[Cite as *State v. Osorio*, 2015-Ohio-716.]

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

STATE OF OHIO Appellee v. WILFREDO OSORIO, JR. Appellant	C.A. No. 13CA010355 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 11CR082450

DECISION AND JOURNAL ENTRY

Dated: March 2, 2015

MOORE, Judge.

{¶1} Appellant, Wilfredo Osorio, Jr., appeals from the January 4, 2013 judgment of the Lorain County Court of Common Pleas. We affirm, in part, and reverse, in part.

I.

{¶2} This matter arises from a single-car accident that occurred on December 5, 2010. At the time of the accident, Mr. Osorio was driving, and his girlfriend, Rachel Frahm, was a passenger in the car. A few days after the accident, Ms. Frahm passed away as a result of her injuries.

{¶3} Mr. Osorio was indicted for aggravated vehicular homicide, in violation of R.C. 2903.06(A)(1)(a), a felony of the first degree, aggravated vehicular homicide, in violation of R.C. 2903.06(A)(2)(a), a felony of the second degree, vehicular homicide, in violation of R.C. 2903.06(A)(3)(a), a felony of the fourth degree, operating a vehicle under the influence of alcohol and/or a drug of abuse, in violation of R.C. 4511.19(A)(1)(a)/(b), a misdemeanor of the

first degree, and operating a motor vehicle without a valid license, in violation of R.C. 4510.12(A)(1), a misdemeanor of the fourth degree. Mr. Osorio pleaded not guilty to all charges and the matter proceeded to bench trial.

{¶4} At trial, Edward Yingling, a criminalist employed with the Ohio State Highway Patrol, Trooper Shawn Kline, employed with the Ohio State Highway Patrol, and Elizabeth Ickes, Ms. Frahm's aunt, testified on behalf of the State. Mr. Osorio testified on his own behalf. At the conclusion of testimony, the trial court found Mr. Osorio guilty of vehicular homicide, in violation of R.C. 2903.06(A)(3)(a), operating a vehicle under the influence of alcohol and/or a drug of abuse, in violation of R.C. 4511.19(A)(1)(b), and operating a motor vehicle without a valid license, in violation of R.C. 4510.12(A)(1). The trial court sentenced Mr. Osorio to thirty months of imprisonment, suspended driving privileges for a period of five years commencing after his release from prison, and imposed a fine in the amount of $375.

{¶5} Mr. Osorio appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED PLAIN ERROR IN FINDING MR. OSORIO GUILTY OF A CRIME WHICH WAS NOT CHARGED IN THE INDICTMENT IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION 10 OF THE OHIO STATE CONSTITUTION.

{¶6} In his first assignment of error, Mr. Osorio argues that the trial court committed plain error in finding him guilty of operating a motor vehicle without a valid license because, prior to trial, the State moved to amend the charge in the indictment to failure to reinstate and the trial court granted the State's motion.

{¶7} Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Further, to correct a plain error, all of the following elements must apply: "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[ ]' [to the extent that it] * * * affected the outcome of the trial." *State v. Roper*, 9th Dist. Summit No. 27025, 2014-Ohio-4786, ¶ 6, quoting *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 64, quoting *State v. Hardges*, 9th Dist. Summit No. 24175, 2008-Ohio-5567, ¶ 9. Here, the record clearly indicates that the trial court granted the State's motion to amend Count Six of the indictment from operating a motor vehicle without a valid license, a fourth degree misdemeanor, to failure to reinstate a license, a minor misdemeanor. Prior to trial, the following exchange occurred:

> [The State]: First, Your Honor, I'd ask to amend the charge on Count Six, * * * from operating a motor vehicle without a valid license to a failure to reinstate, * * * I don't have the exact code section, but I believe it's a minor misdemeanor. And as a result of that, we're going to stipulate to some—to his driving records and to some medical records[.] The Court: Okay. Count Six now charges failure to reinstate a license?
>
> [The State]: Yes, Your Honor.
>
> The Court: All right.

However, the trial court convicted Mr. Osorio of operating a motor vehicle without a valid license. Thus, the trial court committed plain error in convicting Mr. Osorio of operating a motor vehicle without a valid license, a crime that was no longer an indicted offense.

{¶8} Accordingly, Mr. Osorio's first assignment of error is sustained, and his conviction for operating a motor vehicle without a valid license is reversed. This matter is remanded to the point of the error for the trial court to determine whether Mr. Osorio is guilty of the offense charged in the amended indictment.

ASSIGNMENT OF ERROR II

> THE GUILTY VERDICTS ARE AGAINST THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF M[R.] OSORIO'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION 10 OF THE OHIO STATE CONSTITUTION.

{¶9} In his second assignment of error, Mr. Osorio argues that his convictions for operating a vehicle under the influence of alcohol and/or a drug of abuse, in violation of R.C. 4511.19(A)(1)(b), and operating a motor vehicle without a valid license, in violation of R.C. 4510.12(A)(1), are against the sufficiency of the evidence. Specifically, Mr. Osorio argues that his conviction for operating a vehicle under the influence of alcohol and/or drug of abuse is against the sufficiency of the evidence because (1) the State failed to introduce sufficient evidence that his blood was drawn within three hours of the violation, and (2) the State failed to present sufficient evidence that his blood-alcohol content was above the legal limit.

{¶10} Mr. Osorio also specifically argues that his conviction for operating a motor vehicle without a valid license is against the sufficiency of the evidence because he was not charged with this offense in the amended indictment. He further argues that this affects the enhancement of his conviction for negligent homicide from a first degree misdemeanor to a fourth degree felony.

{¶11} "Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo." *State v. Williams*, 9th Dist. Summit No. 24731, 2009-Ohio-6955, ¶ 18, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

> 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. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶12} R.C. 4511.19(A)(1) states that:

> [n]o person shall operate any vehicle * * * within this state, if, at the time of the operation, any of the following apply:
>
> (b) [t]he person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.

Further, pursuant to R.C. 4511.19(D)(1)(b), "the [trial] court may admit evidence on the concentration of alcohol * * * in the defendant's whole blood * * * at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation."

{¶13} Here, the State presented the following evidence: (1) Ed Yingling, a criminalist, testified that Mr. Osorio's blood sample contained .172 grams of alcohol per milliliter of whole blood, (2) Mr. Yingling's "Alcohol Analysis" report, marked as State's Exhibit 4, verified this test result, and (3) BMV Form 2255, marked as State's Exhibit 9, indicated that the accident occurred at "1930" hours, or 7:30 p.m., and Mr. Osorio's blood was drawn at "2130" hours, or 9:30 p.m., within the requisite three hours of time.

{¶14} In viewing the evidence in a light most favorable to the State, there is sufficient evidence that, pursuant to R.C. 4511.19(A)(1)(b), Mr. Osorio was operating a vehicle while under the influence of alcohol because he had a prohibited blood alcohol concentration at the time of the accident

{¶15} Further, based upon our resolution of the first assignment of error, we decline to undergo an analysis of whether there was sufficient evidence to support Mr. Osorio's conviction, pursuant to R.C. 4510.12(A)(1), for driving a motor vehicle without a valid license. However, we will address Mr. Osorio's sufficiency challenge as to the sentencing enhancement for his conviction for negligent homicide.

{¶16} R.C. 2903.06(A)(3)(a) states that "[n]o person, while operating * * * a motor vehicle * * * shall cause the death of another * * * in []the following [way]: [n]egligently[.]" Additionally, R.C. 2903.06(C) states that:

> Whoever violates division (A)(3) of this section is guilty of vehicular homicide. Except as otherwise provided in this division, vehicular homicide is a misdemeanor of the first degree. Vehicular homicide committed in violation of division (A)(3) of this section is a felony of the fourth degree if, at the time of the offense, the offender was driving under a suspension or cancellation imposed under Chapter 4510. or any other provision of the Revised Code or was operating a motor vehicle * * * , did not have a valid driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege, and was not eligible for renewal of the offender's driver's license or commercial driver's license without examination under section 4507.10 of the Revised Code[.]

R.C. 4507.10 states, in relevant part, that:

> (A) Except as provided in section 4507.11 of the Revised Code, the registrar of motor vehicles shall examine every applicant for a * * * driver's license * * * before issuing any such * * * license[.]
>
> (B) Except as provided in section 4507.12 of the Revised Code, the registrar may waive the examination of any person applying for the renewal of a driver's license * * * issued under this chapter, if the person presents and surrenders either an

> unexpired license or endorsement or a license or endorsement which has expired not more than *six months prior* to the date of application.

(Emphasis added.)

{¶17} Here, in State's Exhibit 1, there is evidence showing that Mr. Osorio's driver's license expired on February 25, 2009, more than six months prior to the accident on December 5, 2010. As such, Mr. Osorio would have had to take the driver's examination prior to having his license reinstated. *See* R.C. 4507.10(B). Therefore, in viewing the evidence in a light most favorable to the State, there is sufficient evidence to support the sentencing enhancement, from a first degree misdemeanor to a fourth degree felony, because Mr. Osorio was driving with a suspended license at the time of the accident. *See* R.C. 2903.06(C).

{¶18} Accordingly, Mr. Osorio's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE VERDICT FOR VEHICULAR HOMICIDE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF MR. OSORIO'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION 10 OF THE OHIO STATE CONSTITUTION.

{¶19} In his third assignment of error, Mr. Osorio argues that his conviction for vehicular homicide is against the manifest weight of the evidence. Specifically, Mr. Osorio argues that the accident was caused by bad weather, and not by a substantial lapse of due care on his part. The State responds by arguing that the evidence shows a substantial lapse of due care because Mr. Osorio could have chosen to drive more slowly in poor weather conditions, and Mr. Osorio was legally intoxicated at the time of the crash.

{¶20} When a defendant asserts that his conviction is against the manifest weight of the evidence:

> [A]n 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). In making this determination, this Court is mindful that "[e]valuating evidence and assessing credibility are primarily for the trier of fact." (Citations omitted.) *State v. Winchester*, 9th Dist. Summit No. 26652, 2013-Ohio-4683, ¶ 4. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact[-]finder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). An appellate court should exercise the power to reverse a judgment as against the manifest weight of the evidence only in exceptional cases. *Otten* at 340.

{¶21} As stated above, no person shall negligently cause the death of another while operating a motor vehicle. *See* R.C. 2903.06(A)(3)(a). R.C. 2901.22(D) states that:

> A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

"Under R.C. 2901.22(D), something more than ordinary negligence is required to prove criminal negligence. There must be a substantial lapse from due care." *State v. Brady*, 7th Dist. Mahoning No. 13 MA 88, 2014-Ohio-5721, ¶ 28, citing *State v. Dailey*, 5th Dist. Morrow No. 2006-CA-0012, 2007-Ohio-2544, ¶ 19. Further, "[t]he determination of whether a lapse of due care is substantial is a question for the trier of fact." *State v. Self*, 112 Ohio App.3d 688, 693

(12th Dist.1996). Moreover, "substantial" is another word for "material," which means "being of real importance or great consequence." *Id*.

{¶22} Here, Trooper Kline testified that, on the evening of the accident, "[i]t was snowing and blowing" outside. He stated that "[i]t was not a super heavy snow but it was snowing, and in that portion of the roadway. * * * the road was covered with snow and ice[.]" Trooper Kline indicated that, if a person were going to drive, "[they would] want to drive very slow[ly]." Further, when asked how he saw this accident happening, Trooper Kline responded as follows:

> Well, looking at the snow, we talked about the snow because it was obvious that the vehicle lost control—just lost control and at that point slid off the road. Once [the car] was sliding, it appears there was no control from [Mr. Osorio] or he was unable to make a correction, and he just slid and hit the utility pole and the tree.

{¶23} Trooper Kline further indicated that he was unable to determine what speed Mr. Osorio had been traveling at the time of the accident. However, on cross-examination, Trooper Kline stated that the speed limit in that area is 45 m.p.h., and that, at the hospital, Mr. Osorio told him he "thought he was going 40 [m.p.h.]." As to the general road conditions that night, Trooper Kline testified, "[t]hat road, it was—you had to be careful, you had to be careful driving on it. I mean, there was snow on the roadway, so typical December driving, I suppose, in the Cleveland, Ohio area[.]" Trooper Kline also testified that Mr. Osorio admitted he had been drinking earlier that day, and when asked if he was intoxicated at the time of the accident, Mr. Osorio responded, "[p]ossibly."

{¶24} Mr. Osorio testified that, on the day of the accident, he and Ms. Frahm started drinking shots of rum at approximately 4:30 p.m., while visiting his parents. He explained that he "remember[ed]" drinking three to four shots of rum. He stated that Ms. Frahm asked him to

drive home because she did not feel well. Mr. Osorio also testified that because it was snowing, "[he] knew that [he] had to go a little bit slower than the speed limit[.]"

{¶25} Additionally, as stated above, Ed Yingling, a criminalist employed with the Ohio State Highway Patrol, testified that Mr. Osorio's blood sample showed .172 grams of alcohol per milliliter of whole blood.

{¶26} Based upon the record before us, we conclude that the trial court could have reasonably inferred that Mr. Osorio acted with a substantial lapse from due care at the time of the accident. First, Mr. Osorio admitted that he had been drinking prior to the accident, and that he was "possibly" intoxicated at the time of the accident. Second, Mr. Osorio's blood results verified that he was legally intoxicated at the time of the accident. Third, Mr. Osorio admitted to driving at a speed of approximately 40 m.p.h. at the time of the accident. Fourth, there was snow and ice on the roadway that evening, and Officer Kline testified that if a person were going to drive, "[they would] want to drive very slow[ly]." As such, we cannot conclude that the trial court clearly lost its way and created such a manifest miscarriage of justice that Mr. Osorio's conviction for vehicular homicide must be reversed and a new trial ordered.

{¶27} Accordingly, Mr. Osorio's third assignment of error is overruled.

III.

{¶28} In sustaining Mr. Osorio's first assignment of error and overruling Mr. Osorio's second and third assignments of error, the judgment of the Lorain County Court of Common Pleas is affirmed, in part, reversed, in part, and remanded for further proceedings consistent with this decision.

Judgment affirmed, in part,
reversed, in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, 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(C). 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 equally to both parties.

CARLA MOORE
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

ROBERT CABRERA, Attorney at Law, for Appellant.

DENNIS P. WILL, Prosecuting Attorney, and MARY SLANCZKA, Assistant Prosecuting Attorney, for Appellee.