

[Cite as *State v. Belmonte*, 2011-Ohio-1334.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 10AP-373
	:	(C.P.C. No. 09CR-02-0836)
v.	:	
	:	
Christopher Belmonte,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on March 22, 2011

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*Ron O'Brien*, Prosecuting Attorney, and *Sarah W. Creedon*,  
for appellee.

*Law Offices of Thomas F. Hayes, LLC*, and *Thomas F. Hayes*;  
*J. Scott Weisman Law Offices, LPA*, and *J. Scott Weisman*,  
for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Christopher Belmonte, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas in which the court found him guilty, pursuant to a jury verdict, of two counts of aggravated vehicular homicide, in violation of R.C. 2903.06, one a second-degree felony and one a third-degree felony; four counts of aggravated vehicular assault, in violation of R.C. 2903.08, felonies of the third degree; four counts of vehicular assault, in violation of R.C. 2903.08, felonies of the fourth degree; and two

counts of operating a motor vehicle under the influence of drugs or alcohol, in violation of R.C. 4511.19, misdemeanors of the first degree.

{¶2} On December 19, 2008, at about 5:35 p.m., appellant was at his brother's restaurant helping him prepare food for an event later that evening. Footage from the restaurant's surveillance video shows that, at 5:59 p.m., appellant consumed one double Jack Daniel's and Coke. At 6:32 p.m., appellant consumed another double Jack Daniel's and Coke. Appellant left the restaurant a few minutes later.

{¶3} At about 6:50 p.m., Dennis Wilburn and appellant were involved in an automobile collision. Dalynaca Watrous, the 11-year-old daughter of Wilburn who was traveling with Wilburn, died in the accident. Marissa, David, and Harley Moorhead, the children of Wilburn's girlfriend, were in the backseat of Wilburn's vehicle and suffered serious injuries, as did Wilburn. Another child was in Wilburn's vehicle, but none of the indicted counts pertained to her. Appellant also suffered injuries in the accident.

{¶4} Franklin County Sheriff Deputy David Aurigemma testified he had one 30-second conversation with appellant while he was still in his vehicle and then later a one-minute conversation with appellant while he was still in his vehicle. Aurigemma smelled a "slight to moderate" odor of alcohol emanating from appellant, and he notified his supervisor, Lieutenant Crowston. Appellant was transported to the hospital.

{¶5} Crowston sent Franklin County Sheriff Deputy Scott Morris to the hospital to obtain a blood sample from appellant. Morris smelled a "slight" odor of alcohol while he conversed with appellant at the hospital. Morris then read appellant the BMV 2255 ALS form ("implied consent form"), which indicates an arrest for operating a vehicle under the influence. Appellant consented to have his blood drawn for testing, and the blood was

drawn at 8:20 p.m. The parties stipulated that appellant had a blood alcohol content ("BAC") of 0.140 grams at the time the blood sample was obtained. Dr. John Wyman testified at trial that by back-extrapolating from appellant's 0.140 BAC at the time of the blood draw, appellant had a BAC of 0.048 to 0.063 at the time of the accident.

{¶6} Appellant was indicted as follows: Count 1 – aggravated vehicular homicide, which pertained to the death of Watrous; Count 2 – aggravated vehicular homicide, which pertained to the death of Watrous; Count 3 – aggravated vehicular assault, which pertained to the injuries to Wilburn; Count 4 – vehicular assault, which pertained to the injuries to Wilburn; Count 5 – aggravated vehicular assault, which pertained to the injuries to Marissa; Count 6 – vehicular assault, which pertained to the injuries to Marissa; Count 7 – aggravated vehicular assault, which pertained to the injuries to David; Count 8 – vehicular assault, which pertained to the injuries to David; Count 9 – aggravated vehicular assault, which pertained to the injuries to Harley; Count 10 – vehicular assault, which pertained to the injuries to Harley; Count 11 – operating a vehicle under the influence of alcohol or drugs; and Count 12 – operating a vehicle under the influence of alcohol or drugs.

{¶7} A jury trial commenced on February 23, 2010, and the jury returned a verdict finding appellant guilty on all counts. On April 2, 2010, the trial court entered judgment on the jury verdict and sentenced appellant to prison terms of eight years on Count 1; three years on Count 3; one year on Counts 5, 7, and 9; and six months on Count 11. The court ordered Counts 1, 3, 5, 7, and 9 to be served consecutively to each other and concurrent to Count 11, for a total of 14 years. The court merged the remaining counts for purposes of sentencing, imposed a lifetime driver's license suspension, placed

appellant on community control for five years as to Count 11, and ordered appellant to perform 500 hours of community service. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

I. Appellant was denied [a] fair trial [a]s guaranteed by the sixth and fourteenth amendments of the United States Constitution because the defendant was denied effective assistance of counsel.

II. The trial court erred by allowing Dr. Wyman to testify about the effect a blood-alcohol content of .048 to .063 has on an average person.

III. Appellant's convictions were not supported by the evidence and were against the manifest weight of the evidence.

IV. Prosecutorial misconduct deprived the defendant of a fair trial and due process of law in violation of the fourteenth amendment to the U.S. Constitution.

V. The Court erred by allowing improper opinion testimony to be admitted over objection in closing statements.

VI. The trial court erred by imposing consecutive sentences without making the required statutory findings pursuant to R.C. 2929.14(E)(4) and R.C. 2929.11.

{¶8} Appellant argues in his first assignment of error that he was denied effective assistance of counsel. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. *McMann v. Richardson* (1970), 397 U.S. 759, 771, 90 S.Ct. 1441, 1449. Courts employ a two-step process to determine whether the right to effective assistance of counsel has been violated. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the

"counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.*

{¶9} An attorney properly licensed in the state of Ohio is presumed competent. *State v. Lott* (1990), 51 Ohio St.3d 160, 174. The defendant has the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100. In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶10} Appellant first argues that his trial counsel was ineffective when he failed to file a motion to suppress the blood alcohol test despite the fact that the police did not have probable cause to arrest him. To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question. *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, ¶65.

{¶11} Appellant's contention is that the officer did not have a right to request that he voluntarily submit to a blood alcohol test because the officer did not have probable cause to believe that appellant was driving under the influence of alcohol. A valid arrest supported by probable cause that a defendant was operating a motor vehicle while under the influence of alcohol is a condition precedent to obtaining a defendant's consent to take a blood alcohol test after reading the implied consent form. *State v. Risner* (1977),

55 Ohio App.2d 77, 80; R.C. 4511.191(A). In the absence of a valid arrest, consent obtained after a reading of the implied consent form is considered involuntary, and the test results are inadmissible. *Risner* at 80. The legal standard for determining whether the police had probable cause to arrest an individual for operating a motor vehicle while intoxicated is whether, "at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence." *State v. Homan* (2000), 89 Ohio St.3d 421, 427; *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 225. In making this determination, the trial court must examine the totality of facts and circumstances surrounding the arrest. See *State v. Miller* (1997), 117 Ohio App.3d 750, 761; *State v. Brandenburg* (1987), 41 Ohio App.3d 109, 111. Probable cause to arrest may exist, even without field sobriety test results, if supported by such factors as: evidence that the defendant caused an automobile accident; a strong odor of alcohol emanating from the defendant; an admission by the defendant that he or she was recently drinking alcohol; and other indicia of intoxication, such as red eyes, slurred speech, and difficulty walking. *Oregon v. Szakovits* (1972), 32 Ohio St.2d 271; *Fairfield v. Regner* (1985), 23 Ohio App.3d 79, 84; *State v. Bernard* (1985), 20 Ohio App.3d 375, 376; *Westlake v. Villfroy* (1983), 11 Ohio App.3d 26, 27; *State v. Slocum*, 11th Dist. No. 2007-A-0081, 2008-Ohio-4157, ¶50 (admission by a driver that he has consumed alcoholic beverages is a factor to be considered in a probable cause determination for a driving under the influence arrest).

{¶12} Here, after examining the totality of the facts and circumstances, we find that, at the moment of arrest, the police had sufficient information to cause a prudent

person to believe appellant was driving under the influence. Deputy Aurigemma testified it was sprinkling rain when he arrived at the scene, and the roadways were wet. He interacted with appellant on two occasions at the scene while appellant sat in his vehicle. The first communication lasted about 30 seconds, and the second communication lasted about one minute. Both communications concerned appellant's medical condition and his transportation to the hospital, although appellant did give a vague description of what had happened. Aurigemma testified that, during these interactions, he smelled a slight to moderate odor of alcohol coming from appellant's vehicle. He then notified Lieutenant Crowston that he had smelled alcohol. Because of appellant's pain and injuries, Aurigemma could not perform any field sobriety tests.

{¶13} Deputy Scott Morris testified that, based on Aurigemma's information, Crowston sent Morris to the hospital to check on appellant's well being and draw his blood for testing. Morris stated that, at the hospital, appellant told him he had consumed a "couple" of beers. Morris said appellant was upset about being involved in the accident, and he smelled a slight odor of alcohol from appellant. Appellant was cooperative and listened to and appeared to understand everything Morris said. Appellant also told Morris that he thought he was "messaging" with his cell phone and went left of center at the time of the accident. Morris then read appellant the BMV 2255 ALS implied consent form. He said appellant was very cooperative and consented to a blood test.

{¶14} Appellant's main contention is that there was no probable cause to believe he had been driving intoxicated at the time Crowston ordered Morris to go to the hospital and obtain a blood sample from appellant, and the statements that appellant gave to Morris regarding his alcohol consumption and Morris's smelling of alcohol on appellant's

person were subsequent to Crowston's order for a blood draw. However, the relevant inquiry is whether police had probable cause "at the moment of arrest." *Homan* at 427. The moment of arrest was not until after Morris arrived at the hospital and gained further information from appellant. Based upon all of the information obtained prior to the arrest, the police had probable cause to arrest appellant. Beyond the evidence of the automobile accident itself, Aurigemma also smelled a slight to moderate odor of alcohol on appellant at the scene. Appellant then admitted to Morris at the hospital that he had consumed a couple of beers prior to the accident and believed he had traveled left of center. Morris also smelled a slight odor of alcohol on appellant's person. Although neither Morris nor Aurigemma witnessed appellant having red eyes, slurred speech, or difficulty walking, as pointed out by appellant, that he admitted he may have caused the automobile accident by traveling left of center, had an odor of alcohol emanating from him, and admitted he had been recently drinking alcohol constituted sufficient information to cause a prudent person to believe appellant was driving under the influence. Therefore, appellant's assignment of error is overruled in this respect.

{¶15} Appellant also argues that his trial counsel was ineffective for failing to object to Morris's testimony at the suppression hearing regarding the use of an anticoagulant during appellant's blood alcohol test. Appellant argues that Ohio Adm.Code 3701-53-05(C) mandates that a solid anticoagulant be present in a vacuum container at the time of a blood draw for a blood alcohol test, and that when the lab technician was unable to testify as to whether there was an anticoagulant in the vial, Morris gave inadmissible expert testimony under Evid.R. 702 that an anticoagulant was, in fact, in the

vial. Appellant maintains that Morris was not qualified as an expert to testify about the presence of an anticoagulant in the vial.

{¶16} However, appellant premises his arguments upon the operation of the Ohio Rules of Evidence. It is well-established that the rules of evidence are not applicable to hearings on motions to suppress. *State v. Boczar*, 113 Ohio St.3d 148, 151, citing Evid.R. 101(C)(1) and 104(A). Therefore, at a suppression hearing, the court may rely on evidence even though that evidence would not be admissible at trial. *Maumee v. Weisner*, 87 Ohio St.3d 295, 298, 1999-Ohio-68, citing *United States v. Raddatz* (1980), 447 U.S. 667, 679, 100 S.Ct. 2406, 2414. Thus, officials at suppression hearings may rely on hearsay and other evidence to determine whether alcohol test results were obtained in compliance with methods approved by the Director of Health, even though that evidence may not be admissible at trial. *State v. Edwards*, 107 Ohio St.3d 169, 2005-Ohio-6180, paragraph two of the syllabus. Accordingly, because Morris's testimony on this issue was not inadmissible at the suppression hearing on the argued grounds, we find appellant's trial counsel was not ineffective for failing to object to Morris's testimony. For these reasons, appellant's first assignment of error is overruled.

{¶17} Appellant argues in his second assignment of error that the trial court erred by allowing Dr. Wyman, chief toxicologist for the Franklin County Coroner's Office, to testify regarding the effect a BAC of .048 to .063 has on an average person. Appellant contends the testimony on the effects of low alcohol levels in the body was not scientifically valid or reliable. A trial court's ruling as to the admission or exclusion of expert testimony is within its broad discretion and will not be disturbed absent an abuse of discretion. *State v. Tomlin* (1992), 63 Ohio St.3d 724, 728.

{¶18} Evid.R. 702 provides that:

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

{¶19} In the present case, appellant's argument is that Dr. Wyman's testimony did not meet the requirement of Evid.R. 702(C) that his testimony be based on reliable scientific information. To determine the reliability of expert scientific testimony, a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid. *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 1998-Ohio-178, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 592-93, 113 S.Ct. 2786, 2796. To make that assessment, several factors are to be considered: (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review; (3) whether there is a known or potential rate of error; and (4) whether the methodology has gained general acceptance. *Id.*; see also *Valentine v. PPG Industries, Inc.*, 158 Ohio App.3d 615, 2004-Ohio-4521, ¶25. None of these factors are determinative. *Coe v. Young* (2001), 145 Ohio App.3d 499, 504. Rather, the inquiry is flexible, focusing on the underlying principles and methodologies and not on the resulting conclusions. *Miller* at 611.

{¶20} Appellant's main argument relates to Dr. Wyman's use of an article from the National Highway Traffic Safety Administration ("NHTSA article"). Dr. Wyman testified the

NHTSA article indicates that one may be impaired at even lower levels of BAC, such as 0.05, and at 0.05, people in the general population have loss of inhibitions, altered judgment, and slowed reaction times. Appellant relies upon the following portions of Dr. Wyman's testimony to argue that the NHTSA article was not scientifically reliable, both in general and as applied to the present case: Dr. Wyman testified he was not familiar with the studies underlying the NHTSA article; he admitted he did not know if the underlying studies were inaccurate or if they were done in a manner that was scientifically acceptable or able to pass peer review; he testified the level at which impairment occurs among the general population is variable; he did not know whether appellant was an average person to which the article would necessarily apply; and he admitted that some people would be perfectly able to operate a vehicle with a BAC of 0.048 or 0.063.

{¶21} However, after reviewing the whole of Dr. Wyman's testimony, we find the trial court did not err in permitting Dr. Wyman to testify and rely upon the NHTSA article. Initially, we note that Dr. Wyman indicated that his opinions and testimony were based upon his knowledge, experience, and research, and he mentioned the NHTSA article as an example of research he had reviewed on the subject. He did not testify that the whole of his opinion on these issues was based upon that single article. Nevertheless, we find Dr. Wyman sufficiently established the reliability of the NHTSA article and he could rely upon it, in part, to support his opinions. Dr. Wyman stated the article was prepared for the United States government by two individuals who reviewed the complete literature on the subject, including peer review journals. Dr. Wyman also pointed out that there were over 100 papers in the review, so it was a "significant" review. His belief was that the article was valid based upon who published it. Dr. Wyman further testified that, since the NHTSA

article was published in April 2000, he had not seen any papers invalidating the article. Instead, to the contrary, Dr. Wyman said he had attended week long workshops regarding the effects of alcohol and driving, and the article was used as a teaching aid. He could not comment as to whether the NHTSA article was "widely" accepted in the toxicology community, but he said it was an "important" document in the community. We conclude these circumstances demonstrate the theories in the NHTSA article were reliable, in that it was used and relied upon by members of the scientific community and based upon studies that had been subject to peer review.

{¶22} As to appellant's argument that the NHTSA article was not scientifically reliable as applied to him because the article dealt with the "average" person, and Dr. Wyman could not say whether appellant was an average person to which the article would necessarily apply, this argument goes to the weight rather than the admissibility of Dr. Wyman's testimony. As one court explained in addressing the admissibility of expert testimony based upon "the average person," "parties are, of course, at liberty to attack the evidence and to seek to demonstrate through cross-examination or the introduction of other evidence that the test results for an 'average person' do not accurately reflect the blood-alcohol level of appellant at the time of the offense. The jury can then decide what weight to give to the test results." *State v. Worthington*, 5th Dist. No. 2004-CA-0083, 2005-Ohio-4719, ¶60 (finding that such an argument goes toward the weight rather than admissibility of the testimony). Thus, we do not find the trial court erred when it allowed Dr. Wyman to testify in terms of the "average person," based upon the NHTSA article. For these reasons, appellant's second assignment of error is overruled.

{¶23} Appellant argues in his third assignment of error that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. In reviewing a sufficiency of the evidence claim, the relevant inquiry is whether any rational fact finder, viewing the evidence in a light most favorable to the state, could have found all of the essential elements of the crime proven beyond a reasonable doubt. *State v. Jones*, 90 Ohio St.3d 403, 417, 2000-Ohio-187, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, and *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* at 390. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789. Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273.

{¶24} This court's function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *Thompkins* at 387. In order to undertake this review, we must sit as a "thirteenth juror" and review the entire record, weigh the evidence and all reasonable inferences, consider

the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *Id.*, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we find that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. *Id.* On the other hand, we will not reverse a conviction so long as the State of Ohio, plaintiff-appellee, presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-94, 1998-Ohio-533.

{¶25} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. See *Martin* at 175. However, in conducting our review, we are guided by the presumption that the jury, or the trial court in a bench trial, "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Thus, a reviewing court must defer to the factual findings of the jury or judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Concerning the issue of assessing witness credibility, the general rule of law is that "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. Indeed, the fact finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412. If evidence is susceptible to more than one construction, reviewing courts must give it the

interpretation that is consistent with the verdict and judgment. *White v. Euclid Square Mall* (1995), 107 Ohio App.3d 536, 539. Mere disagreement over the credibility of witnesses is not sufficient reason to reverse a judgment. *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202.

{¶26} In the present case, appellant contends that the state clearly failed to prove he was under the influence of alcohol at the time of the fatal accident. In support, appellant argues that Dr. Wyman placed appellant's BAC between 0.048 and 0.063, which was below the statutory per se violation level of 0.08 BAC; Dr. Wyman admitted that, although the NHTSA article indicated average people can be impaired with a 0.05 BAC, he did not know appellant and some people can operate a motor vehicle in a satisfactory manner at that level; Deputy Aurigemma said appellant had only a slight to moderate odor of alcohol; and Deputy Morris testified that he smelled only a slight odor of alcohol on appellant at the hospital, appellant was cooperative, and appellant said he only had a "couple" of beers.

{¶27} We have already addressed Dr. Wyman's partial reliance upon the NHTSA article, and we find that his testimony supports the jury's verdict. Dr. Wyman also concluded that a BAC of 0.05 would impair the average person's reaction time, which is the type of skill necessary to properly operate a vehicle. Dr. Wyman also stated that the average person's judgment would be impaired at this BAC level. That appellant lacked proper judgment and reactions was demonstrated by Wilburn's testimony, as well as appellant's own admission at the hospital, that appellant had driven his vehicle into Wilburn's lane of travel. In addition, the same evidence appellant relies upon above to make his insufficiency and manifest weight arguments actually supports findings that the

evidence was sufficient and not against the manifest weight of the evidence. In making his arguments above, appellant attempts to minimize the evidence by pointing out what the testimony did not demonstrate and explaining how it could have been better, when the proper focus is what the evidence did demonstrate. The evidence showed appellant admitted drinking a "couple" of beers at the hospital and then later admitted to drinking two double shots of Jack Daniel's and Coke; appellant had a BAC between 0.048 and 0.063 at the time of the accident, and Dr. Wyman said a 0.05 BAC results in impaired driving of the average person; Deputy Aurigemma said appellant had a slight to moderate odor of alcohol at the accident scene; and Deputy Morris testified he smelled a slight odor of alcohol on appellant at the hospital. While we agree that the evidence could have been even more convincing if appellant's BAC had been higher, if he had admitted to having more beers, if he had admitted to drinking more double shots, if Dr. Wyman had performed a personal examination of appellant to determine if he was "the average person," and if the deputies had smelled an overwhelming odor of alcohol, appellant presents no authority for the proposition that such quanta of evidence are required for a reasonable jury to conclude that appellant had been operating a vehicle while impaired. This evidence was sufficient to show impairment, and the greater amount of credible evidence supports a finding of impairment.

{¶28} Appellant also argues that the state failed to show he recklessly caused the death of Watrous and the injuries to the other occupants because appellant testified he saw Wilburn's vehicle enter his lane of traffic and he attempted to avoid it by swerving on a wet road. Operating a vehicle "recklessly" is an element of both aggravated vehicular homicide under R.C. 2903.06(A)(2)(a) and aggravated vehicular assault under R.C.

2903.08(A)(2)(b). "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). As explained above, the state presented evidence that appellant was operating his vehicle while impaired by alcohol. Consuming alcohol prior to operating a motor vehicle may demonstrate heedless indifference to the consequences of one's actions and a perverse disregard of a known risk, as is required by R.C. 2901.22 to demonstrate reckless conduct. *State v. Crabtree*, 10th Dist. No. 09AP-1097, 2010-Ohio-3843, ¶18, citing *State v. Gaughan*, 9th Dist. No. 08CA0010-M, 2008-Ohio-5528, ¶39, citing *State v. Wamsley* (Feb. 2, 2000), 9th Dist. No. 19484. The state also presented evidence that appellant was in Wilburn's lane of travel, and appellant admitted to police at the hospital that he traveled left of center and consumed alcohol. This evidence was sufficient to demonstrate appellant disregarded a known risk that his conduct was likely to cause a vehicular accident that would cause death or serious physical harm to others. Although appellant counters that he testified at trial that Wilburn's vehicle was in his lane of travel and was the cause of the accident, the jury apparently chose not to believe appellant's version of the events. Appellant has given this court no reason to reject the jury's credibility determination, and the jury was free to disbelieve appellant on this point, particularly given that he gave a conflicting statement at the hospital that he had traveled left of center. Therefore, we find the jury's verdict was based upon sufficient evidence and not against the manifest weight of the evidence. Appellant's third assignment of error is overruled.

{¶29} Appellant argues in his fourth assignment of error that prosecutorial misconduct on two occasions during closing arguments deprived him of a fair trial and

due process of law. Appellant first asserts the prosecutor improperly gave his personal opinion on the evidence when he stated during closing arguments, "Mr. Belmonte said that he saw that driveway on the opposite side of the road and decided to try to use that to avoid an accident. I don't believe it at all. I would suggest that you don't believe it at all, because if he missed that driveway, went beyond the driveway - -." The defense objected at this point, but the trial court overruled the objection.

{¶30} Parties are given wide latitude when making their closing arguments. *State v. Hand*, 107 Ohio St.3d 378, 397, 2006-Ohio-18, citing *Lott*. The state can summarize the evidence and draw conclusions as to what the evidence shows. *Id.* at 165. However, the prosecution must avoid insinuations and assertions that are calculated to mislead the jury. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. Prosecutors also may not render their personal beliefs regarding the guilt of the accused. *Id.* Nevertheless, since isolated instances of prosecutorial misconduct are usually harmless, any alleged misconduct in the closing argument must be viewed within the context of the entire trial to determine if any prejudice has occurred. See *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420.

{¶31} In the present case, although the prosecutor stated, "I don't believe it at all," which would be a statement of personal opinion, he followed the statement in the next sentence with his suggestion why the jury should also not believe appellant's testimony based upon reasonable conclusions that could be drawn from the evidence. A prosecutor may comment upon the testimony of witnesses and suggest the conclusions to be drawn. *Hand* at ¶116. A prosecutor may even point out a lack of credibility of a witness, if the record supports such a claim. *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009-Ohio-7085, ¶13, citing *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, ¶45. Furthermore, the

Supreme Court of Ohio has held that a prosecutor may express his personal opinion in closing arguments if he bases that opinion on the evidence presented in court. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 408. As indicated above, after the prosecutor made the statement, he started to explain why appellant's statement should not be believed based upon the evidence presented during trial. Although prosecutors should avoid such personal statements, given the fine line that must be walked when doing so, in the present case, the prosecutor's statement was not improper.

{¶32} We also note that, even if the prosecutor's statement rose to the level of misconduct, we find there was no reversible error. The prosecutor moved on and made no similar remarks after the trial court overruled the defense's objection, lessening the likelihood of prejudice. See *State v. Ware*, 8th Dist. No. 82644, 2004-Ohio-1791, ¶19 (for purposes of a claim of prosecutorial misconduct, defendant failed to demonstrate that he was prejudiced by prosecutor's improper remarks when, among other things, there were no further similar remarks). Therefore, this argument is without merit.

{¶33} Appellant next argues that the prosecutor engaged in misconduct when the state misconstrued facts not in evidence in four instances during closing statements. Initially, we note that appellant failed to object to any of these statements by the prosecutor. The failure to object to prosecutorial misconduct waives all but plain error. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, ¶77, 84.

{¶34} In the first instance, the prosecutor said, "Dr. Wyman said that he would be at a .048 or a .063. That is intoxicated." Appellant argues there was no testimony that he was impaired at that level, and Dr. Wyman testified that he did not know how impaired appellant was at the time of the accident. However, we have already found that there was

sufficient evidence presented that would support a finding that appellant was impaired at that level. Therefore, this argument is without merit.

{¶35} In the second instance, the prosecutor said, "Mr. Belmonte has told you - - we already know that he walks like a penguin and that at a .14 he is perfectly fine and not intoxicated to drive a car, that is what he is saying." Appellant argues that at no time did he state he was perfectly fine to drive at a BAC of 0.14, only that he had the ability to drive several minutes after finishing the last drink. At trial, appellant testified that he was "perfectly fine" four times during his testimony, relating to four different periods on the night in question. Three of the periods were on the drive to his brother's bar; while he was drinking at the bar; and at the time of the collision. However, appellant's testimony was somewhat unclear regarding the fourth period. The initial question that eventually lead to appellant's fourth "perfectly fine" reference was, "[a]nd tell the ladies and gentlemen of the jury what the effects, if any, of that alcohol, what the effect was, if any, on you that evening. Were you intoxicated?" This question was broadly worded and seems to encompass the entire evening, which would include the period his blood was tested at a BAC level of 0.14 at the hospital. In addition, appellant later testified that he was used to the consumption of alcohol, his alcohol consumption that day did not impair his ability to operate a motor vehicle and make decisions in any way, and he fully cooperated with police because he had nothing to hide. This testimony is also broadly worded and suggests appellant believed his alcohol consumption did not impair his ability to drive or make decisions at any period that evening, which would include the period at the hospital when his blood was tested at a BAC of 0.14. Based upon this testimony, we cannot say

that the prosecutor's comment that appellant was "perfectly fine" at a BAC of .14 rose to the level of misconduct. Therefore, this argument is without merit.

{¶36} In the third instance, the prosecutor said Dr. Wyman testified that, when someone consumes alcohol, one "can become drowsy. Your vision can be blurred." Appellant contends Dr. Wyman never testified in either respect. As for the "drowsy" comment, Dr. Wyman did testify that, while those who drink a lot may show up to work with a BAC of 0.02 and no one would know they were intoxicated, most people would be asleep at this level. Thus, we find the prosecutor's drowsy comment was reasonably related to the evidence present and not improper. As for the blurred vision comment, although Dr. Wyman did testify as to a host of other ill effects of alcohol, we agree that Dr. Wyman did not specifically mention blurred vision as one of the effects. However, the prosecutor never made any further references to blurred vision, and we cannot find the trial court's allowance of this single, isolated comment by the prosecutor amounted to plain error. Therefore, this argument is without merit.

{¶37} In the fourth instance, the prosecutor said that Dr. Wyman uses the NHTSA article "for teaching, or it is being used in teaching." Appellant argues that Dr. Wyman never presented such testimony. However, Dr. Wyman specifically testified that he had attended week long workshops on the effects of alcohol and driving, and the NHTSA article was used as a "teaching aid." Therefore, the prosecutor's comment was based upon the evidence presented at trial. For all the foregoing reasons, appellant's fourth assignment of error is overruled.

{¶38} Appellant argues in his fifth assignment of error that the trial court erred when it allowed improper opinion testimony to be admitted over objection in closing

argument. This assertion is premised upon the same statement by the prosecutor that he contests in his fourth assignment of error; that is, "Mr. Belmonte said that he saw that driveway on the opposite side of the road and decided to try to use that to avoid an accident. I don't believe it at all. I would suggest that you don't believe it at all, because if he missed that driveway, went beyond the driveway - -." As we have found above that the prosecutor's statement, in this respect, was not improper, we find the trial court did not err when it overruled appellant's objection regarding this statement. Therefore, appellant's fifth assignment of error is overruled.

{¶39} Appellant argues in his sixth assignment of error that the trial court erred by imposing consecutive sentences without making the required statutory findings pursuant to R.C. 2929.14(E)(4) and 2929.11. The gist of appellant's argument is that *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, has been abrogated by *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, and therefore, the trial court was required to make findings and provide reasons for imposing consecutive terms. The Supreme Court of Ohio, however, recently rejected appellant's argument in *State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, paragraphs two and three of the syllabus. Accordingly, appellant's sixth assignment of error is overruled.

{¶40} Accordingly, appellant's first, second, third, fourth, fifth, and sixth assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

FRENCH and CONNOR, JJ., concur.

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