[Cite as *State v. Hobbs*, 2009-Ohio-3764.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 22784
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-TRD-3110
v.	:	
	:	(Criminal Appeal from Dayton
H. STEVEN HOBBS	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 31st day of July, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant H. Steven Hobbs appeals from his conviction and sentence for Starting and Backing Vehicles in violation of the Revised Code of General Ordinances of the City of Dayton Section 71.01(A). Hobbs contends that the conviction is not supported by the weight of the evidence. In support he argues that the trial court

impermissibly relied on hearsay testimony. He further argues that the physical evidence does not support the conviction.

{¶ 2} From our review of the record, we cannot say that the trial court's decision relied on hearsay testimony. Further, we conclude that the physical evidence and witness testimony constitute evidence upon which a reasonable person could find Hobbs guilty of the charged offense, and that the conviction is not against the manifest weight of the evidence. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Hobbs pulled away from a curb, where he had been parked, and was involved in a collision with a vehicle driving down the one-way street. Hobbs was cited with the offense of Starting and Backing Vehicles. The matter was tried to the court without a jury. Following the trial, the court stated on the record as follows:

{¶ 4} "After considering all the evidence and weighing the credibility of the witnesses, I find that the State has proved its case, and that the Defendant did violate this provision of the Dayton Code."

{¶ 5} The judgment entry merely stated that Hobbs was found guilty, and imposed an appropriate sanction. From his conviction, Hobbs appeals.

II

{¶ 6} Hobbs raises the following as his sole assignment of error:

{¶ 7} "THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 8} Hobbs contends that the evidence does not support his conviction. Specifically, he contends that the trial court impermissibly relied upon hearsay evidence in determining his guilt. Hobbs also claims that the physical evidence demonstrates that he was not guilty of the charged offense.

{¶ 9} Hobbs was convicted of a violation of R.C.G.O. Section 71.01 – Starting and Backing Vehicles – which provides in pertinent part as follows:

{¶ 10} "(A) No person shall start a vehicle or trackless trolley which is stopped, standing, or parked until such movement can be made with reasonable safety."

{¶ 11} We begin with Hobbs's claim that the trial court relied upon hearsay testimony. During trial, the following colloquy took place between the prosecutor and the investigating officer, Dayton Police Officer Daniel Emnett:

{¶ 12} "Q: Did you ask Mr. Hobbs how the accident occurred?

{¶ 13} "A: He stated that he had looked for cars coming and didn't see any coming and pulled out, and that he thought that Mr. Long had changed lanes before he had realized unexpectedly that it didn't give him time to react before the accident occurred.

{¶ 14} "Q: And speaking with Mr. Long and the other witnesses in this case, you decided automatically to cite Mr. Hobbs, is that true?

{¶ 15} "A: That's correct.

{¶ 16} "Q: Did the investigation as far as you were concerned, indicate that Mr. Hobbs' version of events was not accurate?

{¶ 17} "A: 'Till I got the third witness statement, the disinterested witness, I couldn't prove who was at fault, but with her statement I was able to determine that Mr.

Hobbs had pulled out and struck Mr. Long's car."

{¶ 18} Hobbs contends that Emnett's reference to the "third witness statement" constitutes hearsay. He further contends that the trial court improperly relied on this hearsay statement in determining whether he committed the offense. The State conversely contends that the statement is not hearsay because the officer did not "testify as to the third party witness's statements *** [but that] it only goes to show why the officer's investigation leads to him issuing a citation to [Hobbs]."

{¶ 19} Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). A "statement" is an oral or written assertion, or nonverbal conduct of a person if it is intended by him as an assertion. Evid.R. 801(A).

{¶ 20} This court has addressed this issue in *State v. Platfoot*, Montgomery App. No. 22865, _____ -Ohio-____, (July 31, 2009). In that case, an officer investigating a traffic accident testified that he had spoken, by telephone, with a witness to the accident. Id. The witness did not testify at trial. Id. The prosecutor in *Platfoot* asked the officer "whether his interview with [the witness] corroborated" the testimony of one of the parties to the accident. Id.

{¶ 21} We noted that "other appellate districts have held that a police officer's statement that a witness corroborated information during an investigation is not hearsay because no specific out-of-court statement is presented." Id. However, we declined to follow that reasoning, instead holding that the officer testified to the telephone witness's "oral assertion about how the accident had occurred, even if he did not recount it verbatim." Id. We concluded that this testimony violates the rules prohibiting hearsay.

Id.

{¶ 22} In the case before us, Officer Emnett's testimony regarding the non-testifying witness constitutes hearsay, and was therefore inadmissible, but Hobbs did not object to its admission. Therefore, Hobbs has forfeited all but plain error on this issue. Plain error does not exist unless it can be determined that but for the error, the outcome of the trial would have clearly been different. *State v. Moreland* (1990), 50 Ohio St. 3d 58. "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* (1978), 53 Ohio St. 2d 91, paragraph three of the syllabus.

{¶ 23} There is nothing in the record to indicate that the trial court improperly relied upon this testimony in reaching its verdict. The record contains evidence, specifically Willie Long's testimony discussed below, that if believed would support the verdict, without the necessity of relying upon Emnett's testimony. Absent evidence of error, we must presume the regularity in the proceedings. *State v. Williams*, Franklin App. No. 08AP-1090, 2009-Ohio-3233, ¶8. Thus, given the absence of anything in the record to suggest that the trial court relied upon the hearsay evidence, Hobbs has not overcome the presumption that the trial court correctly applied the rules of evidence in this case.

{¶ 24} We next turn to the claim that the physical evidence does not support the conviction. A challenge to the manifest weight of the evidence challenges the credibility of the evidence presented. *State v. Minifee*, Cuyahoga App. No. 91017, 2009-Ohio-3089, ¶62. In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror," and, after "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." Id. at ¶63. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 25} As stated above, the record in this case contains evidence upon which a reasonable finder of fact could rely in determining that Hobbs did commit the charged offense. According to the testimony of Willie Long, he was driving north in the right-hand lane of Wilkinson Street, which is a one-way street. Long testified that he did not change lanes, but remained traveling in the right-hand lane, when Hobbs's vehicle hit his vehicle in the "right door front passenger door lower part."

{¶ 26} According to Hobbs's own testimony, he was parked at the east curb of Wilkinson Street when he pulled out into traffic. Hobbs testified that prior to entering the lane of travel he looked in his mirror and observed Long's car traveling in the left northbound lane. Hobbs testified that he signaled prior to pulling away from the curb, and that the front of his vehicle was squarely in the right lane of travel when he observed Long switch lanes. Hobbs testified that he came to a complete stop, and that Long proceeded to run into his vehicle. Hobbs also presented pictures, which he contends supports his version of the accident.

{¶ 27} This is clearly a case of conflicting testimony. The trial court, as the finder of fact, is permitted to give more credit to Long's version of the accident. A review of the

pictures of the accident neither refutes nor supports either version of the accident, since they merely depict the damage to the vehicles. In other words, the damage reflected in the photographs could have been the result of either version of the events. Without the testimony of an expert to the contrary, we conclude that the trial court did not err in determining that the evidence supported Long's version of the incident.

{¶ 28} Hobbs's sole assignment of error is overruled.

III

{¶ 29} Hobbs's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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