19 of the Revised Code, * * *. The officer shall give that advice in a written form that contains the information described in division (B) of this section and shall read the advice to the person. The form shall contain a statement that the form was shown to the person under arrest and read to the person by the arresting officer. One or more persons shall witness the arresting officer's reading of the form, and the witnesses shall certify to this fact by signing the form. *The person must submit to the chemical test or tests, subsequent to the request of the arresting officer, within two hours of the time of the alleged violation* and, if the person does not submit to the test or tests within that two-hour time limit, the failure to submit automatically constitutes a refusal to submit to the test or tests." (Emphasis added.)

{¶15} As is apparent from Trooper Wlodarsky's testimony, he believed the accident happened at or near 6:33 p.m., which is the time Cordle called 911. But the Trooper also conceded that since no one saw the crash occur, it could have happened earlier. Barnhart argues that R.C. 4511.192(A) requires suppression of a suspect's *refusal* where it is not shown that BMV Form 2255 was read to him within "two hours of the alleged violation" - here, within two hours of the time Barnhart crashed his motorcycle. However, that assertion misreads what the statute says. The plain language of the

statute's two-hour limit refers to the suspect's submission to a "*chemical test*," not to the officer's reading of the Form. While the result of an untimely chemical test might be suppressible, the fact that the suspect refused is not. We note that Barnhart offers us no authority for his interpretation.

{¶16} The Seventh Appellate District rejected this same argument in *State v. Marsh*, 7th Dist. No. 04-BE-18, 2005-Ohio-4690, stating:

{¶17} "Applying [*Maumee v. Anistik*, 69 Ohio St.3d 339, 343, 1994-Ohio-157], *we find it wholly irrelevant when the officers asked Marsh to submit to the tests*. If the refusal is relevant in that it serves as indicia of guilt, then it wouldn't matter if Marsh refused *before or after* the statutory two hour period. If Marsh would have agreed to take the breath test after the two hour limit, then he would have a viable argument that the results of that test should be suppressed. *Because he refused to take the breath test, there is no bad evidence to suppress*." Id. at ¶ 46. (Emphasis added).

{¶18} The Seventh District's conclusion in *Marsh* follows from *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, in which the Supreme Court rejected a similar argument, holding, in pertinent part:

{¶19} "We hold that a person arrested for operating a vehicle under the influence of alcohol who refuses to submit to a chemical test, *even though the test is requested more than two hours after the alleged violation,* is subject to the implied consent law if the police officer making the request has 'reasonable grounds to believe the person to

have been operating a vehicle upon the public highways in this state while under the influence of alcohol.' ([construing] Former R.C. 4511.191[A].)" (Emphasis added.)

{¶20} Here, Trooper Wlodarsky unquestionably had reasonable grounds for believing that Barnhart had operated and crashed the motorcycle on a public highway while under the influence of alcohol, regardless of *when* the crash actually occurred. That was all that was necessary under R.C. 4511.192 for the Trooper to ask him to submit to a blood test at the Medical Center. See, also, *State v. Brabant*, 12th Dist. No. CA-2010-04-031, 2011-Ohio-161, ¶ 15-18.

{¶21} Barnhart next contends that he was "too intoxicated" and "too injured" to "knowingly, intelligently and voluntarily" refuse the blood test and therefore suppression was warranted.[2] We reject these contentions as well.

{¶22} First, Barnhart provided us with no statutory authority or case precedent that mandates the "knowing, intelligent and voluntary" standard as a precondition to a valid refusal. Plainly R.C. 4511.192 contains no such language. We decline to read into the statute a heightened standard where none exists. The "refusal" of a chemical test, within the meaning of R.C. 4511.192(A), is determined by all the surrounding facts and circumstances, including the suspect's statements and conduct at the time. This

[2]The "too intoxicated" claim stems from the trial testimony of Barnhart's brother that *after* the crash, Barnhart drank up to "six shots" of Jack Daniel's whiskey while at his sister-in-law's home, purportedly to dull the pain from his injuries. Barnhart argues that this post-crash consumption accounted for his intoxicated appearance soon after at the Medical Center.

assessment is referred to as a "preponderance" or "totality of the circumstances" test. See, e.g., *Andrews v. Turner*, (1977), 52 Ohio St. 2d 31. Moreover, as to the "too intoxicated to refuse" argument, and Barnhart's related plea that the statute requires a more stringent standard, we observe that the Ohio Supreme Court long ago rejected both, stating:

{¶23} "We cannot subscribe to the defense of 'too drunk to understand' as a means of nullifying the effect of the implied-consent statute *without additional legislative requirements* that the refusal be intelligently, knowingly and intentionally made." *Hoban v. Rice* (1971), 25 Ohio St.2d 111, 118. (Emphasis added.)

{¶24} Following *Hoban*, R.C. 4511.192(A) was never amended to include such a heighten requirement in order for the refusal of a chemical test to be valid. Addressing Barnhart's other claim - that he was "too injured to refuse" - no one disputes that he was seriously hurt and receiving medical treatment when Wlodarsky read him the implied consent warning. Despite his injuries, however, the observational evidence from the Medical Center nurses shows that Barnhart was awake, alert and speaking coherently to the Trooper. In *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130, the Eleventh District declined to accept a similar "too injured" argument in the context of incriminating statements made to police during a vehicular homicide investigation. The court stated:

{¶25} "The mere fact that an individual is questioned in a hospital setting and may be in pain when questioned, is insufficient, without evidence of police coercion, to render an otherwise voluntary statement involuntary. * * * Moreover, intoxication, even if proven, is an insufficient basis to exclude a voluntary statement absent coercive police activity." Id. at ¶ 107. (citations omitted.)

{¶26} The same reasoning applies here. Barnhart's immediate refusal of the blood test, despite the medical circumstances, was adamant and unambiguous. It was clear from his language that he understood what he was doing, refusing explicitly because "he wasn't driving" the motorcycle. Thus, the trial correctly denied his motion to exclude the evidence of his refusal.

{¶27} Accordingly, the first assignment of error is not well-taken.

{¶28} We will address the next three assignments out of order. The third assignment of error states:

{¶29} "Appellant's right against self-incrimination was violated by the prosecutor's statements in closing argument concerning appellant's failure to testify, in violation of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

{¶30} Barnhart did not testify at trial. He did, however, call several witnesses in his defense. Two of them testified that shortly before the crash they saw Barnhart riding *as the passenger* behind a driver whose face they could not see because he was wearing a

helmet. This testimony was presumably offered to the jury to cast doubt on the prosecutor's circumstantial evidence of "operation," as no one saw the crash and Barnhart had been taken from the scene before Cordle arrived. Barnhart contends that during summation the prosecutor asked the jury "to draw an adverse inference from [his] refusal to testify." (Appellant's Brief, p. 16).

{¶31} A review of the pertinent portion of the trial transcript, however, reveals that is not what happened. In his closing argument, the prosecutor directly challenged the credibility of the defense claim, put before the jury through Barnhart's witnesses, that the real driver was someone else. The prosecutor referred to this person as the "mystery driver" who no one could identify but who, if he ever existed, surely would have been found about as seriously injured as Barnhart. The prosecutor then stated:

{¶32} "I understand at the hospital, you know, [Barnhart is] maybe a little discombobulated, he's under the influence too, * * * he doesn't want to get his friend in trouble. But once he realizes the significance of the situation he's in, why doesn't he take the responsibility and say, 'You know what, this is what really happened, here is who you need to go and arrest.' Never happened."

{¶33} Defense counsel did not object to these statements.[3] The failure to do so renders this assignment cognizable only if plain error occurred. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 15. The plain error doctrine restricts us in three ways:

[3]See, in particular, *State v. Day* (1991), 72 Ohio App. 3d 82, 89 (failure to object to use of post-arrest silence waives any error).

{¶34} "First, there must be an error, *i.e.,* a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' * * * Courts are to notice plain error 'only to prevent a manifest miscarriage of justice.'" *Payne* at ¶ 16. (Internal citations omitted.)

{¶35} Here, however, Barnhart does not argue for plain error. Instead he asserts that the prosecutor's remarks were "prosecutorial misconduct," "prejudicial" and a "direct use of [his] silence" at trial. A review of the context within which the challenged statements were made indicates they were not error. Rather, they fell within the reasonable latitude that is generally allowed the State in closing argument to comment on the testimonial evidence. *State v. Lott* (1990), 51 Ohio St. 3d 160, 165. Thus, even assuming Barnhart had argued for plain error, this assignment cannot overcome the first restriction of the analysis required by *Payne,* supra.

{¶36} Accordingly, the third assignment of error is not well-taken.

{¶37} Barnhart's fourth assignment of error states:

{¶38} "Appellant was denied effective assistance of counsel as is guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution."

{¶39} Barnhart argues that the ineffectiveness of his trial counsel consisted in "fail[ing] to thoroughly question Trooper Wlodarsky as to the inconsistent times listed in his investigator notes and in his report." Yet the trial transcript shows that not only were the time discrepancies in the reports acknowledged by Wlodarsky during cross-examination, but even after the court sustained an objection by the prosecutor, Barnhart's counsel then asked the Trooper no less than eight additional questions about the inconsistent times he recorded. Counsel also highlighted certain differences between the Trooper's crash and investigative reports not covered during direct examination.

{¶40} A claim of ineffective assistance of counsel is evaluated under the deficiency standard set forth in the syllabus of *State v. Bradley* (1989), 42 Ohio St.3d 136:

{¶41} "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)

{¶42} "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶43} In Ohio, a licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 62. Given this presumption, challenges to the adequacy of counsel's questioning of an adverse witness bear a heavy burden. This is because skill in the "art" of cross-examination is a confluence of preparation, experience, professional judgment and trial tactics. *State v. Were,* 118 Ohio St. 3d 448, 2008-Ohio-2762, ¶ 216-221; *State v. Foust,* 105 Ohio St. 3d 137, 2004-Ohio-7006, ¶ 86-90.

{¶44} As an initial matter, defense counsel is not obligated to cross-examine every witness the prosecution calls. *State v. Otte* (1996), 74 Ohio St. 3d 555, 565. Whether to do so or not "is firmly committed to trial counsel's judgment." Id. If counsel undertakes cross-examination at all, he is required to do it only with reasonable competence. The scope and nuances of how a particular witness is questioned fall within the ambit of trial strategy, and even debatable tactical decisions do not demonstrate ineffectiveness. *State v. Reeves,* 10th Dist. 05-AP-158, 2005-Ohio-5838, ¶ 26.

{¶45} Obviously, where all or most of the State's case turns on the testimony of a primary witness - here, Trooper Wlodarsky – one would expect a very through cross-examination. But even the most detailed and aggressive questioning will not always discredit a witness's testimony. Barnhart's argument here equates thoroughness with success. Having reviewed that portion of the Trooper's cross-examination about which he complains, we are unable to conclude that counsel's performance was deficient or that it prejudiced Barnhart. *Bradley,* supra. Whether asking more questions about the time

discrepancies in the reports would have been productive is speculative, and more than speculation is required to demonstrate ineffectiveness. *Were* at ¶ 219.

{¶46} Accordingly, the fourth assignment of error is not well-taken.

{¶47} Barnhart's second assignment of error states:

{¶48} "The evidence against appellant was insufficient to sustain a jury verdict of guilty on the charges against appellant and appellant's convictions are against the manifest weight of the evidence."

{¶49} In this assignment Barnhart combines both manifest weight and sufficiency challenges to his DUI conviction. While both challenges concern the essential elements of "operation" and "under the influence," each invokes a distinct conceptual and evidentiary doctrine, and therefore a bifurcated analysis is required. *State v. Wilson*, 113 Ohio St. 3d 382, 2007 Ohio-2202, ¶ 25; *State v. Thompkins*, (1997), 78 Ohio St. 3d 380, 386-387.

{¶50} A sufficiency review entails an elements-based analysis of the evidence. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *Thompkins* at 386. An appellate court must determine whether the State presented evidence on *each element of the crime* to allow the case to go to the jury. Id. No assessment of weight - persuasive force - is involved. In contrast, "manifest weight" contests the *believability* of the evidence before the jury. Id. at 387; *State v. Schlee* (Dec. 23, 1994), 11th Dist., No. 93-L-082.

{¶51} Taking his sufficiency challenge first, Barnhart argues there was no evidence presented to the jury that he was under the influence when the crash occurred. This quillet, however, belies the testimony from the nurses and Trooper Wlodarsky about Barnhart's manifestations of insobriety at the Medical Center. He then suggests the jury disregarded his brother's testimony that he drank "six shots" of whiskey in the space of five minutes before being taken there and that this accounted for his appearance. But this point merely confuses the issue of weight - *whose evidence to believe* - with its sufficiency. The sufficiency issue here is not whether the prosecution's witnesses should be believed, but whether, *if believed*, does their testimony suffice to prove that element? *Thompkins* at 390; see, also, *State v. Lampkin*, 6th Dist. No. L-09-1270, 2010-Ohio-4934, ¶ 79-81. Plainly, if the Trooper and the nurses are believed, Barnhart was "under the influence."

{¶52} Barnhart next maintains that because no one saw the crash, and because two defense witnesses testified he was the passenger seated behind someone else driving the motorcycle, the prosecution failed to prove the necessary element of "operation." His injuries alone, he argues, prove only that he was *on* the bike, not that he was driving it. While perhaps intuitively true in isolation, this ignores the other, mostly circumstantial evidence that was offered to establish this element. For sufficiency purposes, circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*

(1991) 61 Ohio St. 3d 259, 272 (superseded by statute and constitutional amendment on other grounds.)

{¶53} On arriving at the Medical Center, Barnhart told the nurses that "he wrecked his motorcycle" and "hit a deer." These statements aside, the nurses also testified that no one else was admitted that night with injuries consistent with a traffic accident. From the absence of a second crash victim, the jury could reasonably infer that only Barnhart could have been the driver. The jury also heard Trooper Wlodarsky testify that when first shown the damaged motorcycle in the garage, Barnhart's cousin told him that "some guy" asked them "to take care of his bike." The reference was made was in the singular. Contributing to this "lone occupant" theory was Cordle's account of his brief conversation with Barnhart's grandfather and cousin when they arrived at the crash site to retrieve the motorcycle. Cordle had been looking around for the driver, but the men indicated "they had picked *him* up and took *him* to the hospital. He had a few scratches on him, bruises." Though circumstantial, these discreet items of proof, together with the inferences they generate, were sufficient for the jury to conclude that Barnhart was the driver of the motorcycle.

{¶54} In a criminal manifest-weight challenge, the reviewing court must "examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and 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.'" *State v. Leonard*, 104 Ohio St. 3d 54, 2004-Ohio-6235, at ¶ 81. (Internal citations omitted.) Reversing a jury's verdict and ordering a new trial is warranted "only in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶55} "Weight is not a question of mathematics, but depends on its *effect in inducing belief*." *Thompkins* at 387 (emphasis sic). Because the jury had the opportunity to see and hear the witnesses, observe their demeanor and assess their candor (or lack of it), we are required to extend "special deference" to their determinations of credibility. *Thompkins* at 390 (Cook, J. concurring).[4] The jury is free to accept or reject evidence, to note ambiguities and inconsistencies in testimony - whether between witnesses or in the conflicting statements of a single witness - and to resolve or discount them accordingly. They may accept as true some, all or none of what a witness tells them. *State v. Gray*, 5th Dist. No. 07-CA-64, 2008-Ohio-6345, ¶ 45.

{¶56} Upon review of the record and the trial transcript, we cannot say that the jury "clearly lost its way" in finding Barnhart guilt of operating a motor vehicle while under the influence of alcohol and the related charges. Nor are we persuaded that "the evidence weighs heavily against the conviction." *Thompkins*.

{¶57} Accordingly, the second assignment of error is not well-taken.

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[4]This deference originates from the unanimity restriction on appellate courts contained in Section 3(B)3 of Article IV of the Ohio Constitution. That section limits our power to reverse a jury verdict on manifest weight grounds and "preserve[s] the jury's role with respect to issues surrounding the credibility of witnesses." *Thompkins* at 389.

{¶58} On consideration whereof, the judgment of the Norwalk Municipal Court is hereby affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App. R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE