

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

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-02-016
 :
 - vs - : OPINION
 : 9/20/2010
 :
 KELLY S. LISTO, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CR00311

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

R. Daniel Hannon, Clermont County Public Defender, Robert F. Benintendi, 10 South Third Street, Batavia, Ohio 45103, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Kelly S. Listo, appeals her convictions in the Clermont County Common Pleas Court on two counts of operating a motor vehicle while under the influence of alcohol and one count of driving under suspension. We affirm her convictions.

{¶2} In the early morning hours of April 16, 2009, Officer Ryan Frasher of the Miami Township Police Department observed a Chevy Silverado pick-up truck leaving

Pete's Café. Officer Frasher decided to follow the vehicle after learning that the vehicle's driver may have been driving under suspension. When the vehicle pulled into a convenience store Officer Frasher noticed a male and female had gotten out of the vehicle and were heading toward the store. Officer Frasher then radioed the vehicle's license plate number to the National Crime Information Center, requesting that it be checked, and then relocated to a nearby parking lot to await the results. The NCIC check revealed that the vehicle was registered to "Kevin Mobley" and that Mobley had limited driving privileges.

{¶13} Upon seeing the vehicle driving away, Officer Frasher noticed that the vehicle was now being driven by a female and began following it again. When the officer observed the vehicle commit a marked lane violation by driving over the yellow hatch marks that preceded a left turn lane, he turned on his overhead lights and siren to stop the vehicle. The vehicle finally stopped when Officer Frasher turned his spotlight on the vehicle. When Officer Frasher pulled in behind the vehicle, he could see, in the driver's side mirror, the facial features of the woman who had been driving the vehicle. When the vehicle's driver-side door opened, Officer Frasher's back-up officer ordered the occupant to stay inside the vehicle. Officer Frasher then saw a female's arm reach out and close the driver's door. When Officer Frasher approached the vehicle on the driver's side, he could see the woman climbing over her male passenger, who turned out to be Mobley, in order to exchange seats with him.

{¶14} The woman who had been driving the vehicle was subsequently identified as Listo. She admitted to Officer Frasher that she had had "a few" beers. Officer Frasher noticed an odor of alcoholic beverage on Listo and saw that her eyes were bloodshot and glassy. Officer Frasher administered several field sobriety tests to Listo who performed poorly on them, showing six out six possible clues on the Horizontal

Gaze Nystagmus test, two out of eight clues on the walk-and-turn test, and three out of four clues on the one-leg-stand test. Officer Frasher placed Listo under arrest for operating a motor vehicle while under the influence of alcohol and transported her to the police station for a breath test, which produced a result of .145. Officer Frasher also learned that Listo had been driving under suspension.

{¶15} Listo was indicted by a Clermont County Grand Jury on one count of operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), with a specification that she had committed five or more similar offenses within the past 20 years, a felony of the third degree; one count of operating a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(d), with a specification that she had committed five or more similar offenses within the past 20 years, a felony of the third degree; and one count of driving under OVI suspension in violation of R.C. 4510.14(A), a misdemeanor of the first degree. Listo was tried by a jury and convicted as charged. The trial court sentenced her to a prison term of three years.

{¶16} Listo now appeals, assigning the following as error:

{¶17} Assignment of Error No. 1:

{¶18} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY FAILING TO GRANT DEFENDANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO ESTABLISH EACH MATERIAL ELEMENT OF THE OFFENSE BEYOND REASONABLE DOUBT."

{¶19} Listo argues the trial court erred by overruling her Crim.R. 29(A) motion for acquittal made at the close of the state's evidence and renewed at the close of all evidence, because the state failed to present sufficient evidence to prove beyond a reasonable doubt that she had been operating the vehicle at the time in question. We disagree.

{¶10} "The review of a court's denial of a motion for acquittal under Crim.R. 29 is governed by the same standard as that used for determining whether a verdict is supported by sufficient evidence." *State v. Carroll*, Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. "In reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction." *Id.* "[T]he 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." *Id.*, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, syllabus.

{¶11} Officer Frasher testified at Listo's trial that on the night in question, he observed a Chevy Silverado pick-up truck pull up to a gas pump at a convenience store and a male and a female go inside the store. Having learned that the driver may have been under suspension, Officer Frasher pulled in behind the pick-up truck, radioed the truck's license plate number to NCIC, requested that it be checked, and then relocated to a nearby parking lot to await the results of the check. While Officer Frasher was deciphering the readout from NCIC regarding the license plate number, he saw the same pick-up truck that had pulled into the convenience store drive by his position, with the vehicle's driver side passing in front of him. Officer Frasher's headlights were on and they illuminated the pick-up truck's cab. Officer Frasher observed that a female was now driving the vehicle and that "she had darker colored hair, and it was kind of put up ponytail style." Whereas Mobley had short white or gray hair.

{¶12} After Officer Frasher stopped the vehicle, he shined his spotlight on the vehicle's driver side mirror, which is a standard police procedure designed to enhance officer safety by prohibiting a driver from looking back to see the officer's actions. When

he looked in the driver side mirror he could see the reflection of a female. He could tell the person whose reflection he saw was a female by her facial features and by noticing that the person's "hair was longer, darker *** [and] was up -- ponytail style." When the driver's side door opened up, Officer Frasher heard his back-up officer order the driver to stay inside the vehicle and to close the door. Officer Frasher then saw a female's arm reach out and shut the driver's side door. When Officer Frasher approached the vehicle, he saw the female driver climb over her male passenger (Mobley) in order to exchange seats with him. Officer Frasher testified that he was "100 percent" certain that Listo had been driving the vehicle at the time he stopped it.

{¶13} When this evidence is looked at in a light most favorable to the state as it must be in reviewing Listo's sufficiency claim, see *Carroll*, 2007-Ohio-7075 at ¶117, quoting *Jenks*, 61 Ohio St.3d 259, syllabus, the state presented more than sufficient evidence to prove that Listo was operating the vehicle at the time Officer Frasher stopped it, and therefore the trial court did not err in overruling her Crim.R. 29(A) motions for acquittal at the close of the state's case and at the close of all evidence.

{¶14} Consequently, Listo's first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ERRED IN ENTERING A FINDING OF GUILTY ON THE JURY'S VERDICT BECAUSE SUCH VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶17} Listo argues her convictions were against the manifest weight of the evidence because the state failed to prove beyond a reasonable doubt that she had been operating the vehicle at the time in question. We find this argument unpersuasive.

{¶18} "[A] manifest weight challenge 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. [*State v.*] *Wilson*, [Warren App. No. CA2006-01-007, 2007-Ohio-2298] at ¶34. 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 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. *Id.* In such a review, an appellate court considers the credibility of the witnesses and the weight to be given the evidence. *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. 'However, these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence presented.' *Id.*, citing *State v. DeHass* (1967), 10 Ohio St.2d 230." *Carroll*, 2007-Ohio-7075, at ¶118.

{¶19} Even when the credibility of the witnesses *is* taken into account and the evidence is *not* viewed in a light most favorable to the state, Listo's convictions were not against the manifest weight of the evidence. As set forth in our response to Listo's first assignment of error, the state presented ample evidence in this case to show that Listo had been operating the vehicle at the time in question. The fact that the identity of the vehicle's driver could not be seen from Officer Frasher's cruiser cam video and the fact that Listo cannot be seen exchanging seats with Mobley from that video did not render Officer Frasher's testimony on these matters unworthy of belief, and thus did not render the jury's verdict as being contrary to the manifest weight of the evidence. Consequently, Listo's second assignment of error is overruled.

{¶20} Assignment of Error No. 3:

{¶21} "APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL HER OR HER CO-DEFENDANT TO TESTIFY AT TRIAL."

{¶22} Listo argues her defense counsel provided her with ineffective assistance of counsel by not calling her as a witness to testify in her own behalf and by not calling Mobley to testify at trial. We find this argument lacks merit.

{¶23} To prevail on a claim of ineffective assistance of counsel, a criminal defendant has to demonstrate that his counsel's performance fell below an objective standard of reasonableness *and* that but for his counsel's deficient performance, there was a reasonable probability that the outcome of his trial would have been different. *State v. Raleigh*, Clermont App. Nos. CA2009-08-046, CA2009-08-047, 2010-Ohio-2926, ¶13, citing *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052, and *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. "Judicial scrutiny of counsel's performance must be highly deferential *** [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland* at 689; *Bradley* at 142.

{¶24} There is nothing in the record to suggest that the decision of Listo's defense counsel not to have Listo testify in her own behalf or to call Mobley as a witness fell below an objective standard of reasonableness. In fact, counsel's decision not to put his client on the stand could have been trial strategy. There is no evidence in the record to show what Listo's or Mobley's testimony would have been had they been called as witnesses, and thus there is no way to determine whether Listo was prejudiced by her counsel's failure to call them as witnesses. Consequently, Listo has failed to establish either prong of the *Strickland* standard, and therefore her ineffective assistance claim must fail.

{¶25} Accordingly, Listo's third assignment of error is overruled.

{¶26} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.