[Cite as *Shaker Heights v. Tasi*, 2009-Ohio-2393.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90968

CITY OF SHAKER HEIGHTS

PLAINTIFF-APPELLEE

vs.

TERRI TASI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Shaker Heights Municipal Court
Case Nos. 06 TRD 02636 and 07 TRC 00092

BEFORE: Dyke, J., Blackmon, P.J., and Sweeney, J.

RELEASED: MAY 21, 2009

JOURNALIZED:

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ANN DYKE, J.:

{¶1} Defendant Terri Tasi appeals from her convictions for driving while under the influence of alcohol and leaving the scene of an accident. For the reasons

set forth below, we affirm.

{¶2} On March 31, 2006, defendant was cited for driving while under the influence of alcohol, leaving the scene of an accident, and violation of assured clear distance requirements in connection with an alleged collision with a vehicle operated by Audrey Williams. Defendant waived her right to a speedy trial as to charges of leaving the scene of an accident and violation of assured clear distance requirements, and the alcohol-related count was indicted in the court of common pleas as a felony.

{¶3} On April 9, 2007, the felony charge of driving while under the influence of alcohol was dismissed. It was later re-filed in the municipal court as a misdemeanor. The municipal court docket indicates that on July 2, 2007, defendant pled not guilty to the re-filed charges and waived speedy trial time. The docket further reflects that, during pretrial proceedings, the court determined that defendant had not been properly notified of the charge of violating assured clear distance requirements and it ordered that "this charge shall not be considered in trial."

{¶4} The remaining charges of driving while under the influence of alcohol and leaving the scene of an accident proceeded to a jury trial on January 10, 2008. The city presented the testimony of Audrey Williams, and Shaker Heights Police Officers Timothy Keck and Thomas Danko.

{¶5} Audrey Williams testified that at around 6:30 p.m., on March 31, 2006, she was operating her vehicle on Van Aken Boulevard. While stopped at the intersection of Van Aken Boulevard and Lee Road, Williams could see from her side

view mirror that a small red car was approaching her vehicle and "swaggering back and forth." The vehicle, a Dodge, struck Williams' car on the driver's side. Williams rolled down her car window and asked the driver what was wrong and if the driver realized what she had done. According to Williams, the driver was "out of it" but agreed to pull over so that they could exchange information.

{¶6} After the light at the intersection turned green, the other driver drove away. Williams followed after her and called the police. She determined that the vehicle was a Dodge and obtained a partial license plate number. Williams subsequently observed the vehicle proceed into the parking garage of the Parkland Apartments on Van Aken Boulevard. The police arrived at the garage a few minutes later and Williams identified the car and also identified defendant, who was standing away from the vehicle.

{¶7} Officer Keck testified that he responded to the parking garage and observed a vehicle matching the description provided by Williams. This vehicle was parked and had struck an adjacent parked vehicle. Keck contacted the apartment manager, who stated that the driver was making a delivery. Defendant then returned to the car and, according to Keck, admitted that she had been driving the car but became irate when questioned about the incident. Officer Keck further testified that he detected the odor of alcohol on defendant's breath and asked her if she would be willing to take field sobriety tests.

{¶8} According to Officer Keck, defendant agreed to the tests, and he then administered the horizontal gaze nystagmus test, the walk and turn test, and the

one-legged stand. Keck further testified that defendant would not follow the instructions regarding the horizontal gaze nystagmus test so it was hard to determine her state of intoxication through this procedure. Defendant could not complete the one-legged stand and did not walk as instructed for the walk and turn test. According to both Officer Keck and Officer Danko, defendant failed both of these tests.

{¶9} Officer Keck subsequently determined that defendant was unfit to operate a motor vehicle so he placed her under arrest and transported her to the police station. She then agreed to take a breath-alcohol test. According to Officer Keck and Officer Danko, during administration of this test, defendant was instructed to simply blow slowly into the device but she repeatedly inhaled and prevented the accumulation of a test sample. She was therefore listed as having refused consent.

{¶10} At the close of the evidence, the defense moved for a mistrial because the city had failed to provide discovery of defendant's alleged admission that the car was hers and that she had been driving it earlier that day. The trial court denied the motion and defendant presented her case.

{¶11} Ty Andrews, manager for the Parkland Apartments, testified that defendant is a caretaker for Mr. Rand, one of the residents, and also tends to flowers in the building. Andrews testified that on March 31, 2006, he observed defendant three times throughout the course of the day. He first observed her in the lobby of the building at around 6:00 p.m. He next observed her in Mr. Rand's apartment at approximately 6:30 p.m., and again saw her in the parking garage with the police, at

about 7:00 p.m.

{¶12} Defendant was subsequently convicted of both charges. Defendant now appeals and assigns three errors for our review.

{¶13} For her first assignment of error, defendant asserts that the convictions are against the manifest weight of the evidence.

{¶14} In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings which it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has "lost its way." *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. As the Ohio Supreme Court explained:

{¶15} "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, 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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at 387.

{¶16} The reviewing court must be mindful that the weight of the evidence and the credibility of the witnesses are matters primarily for the jury to consider. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶17} In this matter, we cannot conclude that the jury lost its way. Audrey

Williams clearly established that the driver's side of her vehicle was struck by a small red vehicle, which she later identified as defendant's Dodge. Williams spoke to the driver, whom she later identified as defendant and determined that she was "out of it." The driver initially agreed to pull over but then failed to do so and Williams followed her to the parking garage of the Parkland Apartments. She obtained a partial license plate number at this time. Officers Keck and Danko arrived minutes later . They noticed that the car had struck another car in the garage, and spoke to defendant, who was irate. According to Williams, the entire incident lasted no more than 15 minutes. The officers detected the odor of alcohol on her breath. Defendant did not follow instructions for the horizontal gaze nystagmus test and failed the one-legged stand and the walk and turn tests. She did not properly complete the breath-alcohol test after having consented to it. Although defendant presented evidence that she was at the apartment complex at 6:00 p.m., and 6:30 p.m., this evidence is not irreconcilable with the convictions and, in any event, was unsupported by the resident for whom defendant allegedly worked.

{¶18} In light of the foregoing, we cannot conclude that the convictions are against the manifest weight of the evidence.

{¶19} This assignment of error is without merit.

{¶20} Defendant next contends that she was not given a speedy trial. Defendant maintains that she did not waive speedy trial requirements in the case that was initially filed against her and did not waive it in the re-filed action. These claims are inconsistent with the docket of this matter. The record indicates that

defendant waived speedy trial on April 18, 2006, in the original action. The matter was dismissed, remained pending in common pleas court, was dismissed, then re-filed in municipal court on June 20, 2007. The docket then indicates "Time Waived" on August 16, 2007, well within the 90-day limit for bringing the matter to trial. See R.C. 2945.71.

{¶21} We therefore reject this assignment of error.

{¶22} For her final assignment of error, defendant asserts that the trial court abused its discretion when it denied her motion for a mistrial, as a sanction for the city's failure to disclose during discovery defendant's alleged admissions regarding owning and driving the car.

{¶23} Crim.R.16(B)(1)(a) provides that, upon written request of the defendant, the prosecutor must disclose any written or oral statements made by the defendant to the prosecuting attorney, law enforcement officials, or the grand jury. Crim.R. 16(E)(3) vests the trial court with discretion in determining the sanction to be imposed for the state's nondisclosure of discoverable material.

{¶24} "Where, in a criminal trial, the prosecution fails to comply with Crim.R. 16(B)(1)(a)(ii) by informing the accused of an oral statement made by a co-defendant to a law enforcement officer, and the record does not demonstrate (1) that the prosecution's failure to disclose was a willful violation of Crim.R. 16 (2) that foreknowledge of the statement would have benefitted the accused in the preparation of his defense, or (3) that the accused was prejudiced by admission of the statement, the trial court does not abuse its discretion under Crim. R. 16(E)(3) by

permitting such evidence to be admitted." *State v. Parson* (1983), 6 Ohio St.3d 442, 445, 453 N.E.2d 689, syllabus.

{¶25} We find no abuse of discretion in this matter. The record does not indicate that the failure was willful. Rather, since the city did disclose other statements, it appears that the failure to disclose this statement was inadvertent. Further, foreknowledge of this statement would not have benefitted the defense, since the city plainly established that Williams observed defendant driving the car minutes earlier, spoke to defendant, followed the car as defendant drove off, and obtained a partial license plate number.

{¶26} The third assignment of error is without merit.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Shaker Heights Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

ANN DYKE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
JAMES J. SWEENEY, J., CONCUR