[Cite as *State v. Tylke*, 2022-Ohio-2010.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
HARRISON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STEVEN A. TYLKE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 HA 0006

Criminal Appeal from the
Harrison County Court of Harrison County, Ohio
Case No. TRC-1902564 A,B

BEFORE:
David A. D'Apolito, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
Affirmed.

Atty. Lauren E. Knight, Harrison County Prosecutor and *Atty. Jack L. Felgenhauer*, Assistant Prosecuting Attorney, 111 West Warren Street, P.O. Box 248, Cadiz, Ohio 43907, for Plaintiff-Appellee and

Atty. John M. Jurco, P.O. Box 783, St. Clairsville, Ohio 43950, for Defendant-Appellant.

Dated: June 7, 2022

D'APOLITO, J.

{¶1} Appellant, Steven Tylke, appeals his conviction and sentence for one count of operating a motor vehicle while intoxicated ("OVI") in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree, following a trial by jury in the Harrison County Court. He also appeals his conviction for a marked lanes violation in violation of R.C. 4511.33, a minor misdemeanor, which was tried simultaneously to the bench.

{¶2} Appellant advances five assignments of error. First, he contends that the state violated his right to a speedy trial. Second, he argues that the trial court's failure to enter its verdict on the marked lanes violation on the record following the jury's verdict on the OVI conviction constitutes a violation of his "right to trial." Third, he asserts that there was insufficient evidence in the record to support the trial court's conclusion that Appellant's conviction constitutes his second OVI conviction within the past ten years. In his fourth assignment of error, Appellant challenges the sufficiency and weight of the evidence supporting his OVI conviction. Finally, Appellant challenges the length of his OVI sentence as disproportional to another sentence imposed for the same crime from another county in this District, which was reviewed for plain error and affirmed by this Court.

LAW

{¶3} R.C. 4511.19(A)(1)(a) provides that "[n]o person shall operate any vehicle, * * * within this state, if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." A "drug of abuse" is defined as "any controlled substance, dangerous drug as defined in section 4729.01 of the Revised Code, or over-the-counter medication that, when taken in quantities exceeding the recommended dosage, can result in impairment of judgment or reflexes." R.C. 4511.181(E). R.C. 4506.01(M). Controlled substance is defined, in pertinent part, as any substance classified as a controlled substance under the Controlled Substance Act, 80 Stat. 1242 (1970), 21 U.S.C.A. 802(6), as amended, and any substance included in schedules I through V of 21 C.F.R. part 1308, as amended. R.C. 4506.01(E). Clonazepam is a schedule 4 depressant. 21 C.F.R. 1308.14(c).

{¶4} R.C. 4511.22(A)(1), captioned "Rules for driving in marked lanes," reads, in pertinent part: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic, * * * the following rules apply: * * * A vehicle * * * shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

FACTS AND PROCEDURAL HISTORY

{¶5} The sole witness at trial was Sheriff's Deputy James Chaney. Deputy Chaney had been employed by the Harrison County Sheriff's Office for roughly eight years at the time of trial, and estimated that he had performed approximately 100 to 150 traffic stops involving impaired drivers.

{¶6} Deputy Chaney was conducting a routine patrol on State Route 250 near Mill Hill Road at roughly 1:00 a.m. on October 12, 2019 when he began traveling westbound behind Appellant's vehicle. Deputy Chaney's patrol car was not equipped with a dashboard camera.

{¶7} State Route 250 is a two-lane highway, with one eastbound lane and one westbound lane. A double-yellow line separates the lanes and there is a white fog line to the right of the westbound lane.

{¶8} Although Appellant's vehicle was traveling within the posted speed limit, the vehicle weaved within the westbound lane for roughly one-half of a mile. When the vehicle crossed the white fog line by one tire width, Deputy Chaney initiated a traffic stop.

{¶9} At the time, the traffic on State Route 250 was "medium" and included "mostly commercial semi-trucks." (*Id.*, p. 49.) Deputy Chaney testified that roughly one vehicle per minute traveled past the scene. The dispatcher informed Deputy Chaney that Appellant had been convicted of an OVI in 2010 as Deputy Chaney approached the vehicle.

{¶10} When Appellant opened the driver's side window and handed his driver's license to Deputy Chaney, Deputy Chaney "immediately got the scent of an alcoholic beverage," which he identified later in his testimony as beer. (*Id.*, p. 51.) Deputy Chaney informed Appellant that he had committed a marked lanes violation, and asked Appellant

if he had consumed any alcohol that evening. Appellant conceded to drinking "one and a half beers * * * maybe two." (*Id.*, p. 88-89.) Deputy Chaney testified that the consumption of two beers is frequently the default response given by drivers, regardless of the actual amount of their alcohol consumption.

{¶11} Deputy Chaney described Appellant's speech as "lethargic and slow." (*Id.*, p. 54.) Deputy Chaney's body camera video, which was admitted at trial, confirms that Appellant's speech was lackadaisical.

{¶12} Appellant "had a little struggle with the balance issue" when he stepped out of his vehicle to perform a field sobriety test. (*Id.*, p. 54.) After stepping out of the vehicle, but prior to the commencement of the field sobriety test, Appellant offered to undergo an alcohol breath test reiterating that he had only consumed "two beers." (VIDEO)

{¶13} Deputy Chaney responded that portable alcohol breath tests "don't hold up in court so [he] doesn't waste [his] time." (VIDEO) Deputy Chaney explained that, if Appellant refused to take the field sobriety test, Deputy Chaney would assume Appellant was intoxicated.

{¶14} The standard field sobriety test consists of three parts. The first part, which was administered by Deputy Chaney, is the horizontal gaze nystagmus test. Deputy Chaney passed a pen from left to right in front of Appellant's face and asked him to follow the pen with his eyes without moving his head. The test is administered to detect "involuntary jerking of the eye," which is a sign of intoxication. (*Id.*, p. 55.) During the performance of the horizontal gaze nystagmus test, Deputy Chaney noted lack of smooth pursuit, nystagmus at maximum deviation, and nystagmus prior to forty-five degrees, in both eyes, for a total of six signs indicating impairment.

{¶15} Next, Deputy Chaney administered the walk-and-turn test. Deputy Chaney instructed Appellant to walk nine steps, heel-to-toe, then turn and walk nine steps back, while Appellant verbally counted his steps. The test is administered to determine balance and physical stability, as well as to reveal whether the subject will remember and follow the instructions. Appellant, who did not verbally count his steps, was noticeably unstable throughout his first nine steps.

{¶16} Frustrated by his inability to execute the test, Appellant blurted out, "I smoked a joint. I smoked a joint," then terminated the test. (VIDEO) Deputy Chaney

encouraged Appellant to complete the walk-and-turn test and undergo the final test, the one-leg stand, but Appellant declined. As a consequence, Deputy Chaney arrested Appellant for OVI and the marked lanes violation.

{¶17} Deputy Chaney explained to Appellant that he would be released after being processed unless Deputy Chaney "[found] a body or something in [Appellant's vehicle.]" (VIDEO) Appellant responded that Deputy Chaney would find "a roach, a joint, and a cigarette" (VIDEO) in the cigarette pouch in the vehicle. After Deputy Chaney informed Appellant of his rights, Appellant stated, "I didn't smoke weed tonight. It's been a while, I mean, like hours. Earlier today. This morning." (VIDEO)

{¶18} While Appellant was seated in Deputy Chaney's patrol car, a search of the vehicle revealed an unburned marijuana cigarette. Deputy Chaney made arrangements with the passenger in the vehicle to follow the patrol car to the Sheriff's Office and to drive Appellant to his residence after he was charged. When Deputy Chaney returned to the patrol car to inform Appellant that the vehicle would not be impounded, Appellant offered without prompting, "I also take a prescription, three Klonopin a day." (VIDEO) Deputy Chaney asked Appellant if he was permitted to drive, and Appellant responded that he was unaware of any limitations related to the prescribed medication.

{¶19} Appellant further stated that his physician had recently "upped his dose." (*Id.*, p. 72.) Deputy Chaney performed an internet search of Klonopin, which revealed that it is a Schedule IV narcotic and a depressant.

{¶20} At the Sheriff's Office, Appellant underwent an alcohol breath test. The test revealed a blood alcohol content of .021, far below the legal limit of .08. Nonetheless, Appellant was charged with OVI and a marked lanes violation. With respect to the OVI charge, Deputy Chaney testified that "with all the indicators and traffic violation, all the tests that were given, [the] combination of alcohol and drugs, [Appellant] was * * * too intoxicated to be driving." (*Id.*, p. 74.)

{¶21} On cross-examination, Deputy Chaney conceded that no drug test was administered because the Sheriff's Office did not have a contract with a laboratory to test for drugs at the time of Appellant's arrest. Likewise on cross-examination, Deputy Chaney conceded that Appellant did not display many signs of impairment consistent with the use of marijuana. Deputy Chaney did not detect the odor of marijuana on Appellant's

person, and Appellant's eyes were not watery or bloodshot. Deputy Chaney further conceded that Appellant did not cross the double-yellow lines dividing the highway, he maintained the appropriate speed, he stopped at a stop sign, and he did not fumble for his drivers' license.

{¶22} During cross-examination, defense counsel challenged the propriety of several aspects of Deputy Chaney's administration of the field sobriety test. Deputy Chaney conceded that he instructed Appellant to place his hands beneath his chin while Deputy Chaney administered the horizontal gaze nystagmus test. A subject's hands are typically held at his or her sides during the test. Deputy Chaney explained that he asked Appellant to place his hand beneath his chin so that Appellant's hands were in full view while Deputy Chaney administered the test.

{¶23} Deputy Chaney further conceded during cross-examination that he did not test for resting nystagmus, nor did he perform the vertical gaze nystagmus test or examine Appellant for equal pupil size. Deputy Chaney conflated the "equal tracking" aspect of the horizontal gaze nystagmus test with "lack of smooth pursuit." Finally, Deputy Chaney admitted that the administration of the horizontal gaze nystagmus test should require two minutes to complete, but that he completed the test in roughly one minute.

{¶24} During closing argument, defense counsel emphasized that Appellant did not display many of the signs consistent with intoxication, and the breath test confirmed that he had consumed one or two beers, just as he had stated when asked. Likewise, Deputy Chaney did not detect the odor of marijuana on Appellant's person during the traffic stop, which was consistent with Appellant's statement that he smoked marijuana in the morning hours of the previous day. Finally, defense counsel argued that Deputy Chaney failed to properly administer the field sobriety test.

{¶25} Despite the foregoing arguments, the jury entered a guilty verdict on the OVI charge. After the trial court thanked the jury for its service, the state announced that it was prepared to proceed to sentencing. However, defense counsel asked the trial court to postpone the sentencing hearing for a few days to permit Appellant to prepare for a jail sentence.

{¶26} Due to Appellant's failure to timely appear on a few occasions during the pretrial proceedings, the trial court set an appearance bond in lieu of a date for

sentencing. Seemingly taken off course by the state's desire to proceed to sentencing, and defense counsel's objection, the trial court did not announce its verdict on the marked lanes violation, despite the fact that it had been tried simultaneously with the OVI charge to the bench.

{¶27} At the sentencing hearing held five days later, the trial court stated, "[t]here was a jury trial held in this case a few days ago. A jury returned a guilty verdict against [Appellant] for driving – operating under the influence in violation of Section 4511.19(A)(1), and the court found him guilty of a marked lanes violation, minor misdemeanor, at the same trial." (6/22/2021 Sent. Hrg., p. 2.) The trial court further observed that "because it appears from [Appellant's] record that he [had] one prior OVI conviction within the past ten years that there is a slightly enhanced mandatory minimum penalty. The maximum penalty is the same, it's 180 days, but the mandatory minimum is at least ten days incarceration." (*Id.*)

{¶28} The state set forth Appellant's criminal history as follows:

> [C]riminal convictions that we have here is [sic] a domestic violence in '98, in 2000 felony five theft, trafficking drugs in 2001, drug trafficking, five counts, felony four, also in 2001, different case number though. One is in [Tuscarawas] County. The other is – yeah, the other one is from Cambridge PD so they're two different cases, close in time. There's a 2011 theft – no, that's 1999 theft out of Massillon Muni Court. They didn't actually complete until 2015.
>
> As for driving record, start from the oldest to newest, 1994, under age OVI; 1998, assured clear distance; 1999, OVI, with that OVI there's a failure to control; 2010 OVI; 2010 OVI amended – or physical control amended from OVI, and with that there is also a failure to control and speed; in 2016 speed.
>
> He's had suspensions – there's a court suspension for the 2010 case for looks like six months. Noncompliance suspension. * * * There's also accidents in '14, '92, and '98, and one in '97.

(*Id.* at p. 2-3.)

{¶29} At the request of defense counsel, the state clarified that there were two separate OVI charges in 2010, the first in Harrison County for which Appellant was convicted on August 18, 2010, and the second in Tuscarawus County which was amended to physical control. Defense counsel argued that the majority of Appellant's crimes occurred when Appellant was a young adult.

{¶30} The trial court imposed a sentence of 180 days, with 100 days suspended, and a fine of $1,625.00, with $800.00 suspended on the OVI and $100 on marked lanes violation. The trial court further imposed a term of probation of five years and an equivalent license suspension.

ASSIGNMENT OF ERROR NO. 1

THE FIRST ASSIGNMENT OF ERROR IS THAT APPELLANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

{¶31} In his first assignment of error, Appellant contends that the state did not bring him to trial in accordance with Ohio law. However, Appellant did not move to dismiss his case based on an alleged speedy trial violation before the trial court.

{¶32} R.C. 2945.73, captioned "Discharge for delay in trial," reads, in pertinent part, "Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." R.C. 2945.73(B). Based on the foregoing statute, Ohio courts have universally recognized that the issue of speedy trial cannot be raised for the first time on appeal. The failure to file an appropriately-timed motion on speedy trial grounds constitutes a waiver of the issue on appeal. *State v. Paige*, 7th Dist. Mahoning No. 17 MA 0033, 2019-Ohio-1088, ¶ 68. Therefore, we decline to consider the argument advanced in the first assignment of error.

ASSIGNMENT OF ERROR NO. 2

THE SECOND ASSIGNMENT OF ERROR IS THAT THE APPELLANT'S RIGHT TO A TRIAL WAS VIOLATED REGARDING THE MINOR MISDEMEANOR CHARGE.

{¶33} In his second assignment of error, Appellant contends that the trial court violated Crim. R. 23(C), captioned "Trial Without a Jury," which reads, in its entirety, "In a case tried without a jury the court shall make a general finding." Appellant asserts that the trial court erred as a matter of law when it failed to enter a verdict on the marked lanes violation following the entry of the jury's verdict on the OVI. He cites no case law in support of the foregoing argument.

{¶34} The trial court announced its verdict on the marked lanes violation for the first time at the sentencing hearing. Unaware that the verdict had not been announced at the trial, the trial court's statement regarding the marked lanes violation at the sentencing hearing was made in the past tense.

{¶35} There is a paucity of case law interpreting Crim. R. 23(C), with the majority of cases recognizing the rule that no findings of fact or conclusions of law must be issued by the trial court following a bench trial, even where they are requested by the defendant. See, e.g., *State v. McCune*, 11th Dist. Portage No. 1020, 1981 WL 4393, *3 ("Crim. R. 23(C) clearly prescribes the trial court shall render a general verdict. He is not required to make findings of fact and conclusions of law as a court is required to do by Civ. R. 52 if a civil case is tried to the court and he renders a general verdict"); *State v. Zoldak.*, 8th Dist. Cuyahoga No. 36560, 1977 WL 201601, *2 ("The trial judge was under no compulsion to explicate his decision with findings of fact and conclusions of law, Crim. R. 23(C).")

{¶36} The only case which analyzes the issue raised in the second assignment of error is the Ninth District's decision in *City of Oberlin v. Loyer*, 9th Dist. Lorain No. 3307, 1982 WL 2733. In that case, the trial court made no finding of guilt, but instead, proceeded directly to sentencing. The Ninth District opined:

> We interpret this rule to mean that a general finding of guilty must be made by the court before sentence may be imposed. While this record contains evidence to support a finding of guilt to this charge nevertheless we remand for a finding by the court and if the finding is one of guilty then sentence may be imposed.

Id. at *2.

{¶37} Here, Deputy Chaney's testimony regarding the marked lanes violation was uncontroverted. Consequently, like the record in *Loyer,* the record in this case contains evidence to support a finding of guilt on the marked lanes violation charge. Unlike the record in *Loyer*, the trial court announced its verdict at the sentencing hearing, although in the past tense, prior to imposing the sentence.

{¶38} Because Appellant's conviction for the marked lanes violation was not omitted by the trial court entirely, as in *Loyer*, we find that the trial court committed no error when it failed to announce the verdict on that charge at the conclusion of the jury trial, and harmless error to the extent that it announced the verdict in the past tense at the sentencing hearing five days later. Accordingly, we find that the second assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 3

THE THIRD ASSIGNMENT OF ERROR IS THAT THE RECORD DID NOT SUPPORT A CONVICTION FOR 2ND OFFENSE OVI.

{¶39} In his third assignment of error, Appellant asserts that "there are not sufficient facts in the record for the trial court to have found that he had a prior OVI conviction, such to enhance the offense from OVI 1st offense to OVI 2nd offense." (Appellant's Brf., p. 24.) Appellant continues, "In support, no official documents or records appear at the sentencing hearing to support that [Appellant] did, in fact, have a prior [OVI] offense such to enhance the instant charge to OVI 2nd." (*Id.*) Appellant cites no case law that holds the state must offer official documents or records to establish a relevant prior OVI conviction.

{¶40} Appellant concedes that the 2010 OVI conviction was the subject of a motion in limine filed by Appellant to prohibit the introduction of testimonial evidence regarding the prior conviction. In the motion in limine, Appellant writes, 'In the event that Defendant is found guilty of OVI in the instant matter, and provided the State can prove said prior conviction, R.C. 4511.19(G)(1)(b)(i) would require the Court to impose a minimum penalty of 10 days in jail, among other required sentencing features." (11/2/20 Mot. in Limine, p. 1.) Appellant further concedes that the state provided a verbal list of

his prior convictions, including the 2010 OVI conviction, at the sentencing hearing, to which Appellant raised no objection.

{¶41} R.C. 4511.19(G)(1)(b) reads, in relevant part:

> Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within ten years of the offense, previously has been convicted of or pleaded guilty to one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first degree. The court shall sentence the offender to all of the following:
>
> (i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, a mandatory jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

{¶42} Based on Appellant's failure to object to the introduction by the state of Appellant's 2010 OVI conviction at the sentencing hearing, we review the trial court's finding that the current conviction constitutes Appellant's second OVI conviction in the previous ten years for plain error. 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, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶43} Although no documentary evidence was offered at the sentencing hearing, a copy of Appellant's LEADS summary is attached to the citation issued to Appellant on October 12, 2019. The LEADS summary includes Appellant's August 18th, 2010 conviction for OVI. Therefore, we find that the trial court did not commit plain error in

concluding that the OVI conviction on appeal constituted Appellant's second OVI conviction within the statutorily-required ten-year period. We further find that Appellant's third assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 4

THE FOURTH ASSIGNMENT OF ERROR IS THAT THE CONVICTION SHOULD BE REVERSED DUE TO INSUFFICIENCY OF THE EVIDENCE AND/OR VERDICT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶44} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. Jefferson No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. Mahoning No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. Jefferson No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶45} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id.*

{¶46} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541. It is not a question of mathematics, but depends on the effect of the evidence in inducing belief. *Id*. Weight

of the evidence involves the states burden of persuasion. *Id.* at 390. The appellate court reviews 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins*, at 387, 678 N.E.3d 541. This discretionary power of the appellate court to reverse a conviction is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id.*

{¶47} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶48} Earlier this year, we reversed and vacated an OVI conviction in *State v. Love*, 7th Dist. Columbiana No. 21 CO 0009, -- Ohio --, based on the state's failure to establish a nexus between the unidentified drug of abuse and Love's impairment. During a traffic stop, Love exhibited uncontrollable body tremors and conceded that she had ingested something "not prescribed" the previous day. We vacated Love's conviction "[b]ecause law enforcement did not obtain a chemical test, no contraband was found in the vehicle or on [Love's] person, [Love] did not admit to use of a specific drug (a drug of abuse), and no other evidence was presented to demonstrate her impairment was caused by a specific drug of abuse." *Id.* at ¶ 27.

{¶49} In this appeal, Appellant argues that expert testimony was required to show that Appellant's prescription medication "actually affects a person or that the drug has the potential to impair a person's judgment or reflexes." *Chillicothe v. Lunsford*, 2015-Ohio-4779, 49 N.E.3d 852, ¶ 15 (4th Dist.) Appellant cites *State v. Hammond*, 4th Dist. Gallia No. 15CA6, 2016-Ohio-2753, for the proposition that the state must prove a "nexus" between the drug or drugs ingested and the impairment in order to establish a violation of R.C. 4511.19(A)(1)(a), which prohibits the operation of a vehicle when under the influence of drugs of abuse. *Id.* at ¶ 16; see also *State v. May*, 2014-Ohio-1542, 2014 WL 1419568, at ¶ 46 (in cases involving prescription drugs, the state can only establish OVI through direct testimony establishing the nexus between the ingestion of the drug and its impairment on driving by: (1) "the testimony of an expert who is familiar with the potential side effects of the medication" or (2) the testimony "of a layperson (such as a friend or family member) who witnesses the effect of the particular drug on the defendant-driver.")

{¶50} However, *Lunsford* and *Hammond* are distinguishable from the case sub judice, because the prescribed medication, a schedule IV depressant, was only one ingredient in a combination that also included alcohol and marijuana. Moreover, the Ohio Supreme Court in *State v. Richardson*, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, held that where the evidence, viewed in the light most favorable to the state, proved the defendant had ingested a drug of abuse (Richardson admitted to ingesting hydrocodone) and that it impaired his driving, it was sufficient to support his OVI conviction without expert testimony linking the drug to the impairment. *Id.* at ¶ 14. Like Richardson, Appellant conceded to ingesting the prescription drug, consuming alcohol, and smoking marijuana, during the traffic stop.

{¶51} The *Richardson* Court opined:

> When the effects of a drug are sufficiently well known – as they are with hydrocodone – expert testimony linking ingestion of the drug with indicia of impairment is unnecessary. And there was lay testimony that connected Richardson's impairment to the hydrocodone, i.e., the testimony of an experienced and well-trained police officer. On these facts, we hold that the evidence was sufficient to support Richardson's OVI conviction.

Id. at ¶ 19.

{¶52} According to Deputy Chaney's testimony, Appellant's vehicle was weaving in the westbound lane of State Route 250 for roughly five minutes, then he committed a marked lanes violation. During the traffic stop, Deputy Chaney detected the odor of beer on Appellant's person, Appellant's speech was slow and lethargic, and he was unsteady while exiting the vehicle. The horizontal gaze nystagmus test revealed six indicators of impairment. Further, Appellant failed to count his steps while undergoing the walk-and-turn test, during which he was unsteady. In a spontaneous outburst, Appellant attributed his inability to complete the walk-and-turn test to his use of marijuana. Likewise, Appellant volunteered the information that he was prescribed a commonly-recognized Schedule IV depressant and took three doses of the medication that same day.

{¶53} Based on the foregoing uncontroverted testimony, we find that Deputy Chaney's testimony, if believed, would support the OVI conviction. Appellant bore the physical manifestations of impairment, that is, his speech was slurred, he had difficulty maintaining his balance, and he failed the horizontal gaze nystagmus test. Appellant demonstrated cognitive impairment as well, as he did not count his steps as instructed during the walk-and-turn test, and he volunteered information regarding his use of marijuana after having recently increased his daily dosage of Klonopin. Accordingly, we further find that the jury did not lose its way and create such a manifest miscarriage of justice that the conviction should be reversed. Therefore, we find that the fourth assignment of error has no merit.

ASSIGNMENT OF ERROR NO. 5

THE FIFTH ASSIGNMENT OF ERROR IS THAT THE SENTENCE VIOLATED THE LAW.

{¶54} In *State v. Lazazzera*, 7th Dist. Mahoning No. 12 MA 170, 2013-Ohio-2547, the defendant entered a plea of no contest to an OVI charge. Despite Lazazzera's two previous OVI convictions, the state, in entering the plea agreement, agreed to amend the charge to a first offense. The Youngstown Municipal Court imposed a thirty-day sentence for the OVI conviction. For the first time on appeal, Lazazzera argued that his sentence

was disproportionate to the sentences imposed in twenty previous OVI and physical control cases by the same trial court.

{¶55} We observed that "[w]hile felony sentencing is governed by different statutes than misdemeanor sentencing, the structure of the felony sentencing analysis to determine whether the sentence is disproportionate for similarly situated defendants can be applied to the misdemeanor setting." *Id.* at ¶ 35. We provided the following analysis to be applied to misdemeanor sentences:

> For felony sentencing, courts have explained that "[c]onsistent sentencing occurs when a trial court properly considers the statutory sentencing factors and guidelines found in R.C. 2929.11 and 2929.12 in every case." *State v. Hyde*, 6th Dist. WD-11-008, 2012-Ohio-3616, ¶ 14. These statutes, respectively, govern the overriding purposes of felony sentencing and the factors to be considered when determining the appropriate sentence. While these statutes do not apply to misdemeanor sentencing, there are equivalent statutes that are applicable. They are R.C. 2929.21, which lists the overriding purposes of misdemeanor sentencing, and R .C. 2929.22, which lists factors to be considered when determining the appropriate misdemeanor sentence. *State v. Brooks*, 7th Dist. No. 05MA31, 2006-Ohio-4610, ¶ 17-19. A thorough reading of those statutes demonstrates that there are many considerations for determining the appropriate misdemeanor sentence, such as recidivism, the nature and circumstances of the offense, victim's age, the need to protect the public and rehabilitate the offender.

Id. at ¶ 35.

{¶56} In order to find merit in an offender's disproportionality argument, we observed that a reviewing court must only consider offenders that are similarly situated to the offender making the argument. Consequently, "knowing that other offenders were sentenced for the same offense and received a different sentence than the offender

asserting that his sentence is disproportionate, is not sufficient to demonstrate that his disproportionate sentencing argument has merit." *Id.*

{¶57} Finally, Lazazzera raised the disproportionate sentencing argument for the first time on appeal. Although we recognized that the issue was waived, we exercised our discretion to review Lazazzera's sentence for plain error in the interests of justice, then concluded that the offenders in the unreported cases cited by Lazazzera were not similarly situated with Lazazzera. *Id.* at ¶ 34.

{¶58} Appellant contends that the sentencing imposed here is disproportionate to the sentence imposed in *Lazazzera.* He argues, "Unlike [Appellant], Lazazzera had driven while intoxicated 3 times in 3 years." (Appellant's Brf., p. 36.)

{¶59} Like Lazazzera, Appellant waived his disproportionate sentencing argument because he failed to raise it before the trial court. However, even assuming arguendo that the issue is properly before us, Appellant and Lazazzera are not similarly situated, insofar as the state agreed in Lazazzera's plea agreement to treat his OVI conviction as a first offense. Accordingly, we find that Appellant's fifth assignment of error has no merit.

CONCLUSION

{¶60} For the foregoing reasons, Appellant's convictions and sentence are affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgments of the Harrison County Court of Harrison County, Ohio, are affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.