[Cite as *State v. DeWulf*, 2013-Ohio-2802.]

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

State of Ohio — Court of Appeals No. F-12-010

Appellee — Trial Court No. 11CR76

v.

Gregory C. DeWulf — **DECISION AND JUDGMENT**

Appellant — Decided: June 28, 2013

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, and
Paul H. Kennedy, Assistant Prosecuting Attorney, for appellee.

Paul H. Duggan, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for aggravated vehicular assault and failing to stop after an accident, entered on a jury verdict in the Fulton County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} Shortly before midnight on June 24, 2011, Ashley Buehrer was northbound on State Route 108 near an entrance to the Ohio Turnpike in Fulton County. Buehrer remembers passing a Honda dealership on her right and that is the last thing she remembers.

{¶ 3} Shortly thereafter, authorities responded to a report of a two vehicle collision on State Route 108 near the entrance to the Buckeye Estates mobile home park. When sheriff's deputies and Ohio Highway Patrol Troopers arrived, emergency responders were already prying Buehrer from the wreckage of her car, which had come to rest in the middle of the highway. At the side of the road was a Ford pick-up truck with extensive front end damage; the driver's door was open, but no driver was found.

{¶ 4} As Buehrer was being flown to a Toledo hospital, deputies checked the registration of the pick-up and discovered that it was registered to appellant, Gregory C. DeWulf. His address was in the Buckeye Estates mobile home park.

{¶ 5} When a deputy went to the address listed, he found appellant's mother. She told the deputy that appellant had come home a short time earlier and told her that he had been in an accident on the highway. Appellant's mother advised him to return to the scene and went to get dressed. When she returned, she told the deputy, appellant had gone.

{¶ 6} Despite efforts by deputies and troopers to find appellant, he did not reappear until late the next morning. Another deputy was again interviewing appellant's

mother about his whereabouts when appellant approached them. Appellant told the deputy that he had spent the night in a nearby cornfield.

{¶ 7} Appellant complained of injuries to his hand and leg. The deputy transported him to a local medical center for treatment. The deputy later testified that, when appellant was in his cruiser, the deputy noted a strong odor of an alcoholic beverage. Appellant gave a statement to authorities, admitting that he had consumed some alcohol the night before, but only "two beers." A trooper performed a horizontal gaze nystagmus test on appellant while appellant was being treated. The trooper later testified that during the test, given nearly 12 hours after the collision, appellant exhibited four of six indicators.

{¶ 8} Appellant was charged with aggravated vehicular assault and failing to stop after an accident. When the matter proceeded to trial, an Ohio Highway Patrol accident investigator testified that, from viewing the gouge marks in the highway, he could ascertain that the collision occurred in the northbound lane of traffic. Skid marks suggested that when appellant's truck swerved into her lane, Buehrer attempted to steer right to avoid the collision, but was unsuccessful. The evidence also indicated that, after the crash, appellant backed his truck away from the collision, before fleeing the scene.

{¶ 9} One trooper and one sheriff's deputy testified to detecting a strong odor of an alcoholic beverage on appellant nearly 12 hours after the crash. The trooper who administered the gaze nystagmus test on appellant testified that a score of four of six

indicators suggests a high probability that the test subject is under the influence of alcohol.

{¶ 10} The state also called the clerk of an all-night gas station appellant frequented. The clerk testified to seeing appellant in her store moments before the crash. According to the clerk, although she could smell no alcohol on appellant, he was behaving unusually. He placed his elbows on the counter to support himself. His speech was not slurred, but he seemed to omit words as he spoke. He also asked to buy lottery tickets which were not sold in the store on third shift; a fact, according to the clerk, that appellant knew from earlier conversations. When informed that he could not buy a lottery ticket, he became upset and stumbled, grabbing the counter for support. The clerk believed he was intoxicated.

{¶ 11} After deliberation, the jury found appellant guilty on both counts of the indictment. The trial court accepted the verdict and, following a presentence investigation, sentenced appellant to a 12-month term of imprisonment for aggravated vehicular assault and a consecutive seven-month term for failure to stop after an accident. The court also ordered appellant to pay restitution to Ashley Buehrer in the amount of $134,980.48. From this judgment, appellant now appeals. Appellant sets forth the following five assignments of error:

> I. The trial court erred in ordering the Defendant/Appellant to pay restitution in the amount of $134,980.48 to Ashley Buehrer, the alleged victim, without making sufficient findings of fact.

II. The trial court erred in allowing Trooper Scott Gonzales to testify as to the causation of the accident because he is not an accident reconstructionist.

III. The trial court erred in allowing the testimony of Trooper Coll regarding conclusions as to the horizontal gaze nystagmus (HGN) test and for failing to require the State of Ohio to establish a proper foundation for admissibility of the HGN test.

IV. The trial court erred in allowing the testimony of witness Heather Dietrich as to her opinion that Defendant/Appellant was drunk without the establishment of a foundation as to her qualifications to provide an opinion.

V. The ineffective assistance of trial counsel violated Defendant/ Appellant's right to assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, for trial counsel's failure to ask for the results of the blood test of Ashley Buehrer, the alleged victim, nor to offer the results into evidence; for failing to object to the testimony of witness, Heather Dietrich, regarding her opinion that the Defendant, Gregory C. DeWulf, was drunk; for failing to object to the testimony of Trooper Coll regarding the results and his conclusions from the HGN test; for failing to file a motion to suppress the HGN results and holding a hearing; for not objecting to the restitution

ordered without sufficient findings of fact; and for not objecting to the testimony of Trooper Gonzales as to the cause of the accident.

{¶ 12} Purported errors that are not brought to the attention of the court at a time when such error could have been avoided or rectified by the trial court are waived absent plain error. *State v. Hill*, 92 Ohio St.3d 191, 196, 749 N.E.2d 274 (2001). To constitute plain error, there must be an obvious defect in the trial proceedings that affects a defendant's substantial rights. Crim.R. 52(B), *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16. In order to affect a substantial right, the error must have affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

I. Restitution

{¶ 13} In his first assignment of error, appellant suggests that the trial court committed plain error when it imposed restitution when the amount is not "supported by competent, credible evidence." At sentencing, appellant complains, the court did nothing more than ask the prosecution for a figure which the court then entered as a restitution amount without requiring any substantiation of the amount.

{¶ 14} R.C. 2929.18 provides that a court imposing sentence on an offender convicted of a felony may impose financial sanctions, including restitution to the victim of the offender's crime. For a restitution order to be lawful, however, the amount of restitution must be supported by competent credible evidence from which the court can discern the proper amount of restitution to a reasonable degree of certainty. *State v.*

Gears, 135 Ohio App.3d 297, 300, 733 N.E.2d 683 (6th Dist.1999). When the award is not supported by such evidence, it is a judicial abuse of discretion, altering the outcome of the proceeding, thus constituting plain error. *State v. Marbury*, 104 Ohio App.3d 179, 181, 661 N.E.2d 271 (8th Dist.1995); *State v. Alcala*, 6th Dist. No. S-11-026, 2012-Ohio-4318, ¶ 30.

{¶ 15} The method of determining the proper amount of restitution to the victim is stated within the statute:

> If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, *the court may base the amount of restitution it orders on an amount recommended by the victim*, the offender, *a presentence investigation report*, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. (Emphasis added.) R.C. 2929.18(A)(1).

{¶ 16} In this matter, the presentence investigation report lists the restitution amount as $134,980.48 based on a completed restitution form submitted by the victim. This was the amount of restitution the court ordered. At neither the sentencing hearing,

nor after did appellant dispute this figure. Since the court relied on a statutorily approved means of determining restitution and appellant's failure to dispute the amount prompted no further proceedings, we can only conclude that the court's restitution determination was properly supported. Accordingly, appellant's first assignment of error is not well-taken.

II. Expert Qualifications

{¶ 17} In his second assignment of error, appellant argues that the trial court erred in allowing a highway patrol trooper trained in technical crash investigation to testify to the ultimate causation of the collision. Relying on *State v. DeWalt*, 7th Dist. No. 08 CA 852, 2009-Ohio-5283, appellant maintains that an opinion as to the ultimate cause of a crash is within the exclusive province of an accident reconstruction expert, which the trooper testifying in this case expressly denied that he was.

{¶ 18} The testimony at issue is that of Ohio Highway Patrol Trooper Scott Gonzales. Gonzales testified that he had received a three week basic crash investigation course at the patrol academy, participated in three months training in the field with a "coach," then returned to the academy for an additional two-week course in technical crash investigation. Gonzales testified gouge marks in the pavement indicated that the point of initial impact between the vehicles occurred in the northbound lane of State Route 108. According to Gonzales, the depth, length and direction of the gouges revealed that Ashley Buehrer's car was traveling northeast at the time of impact, likely swerving toward the side of the road in an attempt to avoid the accident. The trooper

testified that the debris field and skid marks could be traced from the point of impact directly to where Buehrer's car came to rest. Gonzales supported his testimony with pictures taken at the scene. When asked at the end of his testimony how confident he was of his conclusions, Trooper Gonzales testified, "I'm a hundred percent positive." Appellant maintains this testimony constitutes reversible error.

{¶ 19} There are two *DeWalt* cases. Each recites the familiar standard of review. The admission of expert testimony is within the broad discretion of the court and will not be disturbed absent an abuse of that discretion. An "abuse of discretion" is more than an error of law or judgment, but indicates that the court's attitude is arbitrary, unreasonable or unconscionable. *State v. DeWalt*, 7th Dist. No. 06 CA 835, 2007-Ohio-5248, ¶ 7 ("*DeWalt I*"); *State v. DeWalt*, 7th Dist. No. 08 CA 852, 2009-Ohio-5283, ¶ 15 ("*DeWalt II*"), each citing *State v. Jones*, 90 Ohio St.3d 403, 414, 739 N.E.2d 300 (2000), and *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 20} *DeWalt* involved a head-on collision between two pick-up trucks at the crest of a hill in Carroll County. DeWalt was cited for a left of center violation and the matter was tried to the bench. The trial court, relying on the testimony of a state trooper as to the location of the vehicles at the time of the collision, found DeWalt guilty. On appeal, the court of appeals reversed, concluding that the trooper should have not been permitted to provide expert testimony because he had only two weeks of training in accident investigation, was not trained as an accident reconstructionist and had never previously testified as an accident reconstruction expert. Moreover, although the trooper

testified he had been trained in interpreting tire skid marks, there were no skid marks in the case. *Dewalt I* at ¶ 35.

{¶ 21} In *DeWalt II*, after retrial on remand, the appeals court affirmed DeWalt's conviction. This time, the prosecution called a different expert who had more training in accident reconstruction and had previously testified as an expert in accident reconstruction. The second witness survived "[a]n extensive voir dire" which yielded nothing that would disqualify him as an expert. As a result, the admission of his testimony as an expert was not an abuse of discretion. *DeWalt II* at ¶ 24.

{¶ 22} On the record we have, it would appear that the testimony of Trooper Gonzales in this matter is more akin to *Dewalt II* than *DeWalt I*. Trooper Gonzales appears to have more training and experience that the witness in *DeWalt I*. The investigation involved no advanced technical calculations or complicated formulae as did the *DeWalt* case. Indeed, a review of Gonzales' testimony shows that he clearly explained the evidence, principles and the reasoning employed to reach his conclusions. In that regard, we conclude that the present matter is distinguishable from *DeWalt I*.

{¶ 23} Moreover, appellant did not object to Trooper Gonzales' testimony. Based on the record, we cannot say that there was any obvious defect in the trial that affected appellant's substantial rights. Accordingly, appellant's second assignment of error is not well-taken.

III. Horizontal Gaze Nystagmus

{¶ 24} Appellant, in his third assignment of error, maintains that the trial court erred when it permitted testimony concerning the results of a horizontal gaze nystagmus test without, appellant asserts, proper foundation.

{¶ 25} During trial, appellant objected when the trooper who met with him at the health center began to testify as to the results of the horizontal gaze nystagmus test he administered on appellant. The trial court sustained appellant's objection that the state needed to establish foundation for this testimony.

{¶ 26} The state then elicited detailed testimony from the trooper who explained the precautions he took to make certain appellant's eyes tracked equally to minimize conditions that might interfere with valid test results. The trooper then testified to the manner in which the test is performed and how it is scored. When the state asked the trooper the indicators that applied to appellant, appellant again objected, asserting that the state had failed to establish substantial compliance with standard testing protocols. This time the court overruled the objection, stating "It sounds to me like he's explained the procedures at least as I'm aware of them."

{¶ 27} Field sobriety test results are admissible at trial if the state properly demonstrates that the tests were conducted in substantial compliance with the National Highway Traffic Safety Administration standards. R.C. 4511.19(D)(4)(b). There is no requirement that the standards manual or testimony concerning the standards be introduced if the record shows, even inferentially, that the court took judicial notice of the

standards. *State v. Reed*, 2d Dist. No. 23357, 2010-Ohio-299, ¶ 53. Evidence that the standards were adhered to, if unchallenged, form sufficient foundation for admission. It is only when a defendant challenges the evidence with specificity that the state need present evidence of specific compliance. *Id.* at ¶ 54.

{¶ 28} In this matter, the court inferentially took notice of the standards and concluded that the state had satisfied the foundational requirements necessary to admit the results. Appellant never raised any specific deficiency in compliance with the standards at trial. Consequently, the court acted within its discretion in admitting the testimony at issue. Appellant's third assignment of error is not well-taken.

IV. Lay Testimony of Intoxication

{¶ 29} In his fourth assignment of error, appellant insists that the trial court erred in permitting admission of the testimony of the gas station clerk that she thought appellant was intoxicated.

{¶ 30} Virtually any lay witness may testify as to whether an individual appears intoxicated. *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446, ¶ 12, citing *Columbus v. Mullins*, 162 Ohio St. 419, 421, 123 N.E.2d 422 (1954). In this matter, the gas station clerk not only offered her opinion that appellant appeared intoxicated, she explained in detail the behavior that appellant exhibited that led her to this conclusion. Even had appellant objected to this testimony, the trial court would have been well within its discretion in admitting it. Appellant's fourth assignment of error is not well-taken.

V. Ineffective Assistance of Counsel

{¶ 31} In his remaining assignment of error, appellant asserts that he was denied effective assistance of counsel because trial counsel failed to request the results of the victim's blood alcohol test, did not object to the testimony of the gas station clerk, failed to challenge testimony about, or move to suppress, the failed horizontal gaze nystagmus test and not objecting to the amount of restitution nor the testimony of the crash investigator.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. * * * Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Accord State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985).

{¶ 32} Scrutiny of counsel's performance must be deferential. *Strickland* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving

ineffectiveness is the defendant's. *Smith, supra*. Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland* at 687. "Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel." *State v. Stevenson,* 5th Dist. No. 2005-CA-00011, 2005-Ohio-5216, ¶ 43. "Prejudice" exists only when the lawyer's performance renders the result of the trial unreliable or the proceeding unfair. *Id*. Appellant must show that there exists a reasonable probability that a different verdict would have been returned but for counsel's deficiencies. *Strickland* at 694. *See also State v. Lott,* 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), for Ohio's adoption of the *Strickland* test.

{¶ 33} We have determined appellant's evidentiary issues on the merits rather than by a plain error analysis. Consequently, all of the things appellant asserts should have been objected to do not constitute instances of deficient performance. There is nothing in the record to suggest that a restitution hearing would alter the result of the award. Ashley Buehrer was critically injured and was not fully recovered by the time she testified at the trial. The amount of medical costs she reported does not seem inflated. As to whether trial counsel should have sought the results of Ashley Buehrer's blood test, it is difficult to see the relevance of such information if, as the evidence suggests, she was in her lane of travel at the time of the collision.

{¶ 34} Appellant has not demonstrated serious deficiencies in trial counsel's performance, nor has he established that, as the result of trial counsel's inferior

performance, the outcome of the trial would have been different. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 35} On consideration whereof, the judgment of the Fulton County Court of Common Pleas is affirmed. It is ordered that appellant pay the court 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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE