[Cite as *State v. Hopton*, 2011-Ohio-1155.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 10CA0002
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
IRENE E. HOPTON	WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO
Appellant	CASE No. TRD 09-11-10390

DECISION AND JOURNAL ENTRY

Dated: March 14, 2011

CARR, Judge.

{¶1} Appellant, Irene Hopton, appeals her conviction and sentence out of the Wayne County Municipal Court. This Court affirms.

I.

{¶2} On November 2, 2009, Mrs. Hopton was driving her vehicle in Rittman, Ohio. She made a left turn onto Ohio Avenue, where Mush Rush Utility Company was engaged in a construction project repairing a driveway. Mrs. Hopton drove through the construction site, hitting a worker with her vehicle. The Rittman Police Department cited Mrs. Hopton for failure to obey a traffic control device pursuant to R.C. 4511.12, a minor misdemeanor. The matter was tried to the court which found Mrs. Hopton guilty and fined her $150.00. Pursuant to R.C. 4510.15, the trial court made an additional finding of recklessness and ordered that Mrs. Hopton's license be suspended for six months. The trial court stayed the execution of the

sentence pending appeal. Mrs. Hopton filed a timely appeal, raising three assignments of error for review.

II.

ASSIGNMENT OF ERROR I

> "THE DEFENDANT-APPELLANT'S CONVICTION FOR A VIOLATION OF [] R.C. 4511.12 WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND THEREFORE VIOLATED THE DEFENDANT-APPELLANT'S RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 16 OF THE OHIO CONSTITUTION AND THEREFORE HER CONVICTION MUST BE REVERSED."

{¶3} Mrs. Hopton argues that her conviction is not supported by sufficient evidence. This Court disagrees.

{¶4} The law pertaining to a challenge to the sufficiency of the evidence is well settled:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶5} Mrs. Hopton was cited for a violation of R.C. 4511.12 which states, in relevant part, that "[n]o *** driver of a vehicle *** shall disobey the instructions of any traffic control device placed in accordance with this chapter, unless at the time otherwise directed by a police officer." R.C. 4511.01(QQ) defines "traffic control devices" as "all flaggers, signs, signals, markings, and devices placed or erected by authority of a public body or official having

jurisdiction, for the purpose of regulating, warning, or guiding traffic, including signs denoting names of streets and highways."

{¶6} At trial, Gary Brick testified that he was working for Mush Rush Utility on November 2, 2009. He testified that the crew was working on Ohio Avenue in Rittman, and that his job was to flag traffic as the remaining members of the crew performed patchwork on a driveway. He testified that the work zone was posted on Ohio Avenue with signs and cones. He admitted, however, that he was not using a flag, stop sign, or slow sign as he directed traffic in the work zone.

{¶7} Mr. Brick testified that he was standing in the middle of the street when he put up his hand as a driver approached the construction zone in order to signal her to stop. He testified that he thought she had stopped, so he turned to look for traffic approaching from the other direction. He testified that, when he turned back, the car was already driving along side of him. Mr. Brick testified that he yelled to Arley Nemo who was running the roller at the site to look out because the car was continuing through the construction zone. Mr. Brick testified that the car hit Mr. Nemo who then fell.

{¶8} Steven Troyer testified that he was working on the Mush Rush Utility crew on Ohio Avenue on November 2, 2009. He testified that Mr. Brick was standing on the yellow line in the street, directing traffic on the two-lane road as he normally does in the course of business. He testified that he saw a gray car almost hit Mr. Brick and continue through the construction zone. Mr. Troyer testified that Mr. Brick yelled out to Mr. Nemo who threw up the handle of the roller he was using. He testified that the gray car brushed against Mr. Nemo and continued on its way without stopping.

{¶9} Josh Stevenson testified that he was helping Mr. Troyer rake asphalt at the construction site on Ohio Avenue on November 2, 2009, while Mr. Nemo used a 300-pound roller to compact the asphalt. While he did not see Mr. Brick due to the placement of work vehicles, he testified that he heard Mr. Brick yell for Mr. Nemo to "watch out." He testified that Mr. Nemo flipped up the handle on his roller, causing the roller to come towards him and hit him in the ankle. Mr. Stevenson testified that a car passed Mr. Nemo, brushing him in the side with its mirror. He testified that Mr. Nemo fell in the road after the car passed him. Mr. Stevenson testified that, although it is possible that Mr. Nemo backed into the car to avoid being hit by his roller, Mr. Nemo would not have had to throw up the handle on his roller in order to try to leave the roadway if the car had not been driving through the site.

{¶10} Mr. Stevenson testified that he ran after the car in an effort to stop it and get the license plate number. He testified that the car stopped, and he saw the driver whom he identified at trial as Mrs. Hopton. Mr. Stevenson testified that he informed Mrs. Hopton that she had hit a worker. He testified that Mrs. Hopton "laughed at me and said I know." He testified that when he told Mrs. Hopton that he was calling the police, she drove away.

{¶11} Mr. Stevenson described the work site, testifying that "work area ahead" signs were posted on either side of the site and that bright orange cones were placed next to the trucks on the roadway. He testified that Mr. Brick, Mr. Troyer, and he were all wearing fluorescent yellow hooded sweatshirts with the Mush Rush Utility logo on them, and that Mr. Nemo was wearing an orange and green safety vest with reflective striping. He testified that it is a requirement that crew members wear fluorescent clothing on a construction site. He testified that there is no requirement in Rittman that a police officer be at a construction site to direct traffic.

{¶12} Mr. Stevenson testified that the situation on November 2, 2009, was somewhat unique because the need for a flagger was only temporary. He testified that the road was fairly wide in that area, and the only reason the crew needed a flagger was because Mr. Nemo was forced to enter the roadway at one point as he compacted the asphalt in the driveway because the roller's handle was so long. Mr. Stevenson testified that there was no on-going "stop and go" situation at the site. Rather, he testified that Mrs. Hopton merely needed to stop and wait for approximately two minutes, at which time the crew would have finished the work. Despite the unusual situation, Mr. Stevenson testified that the crew used a normal procedure for this type of temporary work situation.

{¶13} Arley Nemo testified that he was rolling asphalt on Ohio Avenue in Rittman on November 2, 2009, when "the next thing I know there was a gray car on top of me" and he "got brushed over by that car[.]" Mr. Nemo testified that Mr. Brick was flagging traffic in order to make sure that the workers did not get run over by vehicles on the road.

{¶14} Sgt. Robert Shows of the Rittman Police Department testified he was dispatched on November 2, 2009, to the scene of a vehicle/pedestrian accident at the intersection of Ohio Avenue and First Street. He testified that he took the statements of the four members of the site crew and obtained the license plate number of the car that hit Mr. Nemo. Sgt. Shows testified that he learned that the car belonged to Mrs. Hopton. He testified that he went to her home the next day and spoke with her husband in her absence. He testified that Mrs. Hopton contacted him the following day and admitted that she was at that intersection at that time, but she denied seeing any flaggers or traffic control devices of any kind. The officer testified that Mrs. Hopton told him that she proceeded through the work zone and noticed that the workers were doing something. Sgt. Shows testified that Mrs. Hopton told him that a man chased her as she exited

the work zone, that she stopped, that the man told her she had hit someone, and that she denied it. The officer testified that Mrs. Hopton told him that she left the scene when the workman told her he was calling the police.

{¶15} Sgt. Shows testified that there are lane markings on Ohio Avenue. He further testified that there was a large barricade blocking one side of First Street, construction signs on Ohio Avenue, and cones at the site, all of which would notify a person of the work area. He testified that the flagger Mr. Brick, however, did not have a flag or a sign. Finally, Sgt. Shows testified that there is no requirement for work crews to use police officers to direct traffic at a work site.

{¶16} Mrs. Hopton argues solely that the State presented insufficient evidence on the element of whether or not there was a traffic control device, as defined by R.C. 4511.01(QQ), at the site. Although she concedes that a flagger constitutes a traffic control device and that all members of the crew testified that Mr. Brick was a flagger at the site, she argues that Mr. Brick was not, in fact, a flagger under the circumstances because he was not using any signaling devices besides his hands.

{¶17} Mrs. Hopton properly asserts that R.C. 4511.09 directs the department of transportation to adopt a manual and specifications for a uniform system of traffic control devices. She is also correct that R.C. 4511.11(D) directs that all traffic control devices erected on a public road shall conform to the state manual and specifications. The department of transportation has adopted the Ohio Manual of Uniform Traffic Control Devices ("OMUTCD"). The edition in effect at the time of the incident is the 2005 Edition.

{¶18} Mrs. Hopton argues that Section 6E.03 of the OMUTCD requires flaggers to use paddles, lights, or red flags when flagging traffic. She argues that, because Mr. Brick admitted

he was using only his hand to flag traffic, Mr. Brick was not acting as a flagger in conformity with statute and the OMUTCD. The OMUTCD, however, does not mandate that a flagger must use paddles, lights, or red flags when directing traffic. Section 6E.03 of the manual states under the heading of "Support:" that "Hand-signaling devices, such as STOP/SLOW paddles, lights, and red flags, are used to control road users through [temporary traffic control] zones." The introduction section of the manual, however, states as follows:

> **{¶19}** "When used in this Manual, the text headings shall be defined as follows:
>
> "1. Standard – a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All standards are labeled, and the text appears in bold type. The verb 'shall' is typically used. Standards are sometimes modified by Options.
>
> "2. Guidance – a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb 'should' is typically used. Guidance statements are sometimes modified by Options.
>
> "3. Option – a statement of practice that is a permissive condition and carries no requirement or recommendation. Options may contain allowable modifications to a Standard or Guidance. All Option statements are labeled, and the text appears in unbold type. The verb 'may' is typically used.
>
> "4. Support – an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text appears in unbold type. The verbs 'shall,' 'should,' and 'may' are not used in Support statements." OMUTCD, Introduction, page I-2.

Accordingly, because hand signaling devices are addressed in the OMUTCD solely under a "Support" heading, there is no requirement that a flagger use paddles, lights, or red flags, and no prohibition against a flagger using only his hand to signal when directing traffic.

{¶20} Reviewing the evidence in a light most favorable to the State, this Court concludes that any rational trier of fact could have found the essential elements of the charge of failure to obey a traffic control device were proved beyond a reasonable doubt. See *Jenks* at

paragraph two of the syllabus. The State presented evidence that Mr. Brick was a flagger on the roadway construction site when Mrs. Hopton drove through the work zone. The State presented evidence that Mr. Brick was wearing a fluorescent yellow shirt as required and that the work zone was marked as required, giving Mrs. Hopton notice of the work zone. Moreover, the State presented evidence that Mr. Brick signaled Mrs. Hopton to stop while he checked for traffic coming from the other direction. The State's evidence demonstrated that Mrs. Hopton disregarded the flagger's signal to stop and continued through the work zone, ultimately hitting one of the workers. Accordingly, there was sufficient evidence to establish that Mrs. Hopton failed to obey a traffic control device, specifically, a flagger on the site who was directing traffic. Mrs. Hopton's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "THE DEFENDANT-APPELLANTS (sic) CONVICTION FOR A VIOLATION OF R.C. 4511.12 WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶21} Mrs. Hopton argues that her conviction was against the manifest weight of the evidence. This Court disagrees.

{¶22} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Otten* (1986), 33 Ohio App.3d 339, 340.

> "Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a 'thirteenth juror,' and disagrees with the factfinder's resolution of the conflicting testimony. Id." *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶23} Mrs. Hopton testified in her own defense. She testified that, on November 2, 2009, she was traveling north on First Street in Rittman, when she stopped at a red light at the intersection of First Street and Ohio Avenue. She testified that she saw that the other side of First Street was closed by stop signs and a barricade. She testified that she turned left onto Ohio Avenue and saw trucks on the right side of the road which were facing the wrong way. She testified that a man wearing a dark brown jacket was standing near the door of one of the trucks. Mrs. Hopton testified that she slowed her vehicle but the man had turned to look at the other end of the street, so she drove slowly past him. She testified that she saw men with a roller in her peripheral vision. Mrs. Hopton testified that she continued to drive up the street when she heard someone "holler." She testified that she stopped and the crew manager ran to her and told her she had hit someone. She testified that she responded that she had not. She testified that she waited as the man told her he was going to call the police but that he then hung his head and told her to "just go ahead and go wherever you are needing to go," so she left.

{¶24} Mrs. Hopton testified that Sgt. Shows of the Rittman Police Department contacted her and she explained the situation. She testified that she told the police that, to the best of her knowledge, she did not hit anyone in the work zone. Mrs. Hopton admitted that she knew "[t]here was obviously some sort of construction" going on because of the placement of the work

trucks. She further admitted that she did not stop before entering the construction zone and that she did not wait for anyone to clear her to drive around the construction site. Mrs. Hopton testified, however, that no one directed her to stop and there were no signs directing her to stop or slow down.

{¶25} This Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22.

{¶26} A review of the record indicates that this is not the exceptional case, where the evidence weighs heavily in favor of Mrs. Hopton. A thorough review of the record compels this Court to find no indication that the trial court lost its way and committed a manifest miscarriage of justice in convicting Mrs. Hopton of failure to obey a traffic control device.

{¶27} Mrs. Hopton does not dispute that she did not stop before driving through the work zone. She testified that she recognized the site as a work zone. The crew members and Sgt. Shows testified that appropriate signs and cones were in place, putting people on notice of the work site. All four crew members testified that Mr. Brick was working as a flagger, directing traffic in the work zone. Although Mr. Brick was directing traffic with his hands instead of with a flag or sign, there is no requirement that a flagger use a flag or sign. While Mrs. Hopton testified that no one directed her to stop before entering the work zone, Mr. Brick testified that he used his hand to direct her to stop while he checked for on-coming traffic. Although Mrs. Hopton testified that Mr. Brick was wearing a dark brown shirt, the crew manager testified that all members of the crew, including Mr. Brick, were wearing the required fluorescent clothing.

{¶28} The weight of the evidence supports the conclusion that Mrs. Hopton failed to obey a traffic control device, specifically Mr. Brick as he directed her to stop before proceeding

through the marked work zone. Accordingly, her conviction for failure to obey a traffic control device is not against the manifest weight of the evidence. Mrs. Hopton's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT THE DEFENDANT-APPELLANT'S OPERATION OF HER MOTOR VEHICLE RELATED TO RECKLESS OPERATION PURSUANT TO R.C. 4510.15 AND SUSPENDED THE DEFENDANT-APPELLANT'S DRIVER'S LICENSE FOR SIX MONTHS."

{¶29} Mrs. Hopton argues that the trial court abused its discretion when it suspended her driver's license for six months after finding that she operated her vehicle in a reckless manner. This Court disagrees.

{¶30} R.C. 4510.15 governs license suspension for reckless operation and states:

> "Whenever a person is found guilty under the laws of this state, or under any ordinance of any political subdivision of this state, of operating a motor vehicle in violation of any such law or ordinance relating to reckless operation, the trial court of any court of record, in addition to or independent of all other penalties provided by law, may impose a class five suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of section 4510.02 of the Revised Code."

"A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶31} R.C. 4510.02(A)(5) provides for a suspension of a definite period of six months to three years. The trial court suspended Mrs. Hopton's driver's license for a period of six months.

{¶32} "This Court reviews a trial court's decision to suspend a defendant's driving privileges pursuant to R.C. 4507.34 for an abuse of discretion." *Akron v. Cripple*, 9th Dist. No. 21385, 2003-Ohio-3920, at ¶22, citing *State v. Tamburin* (2001), 145 Ohio App.3d 774, 780. R.C. 4507.34 was recodified as R.C. 4510.15 by 2002 S 123, effective January 1, 2004. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶33} As this Court stated in *Cripple*:

> "'[A] court of record, in deciding whether to suspend a driver's license pursuant to R.C. [4510.15], is entitled to consider all the evidence the record reveals which is probative of whether a defendant's operation of a motor vehicle was reckless[.]' *State v. Hartman* (1987), 41 Ohio App.3d 142, 144, fn. 3. 'That a driver's operation of a motor vehicle was reckless is a conclusion reached by examining both the driving in issue and *all* the circumstances under which it took place. Foremost among these circumstances is the threat this manner of operation poses to others.' (Emphasis sic.) Id." *Cripple* at ¶23.

{¶34} As in *Cripple*, the record before us is replete with evidence that the manner in which Mrs. Hopton operated her vehicle threatened the safety of others. See id. at ¶24. Mr. Brick testified that, notwithstanding his direction to Mrs. Hopton that she stop, she continued to drive through the work zone at the same time that Mr. Nemo was in the street rolling asphalt. All four crew members testified that Mrs. Hopton's vehicle made contact with Mr. Nemo. Nevertheless, Mrs. Hopton did not initially stop after she hit the workman. Mrs. Hopton admitted that she noticed, first, the work zone because of the vehicles and, later, the work crew in her peripheral vision as she drove through the work zone. Nevertheless, she admitted that she

did not stop before attempting to pass through it. Although the crew manager testified that all members of the crew were wearing fluorescent clothing, Mrs. Hopton was not paying enough attention while driving to notice their clothing or the presence of the flagger in the roadway. Moreover, she disregarded the flagger's cautionary yelling to a crewman and the contact of her vehicle with the crewman. Mr. Stevenson testified that when he informed Mrs. Hopton that she had hit a worker, she admitted it and laughed. Mrs. Hopton denied laughing or admitting that she hit Mr. Nemo. Although she claims she was told to leave, Mrs. Hopton admitted that she left the scene after Mr. Stevenson told her he was calling the police.

{¶35} Based on a review of the evidence, this Court cannot conclude that the trial court acted arbitrarily, unreasonably, or unconscionably when it found that Mrs. Hopton was reckless in operating her vehicle in the vicinity of the work zone. Not only did her driving pose a threat of harm to others, she actually made physical contact with one of the workmen. Accordingly, the trial court did not abuse its discretion by ordering a six-month suspension of the defendant's driver's license. Mrs. Hopton's third assignment of error is overruled.

III.

{¶36} Mrs. Hopton's assignments of error are overruled. Her convictions and sentence out of the Wayne County Municipal Court are affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

MOORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

NORMAN R. "BING" MILLER, JR., Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.