[Cite as *State v. Williams*, 2010-Ohio-1224.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 09AP-619
v.	:	(M.C. No. 2008 TRC 193959)
Reginald Williams,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 25, 2010

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker,* City Prosecutor, and *Melanie R. Tobias,* for appellee.

Joseph D. Reed, for appellant.

APPEAL from the Franklin County Municipal Court.

PER CURIAM.

{¶1} Defendant-appellant, Reginald Williams, appeals from a judgment of the Franklin County Municipal Court finding him guilty of operating a vehicle while impaired ("OVI") in violation of Columbus City Code 2133.01(A)(1)(a), refusing a breath test while having a previous OVI conviction within the past 20 years in violation of R.C. 4511.19(A)(2), unnecessary use of a horn in violation of City Code 2131.32(A), and operating a vehicle with prohibited window tints in violation of City Code 2137.221.

Because (1) the manifest weight of the evidence supports the jury's verdict finding defendant guilty of violating City Code 2133.01(A)(1)(a) and R.C. 4511.19(A)(2), (2) R.C. 4511.19(A)(2) is not unconstitutional, and (3) no plain error is evident in the prosecution's closing argument, we affirm.

I. Procedural History

{¶2} On the evening of October 3, 2008, shortly before 1:00 a.m., Officers Mike Muscarello and Jason Penhorwood, both with the Columbus Division of Police, were parked in a paddy wagon on East Fifth Avenue close to the intersection of Alton and near the Woods Bar. Driving a Black 1999 Crown Victoria, defendant sped by the bar at a high rate of speed, honking his horn. The officers pulled in behind defendant and signaled for him to stop. As a result of the stop, the officers ultimately charged defendant with (1) operating a vehicle while under the influence of alcohol, (2) refusing a chemical test while having a previous OVI conviction within the past 20 years, (3) unnecessary use of car horn, and (4) illegally tinted car windows. The alcohol-related offenses were tried to a jury; the jury rendered guilty verdicts. The two remaining minor misdemeanor offenses were tried to the court; the court entered guilty verdicts. The trial court sentenced defendant accordingly.

II. Assignments of Error

{¶3} Defendant appeals, assigning three errors:

> I. THE CONVICTION OF DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> II. THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT-APPELLANT'S MOTION TO DISMISS THE CHARGES OF A PRIOR REFUSAL WITHIN 20 YEARS IN VIOLATION OF RC 4511.19(A)(2).

III. DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL AS THE RESULT OF PROSECUTORIAL MISCONDUCT BY INJECTING RACE INTO THE CASE.

III. First Assignment of Error – Manifest Weight of the Evidence

{¶4} Defendant's first assignment of error asserts the manifest weight of the evidence does not support his conviction for OVI.

{¶5} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387; *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, at ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶6} According to the state's evidence, Officer Mike Muscarello and his partner, Jason Penhorwood, were sitting in a paddy wagon between 12:30 a.m. and 1:00 a.m. on October 3, 2008, observing traffic. At that time, defendant drove his car past the paddy wagon at a high rate of speed, "obnoxiously honking its horn" about five or six times. (Tr.

138.) When the vehicle passed the paddy wagon, the officers pulled the wagon in behind defendant's vehicle and initiated a traffic stop. Because of the tinted windows, they could not see inside the vehicle.

{¶7} As Muscarello approached the vehicle, defendant popped open the car door and exited the vehicle. The officer asked defendant if the window worked; when defendant replied that it did, the officer asked defendant to get back into the car. According to Muscarello, defendant slouched in his seat and seemed confused. When defendant opened the window, Muscarello immediately could smell a strong odor of alcohol. Muscarello asked defendant how many beers he had consumed or if he had been drinking; defendant responded that he had four beers and told the officer, "I can't get another DUI." (Tr. 141.) Muscarello noted defendant's speech was slurred and his eyes were glassy or "kind of glazed over." (Tr. 141.)

{¶8} Muscarello asked defendant to step out of the car for a field sobriety test. Once out of the car, defendant grabbed the door for support and hesitated. He and the officer then walked to the sidewalk, where defendant was "swaying heavily" as the officer attempted to talk to defendant. (Tr. 143.) Defendant told the officer, "I'm probably had too much to drink." (Tr. 145.) The officer's report specifically noted defendant used those words.

{¶9} Muscarello planned to administer three field sobriety tests, the horizontal gaze nystagmus, the one-leg stand, and the walk-and-turn. He began with the horizontal gaze nystagumus test, telling defendant to place his hands on his face, to hold his head still and to follow the tip of the officer's finger with his eyeballs only. The officer held his finger about a foot away from defendant's face; defendant followed the officer's finger to

the left, where the officer saw nystagmus. Defendant then looked at the officer, not at his finger. When the officer moved his finger to the right, defendant did the same. The officer tried moving his finger left again, but defendant was looking around or looking straight ahead. At that point Muscarello realized defendant was not going to be able to perform the rest of the test. A completed test will produce up to six clues indicating alcohol impairment; performance of half the test on defendant produced three clues.

{¶10} The officer then attempted to administer the walk-and-turn test. Defendant, however, did not give the officer a chance to fully explain but instead said, "I'm done, I'm not going to do it all." (Tr. 150.) With that, the officers placed defendant under arrest for OVI based on the field sobriety test, the odor of alcohol, his statements, and his glazed eyes. The officers additionally cited him for two minor misdemeanor offenses of unnecessary honking and illegal car window tint. They then handcuffed defendant, took him to the paddy wagon, searched him, took his property and put him in the back of the wagon. At some point they asked him to take a Breathalizer test, and defendant refused. Defendant undisputedly had prior OVI convictions in the 20 years preceding the events of October 3.

{¶11} Penhorwood's testimony corroborated the main points of Muscarello's testimony, including defendant's saying a half a dozen times that he did not want to receive another OVI citation. Penhorwood's testimony, however, differed in some respects. For example, although Muscarello testified he asked defendant to put his hands on his face during the horizontal gaze nystagmus test, Penhorwood stated defendant's hands remained at his side.

{¶12} Defendant's testimony varied significantly from that of the officers. Defendant testified that around 8:00 or 9:00 p.m. on October 2, 2008, he had dinner at Logan's Steakhouse with his family, where he admittedly drank beer. Defendant testified he shared the beer with his wife and consumed "[t]wo, three, maybe even four" beers. (Tr. 253.) Later that evening, he dropped his daughter off and picked up his other children who live on the north side of Columbus. He ultimately found himself on East Fifth Avenue a little after 12:30 in the morning on October 3. At the time, he was driving a Crown Victoria which is a "cop car—an ex-cop car with rims on it, 22-inch rims, a reflection paint job, just real tricked out, just real shiny." (Tr. 254.) He purchased the car shortly before his birthday on September 27 and intended to sell it.

{¶13} As he was driving down Fifth Avenue, he saw a couple of people he knew in front of Woods Bar. He stated he "blew my horn –- boom, boom, boom –- and just was riding. And the next thing you know I looked over and it was the cops were sitting in the back of Nick's, which is like up the street and back to the back." (Tr. 255.) Defendant kept driving. The "next thing I know I look in my rear view mirror and they pull me over." (Tr. 255.)

{¶14} Muscarello approached the car, asked defendant to get out of the car, did not ask him for identification, and "just was like –- somehow he just pulled me out the car, like, quick." (Tr. 256.) After defendant was out of the car, the officers asked him a couple of questions. Muscarello had defendant up against the car, looked at defendant's identification and told defendant he was going to take a test.

{¶15} In administering the horizontal gaze nystagmus test, Muscarello used a pen, not his finger. Defendant further testified that, contrary to Muscarello's testimony,

defendant did not raise his hand to his face during the horizontal gaze nystagmus test. Defendant explained he was in a serious car accident and suffered injuries that prevent him from moving his hand to his face. Moreover, contrary to Penhorwood's testimony, defendant stated he did not recall being asked to put his hand at his side during the horizontal gaze nystagmus test. Indeed, defendant stated no one told him what he should do for purposes of the test.

{¶16} When Muscarello actually began the test, he had the pen so close to defendant's face that defendant had to back up slightly. Defendant told the officer he had the pen too close to his face, but the officer responded by telling defendant to "[j]ust get in the car. * * * You ain't going – You ain't even taking the test." (Tr. 257.) A wrecker was called to take defendant's car, and the officers left defendant on the street. They ultimately returned but had no more interaction with defendant.

{¶17} Columbus City Code 2133.01(A)(1)(a) provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this City, 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." The manifest weight of the evidence supports the jury's determination that defendant is guilty of violating City Code 2133.01(A)(1)(a).

{¶18} According to the evidence, defendant was driving at a high rate of speed, was slouched in his seat, had a strong odor of alcohol about him, used the car for support once he exited the vehicle, and then walked slowly and unsteadily. His speech was slurred, and his eyes were glassy. When he attempted to perform the horizontal gaze nystagmus test, he was unable to fully follow the instructions. Nonetheless, in

administering half of the test, the officer saw three clues out of a possible six that indicated impairment.

{¶19} Although defendant's testimony unquestionably varied from the officers' testimony, the jury was charged with the responsibility of resolving the discrepancies and the credibility issues. Nothing in this record suggests the jury lost its way, despite some inconsistencies between the two officers' testimony. *Raver*, supra. Similarly, although defendant supports his argument by focusing on how quickly the officers purportedly acted, the officers' speed in conducting the stop and test was a factor for the jury to consider. Even if defendant's characterization is accurate, the officers' speed alone does not compel the additional conclusion that the state's evidence does not support the jury's verdict. Lastly, although the officers testified that they saw no signs of impairment while defendant was driving, that too, though a factor for the jury's consideration, does not compel the conclusion that defendant was not under the influence of alcohol or drugs when the officers saw defendant operate his car.

{¶20} In the final analysis, defendant's misdemeanor traffic violations provided a basis for the officers to stop defendant. In their interaction with defendant following the stop, defendant, as reflected in the officers' testimony, gave the jury an adequate evidentiary basis to convict him of OVI. Defendant's first assignment of error is overruled.

IV. Second Assignment of Error—Constitutionality of R.C. 4511.19(A)(2)(a)

{¶21} Defendant's second assignment of error contends the trial court wrongly concluded R.C. 4511.19(A)(2)(a) is constitutional. Defendant asserts the statute is "an unconstitutional requirement for a suspect to waive his rights as guaranteed by the Fifth Amendment to the Constitution of the United States and the Constitution of Ohio." (Brief,

9.) R.C. 4511.19(A)(2) provides that no person who, within 20 years of the current OVI charge, "previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall * * * (a) [o]perate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or combination of them"; and "(b) [s]ubsequent to being arrested for operating the vehicle * * * being asked by a law enforcement officer to submit to a chemical test or tests * * * and being advised by the officer * * * of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests."

{¶22} Defendant acknowledges the Ohio Supreme Court in *State v. Hoover,* 123 Ohio St.3d 418, 2009-Ohio-4993, held R.C. 4511.19(A)(2) does not violate search and seizure provisions of the Ohio and United States Constitutions. Defendant's second assignment of error is overruled.

V. Third Assignment of Error—Prosecutorial Misconduct

{¶23} Defendant's third assignment of error contends the prosecution committed plain error when it accused defendant of "playing the race card."

{¶24} The test for prosecutorial misconduct is whether the prosecution's conduct was improper and, if so, whether the conduct prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Wilkerson,* 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶38, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947. As such, prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶25} Because defendant failed to object to the alleged prosecutorial misconduct, the alleged impropriety is waived, absent plain error. *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, ¶139; *State v. Saleh,* 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. Id. We may reverse only where the record is clear defendant would not have been convicted in the absence of the improper conduct. *State v. Williams* (1997), 79 Ohio St.3d 1, 12.

{¶26} Defendant's argument rests on the parties' closing arguments. During defendant's testimony, he described his vehicle in some detail. In closing argument, defendant's counsel noted how rapidly the officers called for a tow truck that took defendant's car. With that premise, defendant's counsel argued that "[t]he car is the first thing they want. The car was gone. Within 15 minutes of them stopping him, that car was on its way to be hooked and on its way down to the impound lot." (Tr. 299.) Defense counsel argued, "I don't believe it wasn't about the car. I believe the car was part of it. And I believe they ran [defendant's] record and I believe they found that he had prior OVIs. Easy pickins, easy pickins." (Tr. 299.)

{¶27} On rebuttal, the prosecution noted "this Defendant will * * * tell you that he thinks this all because of his car, that it's an old police car, that it has rims and that it is tricked out," even though, the prosecution pointed out, neither officer testified defendant at the scene accused them of pulling him over for that reason. (Tr. 314.) The prosecution then added, "[b]ut let's call what it is. They've tiptoed around it. I'm not going to tiptoe around it. He's playing the race card. It's his final desperation move to try to get out of this DUI." (Tr. 315.) The prosecution added, "It's desperate and it's sad, but the bottom line is

both of those officers testified they couldn't even see into that car, that the tint was only letting 23 percent of light in. * * * They had no clue who they were pulling over because they couldn't see through the windows to begin with." (Tr. 315.)

{¶28} While we agree with defendant that the prosecution's statement arguably was improper, we cannot conclude the statement prejudicially affected defendant's substantial rights. The state's rebuttal was approximately 10 or 11 pages, and the statement at issue both was brief and did not "pervade the rebuttal portion of appellee's closing argument." *State v. Cunningham* (Sept. 21, 2000), 10th Dist. No. 00AP-67 (concluding the statement that defense counsel played "the race card" did not taint the jury or prejudice the trial). Rather, the majority of the rebuttal pertained to the record evidence of defendant's impairment and was a legitimate response to defendant's argument. Id. See also *State v. Martin* (Apr. 22, 1999), 8th Dist. No. 73842 (concluding the prosecution's accusing defendant of playing the race card was a permissible criticism of defendant's strategy if not merely derogatory). Because we cannot say the outcome of the trial clearly would have been different but for the single remark at issue, we overrule defendant's third assignment of error.

{¶29} Having overruled all three of defendant's assigned errors, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BRYANT, BROWN, and McGRATH, JJ., concur.

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