[Cite as *State v. Boeddeker*, 2010-Ohio-106.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-029
	:	O P I N I O N
- vs -		1/19/2010
	:	
DUSTIN S. BOEDDEKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY MUNICIPAL COURT
Case No. 2008-CRB-4051

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 N. Third Street, Batavia, OH 45103-3033, for plaintiff-appellee

Edward C. Perry, 810 Sycamore Street, Floor 6, Cincinnati, OH 45202, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Dustin Boeddeker, appeals his conviction in the Clermont County Municipal Court for one count of vehicular homicide. We affirm the decision of the trial court.

{¶2} On the evening of March 23, 2008, Boeddeker and his passenger, Erika Jividen, were traveling east on an area of State Route 131 that had a posted speed

limit of 45 m.p.h. According to an accident reconstruction, Boeddeker was traveling at over 65 m.p.h. when his car veered off a slight curve on the right side of the road onto a soft gravel shoulder. In order to compensate, Boeddeker jerked his wheel to the left in order to reenter the roadway, but found himself too far left. Boeddeker corrected again towards the right, losing control of his car in the process and causing the car to careen into a ditch and flip several times. Jividen, who was not wearing her seatbelt, was ejected from the car and died as a result of her injuries.

{¶3} According to Boeddeker, he and Jividen were in a relationship and on the day of the accident the two were traveling to Jividen's father's house to celebrate Easter Sunday. Boeddeker claims that he was traveling east at approximately 50 m.p.h on State Route 131 when he saw a gold car traveling west. Boeddeker told police that the gold car drifted left of center, causing him to swerve to avoid a head-on collision. Boeddeker claimed that his swerving to avoid the oncoming vehicle forced him into the ditch and caused the car to flip five to seven times before landing in a field. Boeddeker was essentially uninjured, and unaware that Jividen had been ejected from the car until he climbed out of the driver's side and found her lying in the field.

{¶4} During the investigation, police interviewed Bruce McCarty, the first person to call 911 after the accident occurred and driver of the gold car traveling west on State Route 131. Though he initially told police that he was a passenger in the car, McCarty later admitted that he was actually the driver, but had lied because he did not have a valid driver's license at the time of the accident. However, McCarty remained adamant that his vehicle never crossed the center line and that he did not force Boeddeker off of the road.

{¶5} After the investigation was complete, the Ohio State Highway Patrol filed a criminal complaint charging Boeddeker with one count of vehicular homicide. Boeddeker was convicted after a jury trial, and sentenced to 180 days in jail. Boeddeker now appeals his conviction and sentence, raising the following assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "DEFENDANT-APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL."

{¶8} In his first assignment of error, Boeddeker claims that his trial counsel was ineffective for failing to object to certain statements made during the prosecutor's opening statement and for failing to object to certain testimony from a state's witness. There is no merit to these arguments.

{¶9} The Sixth Amendment pronounces an accused's right to effective assistance of counsel. However, and warning against the temptation to view counsel's actions in hindsight, the United States Supreme Court stated that judicial scrutiny of an ineffective assistance claim must be "highly deferential * * *." *Strickland v. Washington* (1984), 466 U.S. 668, 689, 104 S.Ct. 2052.

{¶10} Also within *Strickland*, the Supreme Court established a two-part test that requires an appellant to establish that first, "his trial counsel's performance was deficient; and second, that the deficient performance prejudiced the defense to the point of depriving the appellant of a fair trial." *State v. Myers*, Fayette App. No. CA2005-12-035, 2007-Ohio-915, ¶33, citing *Strickland*.

{¶11} Regarding the first prong, an appellant must show that his counsel's representation "fell below an objective standard of reasonableness." *Strickland* at

688. The second prong requires the appellant to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. Because the appellant must prove both prongs, a reviewing court need not address the deficiency issue if appellant was not sufficiently prejudiced by counsel's performance. Id. at 697.

{¶12} Boeddeker first claims that his trial counsel was ineffective because he failed to object to certain statements made during the prosecutor's opening statement. Specifically, the prosecutor told the jury that "the defendant is going to make or attempt to make a big deal out of the fact that the Defendant was taking evasive action to avoid this vehicle that's in the middle of his lane up ahead. * * * They're going to want to point the finger at Mr. McCarty and blame him."

{¶13} According to Boeddeker, his trial counsel should have objected to the prosecutor's statements because they were arguments better suited for closing argument rather than an opening statement, and that the statements were too speculative as to the defense's theory of the case. Boeddeker further claims that the prosecutor's preview of the defense's case also deprived him of the right not to testify because it implied to the jury what Boeddeker would say on the stand, thereby prejudicing him because he did not actually testify when the state's opening statement made it seem as if he would. While Boeddeker claims that the opening statement essentially prejudiced the jury against him, a review of the record indicates otherwise.

{¶14} During voir dire, Boeddeker's counsel specifically told the potential jurors that Boeddeker would not be testifying and asked them if anyone would hold that fact against him. None of the potential jurors indicated that they would be

prejudiced by Boeddeker exercising his right to remain silent. Trial counsel then went on to ask the potential jurors if anyone had been in a situation where they were driving "and an oncoming car crosses over the center line into your lane?" Also during the voir dire, trial counsel asked the few jurors who indicated involvement in a car accident if their accident involved anyone crossing the center line.

{¶15} While Boeddeker claims that his trial counsel should have objected to the prosecutor's opening statement that made reference to what the defense would try to prove, the state was merely referencing strategy Boeddeker's trial counsel had already made reference to during voir dire and what the general nature of the case would be. See *State v. Hamilton*, Clermont App. No. CA2001-04-044, 2002-Ohio-560, *4, (explaining that the "purpose of an opening statement is to acquaint the jury with the general nature of the case and to outline the facts which counsel expects the evidence to show"). Additionally, we cannot see how these comments would have made the jurors think that Boeddeker was going to take the stand when his trial counsel specifically told the jury that he would be exercising his right to not testify.

{¶16} Because the jury was already aware of the defense's strategy, and had been explicitly informed that Boeddeker was not going to testify, Boeddeker has failed to show how he was prejudiced by his trial counsel's failure to object to the prosecutor's opening statement. Boeddeker has therefore failed to demonstrate that his counsel was ineffective.

{¶17} Boeddeker next argues that his counsel was ineffective for failing to object to the state calling Paula Cupp, Jividen's mother, as a witness. During Cupp's testimony, the jury heard a brief description of what Jividen's life was like before she was killed in the accident. Cupp spoke of Jividen's younger siblings, her education,

where she worked, and that she "loved life." The state then entered Jividen's picture into evidence, and asked no further questions. Boeddeker's trial counsel did not cross-examine Cupp and did not object to the photograph being entered as an exhibit.

{¶18} Boeddeker now claims that his trial counsel should have objected because Cupp's testimony was inadmissible where Jividen's death was not in dispute and Jividen's character was not relevant to whether Boeddeker committed vehicular homicide. Even if we were to agree with Boeddeker that an objection may have been successful based on the inadmissibility of Cupp's testimony, we cannot say that trial counsel's failure to object was anything more than trial strategy. See *Strickland*, 466 U.S. at 689-690 (holding that a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy).

{¶19} Here, while the state and Boeddeker stipulated that Jividen died as a result of the car accident, had trial counsel objected to Cupp's testimony, it may have negatively impacted the jury's opinion of Boeddeker. An objection to testimony from the victim's mother may have left the jury feeling resentful that Boeddeker was trying to shield the jury from hearing more about Jividen. Trial counsel's strategy may have also been to allow Cupp's testimony to proceed without objection to avoid the possibility that the jury would consider Boeddeker unsympathetic to the loss suffered by Cupp and Jividen's family and friends.

{¶20} In a similar situation, the Eighth District Court of Appeals also recognized that the trial counsel's decision to not object to testimony regarding the victim can be considered trial strategy. *State v. Brown*, Cuyahoga App. No. 84059,

2004-Ohio-6862. "* * * [R]epeated objections to the testimony of the victim's wife may have soured the jury. It is possible that the jurors would have viewed counsel's objections as an affront to a sympathetic witness, and counsel could rationally conclude that an objection was not worth the risk of antagonizing the jury. While we admit that all of this is in the realm of possibility, not probability, our standard of review for ineffective assistance of counsel requires us to give strategic decisions of counsel wide latitude." Id. at ¶38.

{¶21} In addition to sound trial strategy, we also conclude that Boeddeker has failed to demonstrate the requisite prejudice because there is no reason to believe that the results of the trial would have been different had Cupp not testified. Instead, and as will be discussed in greater detail under Boeddeker's fourth assignment of error, the physical evidence supported the conviction. See *State v. Wharton*, Summit App. No. 23300, 2007-Ohio-1817 (rejecting ineffective assistance of counsel claim where victim impact evidence was not prejudicial because of other evidence of guilt).

{¶22} Having found no prejudice, Boeddeker cannot show that his trial counsel was ineffective in failing to object to the state's opening statement or in failing to object to Cupp's testimony. Boeddeker's first assignment of error is therefore, overruled.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT ERRED WHEN IT PERMITTED A STATE'S EXPERT WITNESS TO TESTIFY THAT DEFENDANT-APPELLANT WAS NEGLIGENT."

{¶25} In his second assignment of error, Boeddeker asserts that the state's expert witness usurped the power of the jury by testifying that Boeddeker was

negligent. While we agree that the trial court should not have permitted the state's expert to answer a question going to the ultimate issue, we find the error harmless.

{¶26} During the state's case-in-chief, it called Sergeant Charles Scales who is an accident reconstruction supervisor with the Ohio State Highway Patrol. The state and Scales went through 19 photographs taken at the scene of Boeddeker's accident, and Scales explained how various markings on and off of the road led him to conclude that Boeddeker's car veered off of a curve in the road onto the soft gravel shoulder, and how other marks indicated that he overcorrected to the left before overcorrecting again to the right.

{¶27} Scales then went into detail regarding the two different ways a reconstructionist can ascertain the speed a car travels before an accident. Scales explained to the jury the processes he employed and then stated his conclusion that Boeddeker was traveling in excesses of 65 m.p.h. prior to his car veering off of the road onto the soft gravel shoulder.

{¶28} Soon after giving his estimate, the state asked Scales if he had "an opinion, based once again upon a reasonable degree of scientific and forensic certainty, as to whether the defendant was negligent and had a substantial lapse of due care as he operated his vehicle and the resultant crash on March 23rd, 2008?" Although Boeddeker objected to the state's question, the court allowed Scales to answer because the parties had stipulated to Scales' expertise. Scales then stated that "there was a substantial lapse of care in that [Boeddeker] failed to maintain himself in his lane and, in fact, drifted off the side of the roadway at the end of that curve."

{¶29} According to Evid.R. 702 (A), a witness may testify as an expert so long

as such testimony "relates to matters beyond the knowledge or experience possessed by lay persons * * *." Additionally, Evid.R. 704 states that "testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

{¶30} Based on the requirements of these two evidentiary rules, before an expert may testify as to the ultimate issue, it must be determined that "(1) the witness is qualified as an expert by knowledge, skill, experience, training, or education; and (2) scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to decide an issue of fact." *Lee v. Baldwin* (1987), 35 Ohio App.3d 47, 49.

{¶31} Because the parties stipulated Scales' expertise, there is no dispute regarding the first prong set forth in *Lee v. Baldwin*. While the trial court recognized the first aspect of permitting ultimate issue testimony under rules 704 and 702, it failed to address whether Scales' determination of negligence would be beneficial to the jury. After reviewing the record, we find that due to Scales' detailed and informative testimony, the jury had before it all the necessary facts from which to determine whether the accident was caused by Boeddeker's negligence. His specific answer regarding Boeddeker's negligence, was therefore inadmissible because it offered no assistance to the jury.

{¶32} Specifically, the jury heard Scales testify regarding the many steps necessary to reconstruct an accident and how to interpret all of the collected data. We recognize that without Scales' testimony, it would have been nearly impossible for the jury to understand all of the hypertechnical aspects of accident reconstruction and what the scene of the accident revealed about the moments leading up to the

accident. However, as stated above, Scales and the state walked through each of the 19 photographs taken at the scene of the accident and how each clue indicated where Boeddeker went off of the road and why.

{¶33} After hearing all of the evidence and all of Scales' explanations, the jury could readily draw the necessary inferences and conclusions without the aid of Scales' ultimate issue opinion. Although we have found that the trial court erred in permitting Scales to offer his opinion of Boeddeker's negligence, we find this error harmless for two reasons.

{¶34} First, the jury was instructed that it was under no obligation to believe a witness simply because they testified under oath. While we are in no way suggesting that Scales' testimony in any way lacked credibility, his testimony did offer a version of events contrary to the defense's case. As stated, Boeddeker asserted that he was run off the road by the oncoming car, and the jury was free to disregard Scales' testimony and instead find that the facts favored Boeddeker's claim that he was not negligent.

{¶35} Through opening statements, cross-examination, and every stage of the trial, Boeddeker presented the jury with the possibility that he swerved to avoid a head-on collision with McCarty's car. Therefore, the jury was left to determine whether it believed Scales' interpretation of the physical evidence, and if the accident reconstruction was enough to overcome Boeddeker's assertion that he was not negligent in operating his vehicle on the day of the accident.

{¶36} Second, we recognize that Scales' testimony was cumulative to that of other evidence offered at trial. During its case-in-chief, the state called Laura Frenkiel who was driving behind Boeddeker when the accident occurred. Although she

somewhat supported Boeddeker's claim by testifying that McCarty's oncoming car momentarily crossed the center line approximately one tire width, she specifically testified that Boeddeker was speeding; that he "kind of went off the road, onto the ditch and when he tried to go back onto the road he flipped"; that the oncoming car did not come into Boeddeker's lane "to the point where you need to swerve away from it"; and that she believed the accident was Boeddeker's fault.

{¶37} Scales' testimony is also cumulative to the physical evidence presented during the state's case-in-chief. The jury saw multiple pictures showing where and why Boeddeker's car went off of the road, where and how it reentered, and where and why it finally careened into the ditch. This is not a case where Boeddeker was prejudiced because Scales' offered a baseless opinion or one where Scales' opinion was any sort of tiebreaker among differing eye witness accounts. See *Baldwin* 35 Ohio App.3d 47, (reversing judgment where expert offered ultimate issue opinion even though he failed to first explain how data led him to his conclusion); and *State v. Campbell*, Hamilton App. Nos. C-010567, C-010596, 2002-Ohio-1143 (reversing conviction where expert testified to ultimate issue although his opinion only served to verify the victim's veracity).

{¶38} Instead, given the cumulative nature of Scales' testimony and considering that the jury was free to disregard his opinion of Boeddeker's negligence, we are unable to say that the trial court's error had any prejudicial effect sufficient to justify reversal. Boeddeker's second assignment of error is overruled.

{¶39} Assignment of Error No. 3:

{¶40} "THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION IN LIMINE, DENYING THE DEFENDANT-APPELLANT PROPER CROSS-

EXAMINATION OF A STATE'S WITNESS."

{¶41} In his third assignment of error, Boeddeker asserts that the trial court erred in granting the state's motion in limine because by doing so, he was denied the right to effectively cross-examine McCarty. There is no merit to this argument.

{¶42} During the trial, the state asked the court to prohibit Boeddeker from cross-examining McCarty about a prior conviction for operating a vehicle under the influence (OVI). Before McCarty testified, the court heard arguments from both the state stating why the testimony regarding McCarty's prior bad act was inadmissible, as well as Boeddeker's argument that the testimony was admissible for impeachment purposes. After considering the respective arguments, the court granted the state's motion.

{¶43} Boeddeker now asserts that the trial court erred by granting the state's motion in limine because by doing so, the court prohibited his right to confrontation. The state counters Boeddeker's argument by stating that the trial court did not err because the testimony was not needed to impeach the witness because McCarty openly testified on direct examination to lying to police about being the driver of the oncoming car. However, we need not determine whether the trial court's ruling was erroneous because Boeddeker did not object to the court's ruling during McCarty's testimony and has therefore waived this argument on appeal.

{¶44} "A decision on a motion in limine is a pretrial, preliminary, anticipatory ruling on the admissibility of evidence. * * * It therefore cannot serve as the basis for an assignment of error on appeal. * * * An appellate court need not review the propriety of such an order unless the claimed error is preserved by a timely objection when the issue is actually reached during the trial. The failure to object at trial to the

allegedly inadmissible evidence constitutes a waiver of the challenge." *State v. Baker*, 170 Ohio App.3d 331, 2006-Ohio-7085, ¶9. (Internal citations omitted.)

{¶45} During the morning portion of trial, and immediately preceding a lunch recess, the court considered the state's motion in limine and granted it. When the trial resumed after the recess, the state called McCarty who testified regarding his perception of the accident. Specifically, McCarty testified that at no time did his car cross the center line, and that he had slowed down and was stopped well before Boeddeker's car careened into the ravine.

{¶46} Boeddeker then cross-examined McCarty and asked several questions specific to why McCarty initially lied to police about being a passenger in his car. McCarty then admitted that he was fearful of the repercussions of driving under suspension. At that time, Boeddeker should have objected and renewed his argument for why the trial court should have permitted him to question McCarty about the suspension and whether he had crossed the center line in the past instance. However, Boeddeker failed to object, or to proffer what his specific questions would have been, at the point when the issue was actually reached at trial.

{¶47} Without Boeddeker's objection, the trial court was not asked to determine the evidence's admissibility in its actual context so that we cannot review the trial court's decision when none was actually made. Therefore, Boeddeker waived his argument on appeal, and his third assignment of error is overruled.

{¶48} Assignment of Error No. 4:

{¶49} "THE JURY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶50} In his fourth assignment of error, Boeddeker claims that his conviction

is against the manifest weight of the evidence. This argument lacks merit.

{¶51} A manifest weight challenge examines the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298. "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines 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. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12. Therefore, an appellate court will overturn a conviction only when the evidence presented at trial weighs heavily in favor of acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶52} Boeddeker was convicted of one count of vehicular homicide in violation of R.C. 2903.06(A)(3)(a) which states, "no person, while operating or participating in the operation of a motor vehicle * * * shall cause the death of another * * * in any of the following ways: negligently." According to R.C. 2901.22(D), "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."

{¶53} The jury heard from several witnesses regarding the sequence of events immediately preceding the accident. McCarty testified that he saw Boeddeker's car veer off onto the soft shoulder, and that Boeddeker overcorrected multiple times before flipping into the field. McCarty also testified that he never

crossed the center line, that he was never close enough to Boeddeker to force him off of the road, and that he had enough time to slow down and come to a stop before Boeddeker's car flipped into the field.

{¶54} The jury also heard the testimony of Laura Frenkiel who was driving behind Boeddeker when the accident occurred. As stated above, Frenkiel supported Boeddeker's claim that McCarty's oncoming car momentarily crossed the center line. However, she stated that McCarty's car crossed only one tire width over the line and that it did not come into Boeddeker's lane "to the point where you need to swerve away from it." She also testified that Boeddeker was speeding; that he "kind of went off the road, onto the ditch and when he tried to go back onto the road he flipped"; and that she believed the accident was Boeddeker's fault.

{¶55} The state also presented physical evidence for the jury's consideration during its direct examination of Sergeant Scales, the accident reconstruction supervisor with the Ohio State Highway Patrol. During his testimony, the jury saw multiple pictures of the accident site and heard what the visual clues demonstrated about Boeddeker's actions immediately preceding the accident. Specifically, this physical evidence confirmed that Boeddeker was speeding; that his car veered onto the soft shoulder; and that he overcorrected multiple times before his car careened into the ravine causing his car to flip several times and land in the field.

{¶56} After weighing the evidence and all reasonable inferences, we cannot say that 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.

{¶57} Boeddeker's fourth assignment of error is overruled.

{¶58} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.