

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-12-317
- vs -	:	<u>OPINION</u> 8/15/2011
VAN M. COMBS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAIRFIELD MUNICIPAL COURT
Case No. 2010 TRC 00705

Steven J. Wolterman, Fairfield City Prosecutor, 530 Wessel Drive, Suite 2A, Hamilton, Ohio 45014, for plaintiff-appellee

Jeffrey C. Meadows, 8310 Princeton-Glendale Road, West Chester, Ohio 45069, for defendant-appellant

POWELL, P.J.

{¶1} Van M. Combs seeks to overturn his conviction for operating a motor vehicle while under the influence of alcohol or drugs (OVI) and a traffic violation. We affirm the judgment of the Fairfield Municipal Court as there was sufficient evidence of the traffic violation, the trial court did not err in overruling his Crim.R. 29 motion on the OVI charge, and the jury did not lose its way when it found him guilty of OVI.

{¶2} Combs was driving a vehicle on Nilles Road at approximately 1:20 a.m. when he was stopped by Fairfield City Police. He was arrested for OVI and issued a citation for weaving. A jury found Combs guilty of OVI and the trial court found him guilty of the weaving violation. On appeal, Combs raises three assignments of error for our review.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED IN FINDING DEFENDANT GUILTY OF THE MARKED LANE VIOLATION UNDER THE FAIRFIELD ORDINANCE 331.34(B)[.]"

{¶5} Combs argues that he was observed slightly drifting within his lane and therefore, there was insufficient evidence to convict him of a marked lane violation.

{¶6} When reviewing the sufficiency of the evidence, 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 offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶7} As Combs noted in his assignment of error, he was charged with violation of Fairfield City Ordinance 331.34(b). That section, titled: "Failure to Control; Weaving; Full Time and Attention," states in subsection (b): "No person shall operate a vehicle in a weaving or zigzag course unless such irregular course is necessary for safe operation or in compliance with law."

{¶8} Fairfield Police Officer Elli King testified that she stopped Combs' pickup truck after she observed Combs twice weave within his lane within a distance of one mile. The trial court, as trier of fact, considered the testimony and found Combs guilty of the traffic ordinance. After reviewing the record with the appropriate standard in mind, we find sufficient evidence supports the trial court's decision. Combs' first assignment of error is

overruled.

{¶19} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIM.R. 29[.]"

{¶11} Combs argues that his motion for acquittal should have been granted because the officer's opinion that he was "possibly impaired" was insufficient for the OVI conviction.

{¶12} R.C. 4511.19(A)(1) states that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶13} "(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶14} According to the record, Officer King stopped Combs' vehicle after she observed his vehicle weave within its lane. Officer King testified that she walked up to the driver's side window of Combs' truck and immediately observed that Combs' eyes were glassy. She said she smelled a "slight odor commonly associated with alcohol upon his person." Officer King indicated that Combs' behavior seemed "to be slow and lethargic, but he did produce his license." She asked Combs if he had anything to drink; he said he had "nothing."

{¶15} Officer King said she decided to check Combs before allowing him to leave because of the odor of alcohol, his eyes, and his actions. Fairfield Police Officer Michelle Bretton arrived on the scene to assist Officer King.

{¶16} Officer Bretton testified that Combs was getting out of the vehicle as she approached. When she stepped within a couple of feet of Combs, she said she could "smell the odor of alcohol emanating from him."

{¶17} Officer Bretton asked Combs to perform field sobriety tests, starting with the walk and turn test. Officer Bretton said she explained to Combs how to complete the test and he said he understood. She also described how Combs performed the test. Officer Bretton said Combs exhibited four of eight clues on the walk and turn test, explaining that exhibiting two clues would indicate "there is possibly an impairment." Officer Bretton said, "I felt that there was enough impairment that he needed to be removed from driving the vehicle."

{¶18} Officer Bretton testified that she next explained the one-leg stand test to Combs. He reportedly asked if he was required to do this test and then asked for an attorney. At that point, Officer Bretton said she arrested Combs and took him to the police department. Combs subsequently refused to permit a chemical test of his breath.

{¶19} Officer Bretton indicated she felt Combs was impaired. When asked a second time about her opinion "now today," the officer said Combs was "possibly impaired." The officer concluded her direct testimony by indicating she did not feel comfortable that night allowing Combs to leave the police department and drive his vehicle home.

{¶20} When reviewing the trial court's denial of a motion for acquittal under Crim.R. 29, an appellate court applies the same test it would in reviewing a sufficiency of the evidence argument. *State v. Alkire*, Madison App. No. CA2008-09-023, 2009-Ohio-2813, ¶51. As we previously noted in the first assignment of error, 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. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. Further, a reviewing court must not substitute its evaluation of the witnesses' credibility for that of the jury. *State v. Benge*, 75 Ohio St.3d 136, 143, 1996-Ohio-227.

{¶21} Officer Bretton used the term, "possibly impaired" when asked her opinion of Combs' condition, but she also indicated during her testimony that she held the opinion that Combs was impaired and should not be permitted to drive his vehicle. Given both officers' testimony, their observations of Combs' behavior, and his performance on the one field sobriety test, we find the trial court did not err in overruling Combs' motion for acquittal as any rational trier of fact could have found the essential elements of the OVI offense beyond a reasonable doubt. Combs' second assignment of error is overruled.

{¶22} Assignment of Error No. 3:

{¶23} "THE JURY LOST ITS' WAY BY RENDERING A VERDICT THAT WAS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE[.]" [sic]

{¶24} Combs argues the state failed to show beyond a reasonable doubt that he was guilty of OVI when the officer testified that he was "possibly impaired."

{¶25} We note that we reviewed the sufficiency of the evidence under the second assignment of error; Combs presented no evidence after he moved for acquittal. We will review the manifest weight of the evidence challenge, mindful that a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, but this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Perkins*, Fayette App. No. CA2009-10-019, 2010-Ohio-2968, ¶9; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31.

{¶26} A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39. The question is 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. *Id.* A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment on the weight of the evidence in a jury trial. *State v. Thompkins*, 78 Ohio St.3d 380, 389, 1997-Ohio-52.

{¶27} We previously outlined the evidence presented by the prosecution. Cross-examination of the two officers revealed that they did not observe or testify to other indicia of impairment or intoxication, such as fumbling for documentation, stumbling, needing support to walk, slurred speech, and the like.

{¶28} Combs again focuses on Officer Bretton's use of the statement "possibly impaired." The record indicates the jury heard both police officers testify they were concerned about Combs' possible impairment. Testimony was presented about the circumstances preceding the stop, the encounter with police, and the one field sobriety test. As previously noted, Officer Bretton subsequently testified she believed Combs was impaired, and she would not be comfortable permitting him to drive. See *State v. Barrett*, Butler App. No. CA2003-10-261, 2004-Ohio-5530, ¶16 (crucial issue in driving under the influence prosecution is the behavior of the defendant, his ability to perceive, make judgments, coordinate movements, and safely operate a motor vehicle).

{¶29} Applying the applicable standard of review for this assignment of error, we find the jury did not clearly lose its way and create such a manifest miscarriage of justice that the conviction must be reversed. The conviction for OVI was supported by sufficient evidence and was not contrary to the manifest weight of the evidence. Combs' third assignment of error is overruled.

{¶30} Judgment affirmed.

PIPER and HUTZEL, JJ., concur.