[Cite as *State v. DeWalt*, 2009-Ohio-5283.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 08 CA 852
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
JAMES M. DeWALT	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Carroll County Municipal Court of Carroll County, Ohio Case No. TRD-0601132

JUDGMENT: Affirmed in part. Sentence Vacated. Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: September 30, 2009

WAITE, J.

{¶1} Appellant James M. DeWalt appeals his conviction in Carroll County Municipal Court on a minor misdemeanor traffic offense of failure to yield half the roadway. Appellant was driving a Chevy pickup truck that collided with a vehicle travelling in the opposite direction at the crest of a hill. The matter has been appealed once before, and was reversed and remanded for retrial because a witness testified as an accident reconstruction expert when there was no evidence he had training in accident reconstruction. *State v. DeWalt*, 7th Dist. No. 06 CA 835, 2007-Ohio-5248. On retrial, the state utilized a different expert, properly trained and certified in accident reconstruction. Appellant's current arguments are that the expert was not properly certified as an accident reconstruction expert, that Appellant was denied a speedy trial, and that the weight and sufficiency of the evidence do not support the conviction. As to the first issue, the record contains ample evidence of the expert's qualifications. Regarding the second issue, retrial took place less than five months after the case was remanded to the trial court. The case was scheduled to be retried earlier but was postponed due to an urgent medical issue on the part of the trial judge. Speedy trial issues that arise after a case is remanded from a direct appeal are reviewed for reasonableness, and the record reflects that the retrial was held in a reasonable amount of time. As to the third argument, the evidence of record fully supports Appellant's conviction.

{¶2} Appellant also raises two issues regarding sentencing. Our review of the record reveals that Appellant was not afforded the right to make a final statement prior to being sentenced and his fine appears excessive. These errors will require a

new sentencing hearing. Thus, Appellant's conviction is affirmed, but the matter is remanded for resentencing.

Case History

{¶3} The accident involving Appellant and 17-year-old Michael Bolon occurred on June 29, 2006, at approximately 2:00 p.m. Appellant was driving a 1989 Chevy pickup truck eastbound on Country Road 52 in Carroll County. Mr. Bolon was driving 1999 Dodge Durango truck, heading in the opposite direction. The two vehicles collided at a crest in the road. Mr. Bolon's vehicle veered to the left after impact and came to rest in the gully on Appellant's side of the road. The yellow painted line in the center of the road had almost completely faded away at the time of the accident.

{¶4} The accident was reported to the police. Trooper Clinton Armstrong arrived while Mr. Bolon was being treated by an emergency medical technician. The trooper took statements from Appellant and Mr. Bolon, and he photographed the accident scene. The trooper cited Appellant for failure to yield half the roadway to oncoming traffic, R.C. 4511.26, a minor misdemeanor.

{¶5} The case was heard in a bench trial on August 8, 2006. Trooper Armstrong testified at trial as an expert witness. Appellant was convicted and fined $100. He filed an appeal to this Court, and the conviction was overturned because Trooper Armstrong was improperly permitted to testify as an expert in accident reconstruction when his training extended only to accident investigation. The case was remanded to the trial court on September 25, 2007.

{¶6} The court held a pretrial conference on November 15, 2007, and set retrial for January 29, 2008. Due to a medical issue that the judge needed to attend to on the date set for trial, trial was rescheduled to February 22, 2008. The state called a different expert witness at retrial who had been trained in accident reconstruction. Appellant and Mr. Bolon both also testified at trial. The court again convicted Appellant and imposed a $150 fine and court costs.

{¶7} Immediately prior to trial, on February 21, Appellant filed a motion to dismiss on speedy trial grounds. The trial court did not rule on the motion prior to trial, but did respond on February 26, 2008, in a six-page entry that included findings of fact and conclusions of law. The court overruled the motion and determined that retrial was held in a reasonable amount of time.

{¶8} This appeal was filed on February 28, 2008. Appellant presents six assignments of error, which will be treated out of order.

ASSIGNMENT OF ERROR NO. 3

{¶9} "JAMES DeWALT WAS DENIED A SPEEDY TRIAL."

{¶10} Appellant argues that he was denied a speedy trial because his case took over two years to come to trial from the time the traffic citation was issued to the time of his second trial. Appellant is aware that the statutory requirements for speedy trial, found in R.C. 2945.71, do not apply to a retrial following remand after a direct appeal. *State v. Hull*, 110 Ohio St.3d 183, 2006-Ohio-4252, 852 N.E.2d 706, paragraph one of the syllabus; *State v. Fanning* (1982), 1 Ohio St.3d 19, 21, 1 OBR 57, 437 N.E.2d 583. The standard to be applied in cases involving a retrial after appeal is that of reasonableness under the state and federal constitutions. *Hull* at

paragraph two of the syllabus; *State v. Fields* (1991), 75 Ohio App.3d 123, 127, 598 N.E.2d 1264. In *Barker v. Wingo* (1972), 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, the United States Supreme Court identified four factors to be assessed in determining whether an accused had been constitutionally denied a speedy trial: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. Id. at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101. *Barker* considered the length of the delay to be particularly important. Id. at 531-532.

{¶11} In *Hull*, supra, a first degree misdemeanor DUI case was overturned on direct appeal and remanded for retrial. During the remand, the defendant filed a motion to dismiss on speedy trial grounds, which was denied and he was convicted. Hull's speedy trial issue was accepted for review by the Ohio Supreme Court. The Court held that statutory speedy trial requirements did not apply on remand after the first direct appeal, and that once the case is remanded, any speedy trial issue would be reviewed for reasonableness. Id. at ¶25-26. The case was tried 149 days after remand, and the Supreme Court held that this was not presumptively prejudicial and that there was no reversible speedy trial error. Id. The *Hull* Court held that, "delays of five months and six months are not presumptively prejudicial," in retrying misdemeanor traffic cases. Id. at ¶24. This Court had earlier held that, " 'a one-year delay between indictment and trial is generally considered the minimum amount of time required to trigger a full *Barker* analysis.' " *State v. Hull*, 7th Dist. No. 04 MA 2, 2005-Ohio-1659, at ¶31, quoting *State v. Anderson* (May 16, 2003), 7th Dist. No. 2002 CO 30.

{¶12} In the instant case, we released our Opinion following direct appeal on September 25, 2007. Retrial occurred on February 22, 2008; a period of 147 days. The record reveals that the retrial had been scheduled for January 29, 2008, but that the trial judge needed to reschedule it due to a medical issue that arose just before trial. (2/26/08 J.E., p. 3.) The record supports our conclusion that this case was retried in a reasonable amount of time, and Appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

{¶13} "THE TRIAL COURT ERRED IN QUALIFYING THE [sic] SERGEANT YOHO AS AN EXPERT ON ACCIDENT RECONSTRUCTION."

{¶14} Appellant argues that the state's expert witness was not qualified to testify as an expert in accident reconstruction, and that the verdict should be overturned based on the expert's improper testimony.

{¶15} A trial judge has a special obligation to ensure that scientific testimony is relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469; *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038. A trial court's ruling on the admissibility of an expert's testimony is within its broad discretion and will not be disturbed absent an abuse of discretion. *State v. Jones* (2000), 90 Ohio St.3d 403, 414, 739 N.E.2d 300, citing *State v. Awkal* (1996), 76 Ohio St.3d 324, 331, 667 N.E.2d 960. The term abuse of discretion is more than an error of law or judgment. It indicates that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶16} Evid.R. 702 governs the admission of expert testimony, and states in part:

{¶17} "A witness may testify as an expert if all of the following apply:

{¶18} "(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;

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

{¶20} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. * * *"

{¶21} It has been held that a prospective expert witness does not have to be the best witness on the topic to qualify as an expert. *Alexander v. Mt. Carmel Medical Center* (1978), 56 Ohio St.2d 155, 159, 383 N.E.2d 564. Instead, a potential expert must demonstrate knowledge greater than that possessed by an average juror. *State Auto Mut. Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151, 160, 304 N.E.2d 891.

{¶22} In criminal cases, if an error in the admission of expert testimony is harmless beyond a reasonable doubt, it is not reversible error. *State v. Whitt* (1991), 68 Ohio App.3d 752, 753, 589 N.E.2d 492.

{¶23} A court must examine the expert's qualifications, education, and knowledge in order to determine the scope of his or her expertise. "Once qualified, an expert witness may give an opinion only as to matters within his or her expertise." *Metro. Life Ins. Co. v. Tomchik* (1999), 134 Ohio App.3d 765, 777, 732 N.E.2d 430,

citing *State v. Hopfer* (1996), 112 Ohio App.3d 521, 559, 679 N.E.2d 321. An accident reconstruction expert may testify as to the point of impact of an accident. *Schaffter v. Ward* (1985), 17 Ohio St.3d 79, 81, 477 N.E.2d 1116. Expert witness testimony is particularly helpful in a case in which the only eyewitnesses were the parties involved in the accident. Id.

{¶24} The "expert" used in Appellant's first trial was Trooper Armstrong, who had taken a two-week course in accident investigation and who testified that he was not trained in accident reconstruction. *DeWalt*, supra, ¶33-35. He did not know what kind of training was available to become an expert in accident reconstruction. Id. at ¶35. He had never testified as an expert in accident reconstruction. Id. On retrial, the state called Sergeant Shawn Yoho to testify as an expert witness as to accident reconstruction. An extensive voir dire was held to examine his qualifications. In 2000, Yoho took an 80-hour course on crash reconstruction held in Columbus at the Highway Patrol Training Academy. (Tr., p. 38-39.) Yoho took an additional 80-hour crash reconstruction course in 2004. (Tr., p. 49.) Crash damage analysis was a significant part of the training. (Tr., p. 40.) Yoho testified as an expert in accident reconstruction six times prior to the instant case. (Tr., p. 50.) Yoho was also familiar with other courses and certifications available in accident reconstruction. Appellant's counsel did not uncover any lapses in Yoho's training or expertise that would have disqualified him as an expert. Therefore, the trial court was within its discretion to qualify Yoho as an expert in accident reconstruction. Appellant's second assignment of error is overruled.

ASSIGNMENTS OF ERROR NOS. 1 & 5

{¶25} "THE TRIAL COURT ERRED TO THE PREJUDICE OF MR. DEWALT [sic] BY DETERMINING THAT THERE WAS SUFFICIENT EVIDENCE TO CONVICT HIM OF THE TRAFFIC OFFENSE OF FAILURE TO YIELD HALF OF THE ROADWAY."

{¶26} "THE TRIAL COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶27} Appellant contends that the evidence did not support the conviction. He argues that the testimony that a step bar from Mr. Bolon's Dodge Durango truck made a gouge mark on Mr. Bolon's side of the roadway was not credible. Appellant argues that he misspoke at trial and that his testimony should not be used against him. Appellant also speculates as to why it was more likely that Mr. Bolon crossed the center line of the road, and he believes that the court should have relied on that speculation rather than on the actual testimony at trial. Appellant's arguments on these matters are without merit.

{¶28} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, paragraph two of the syllabus. The Supreme Court explained the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492: "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." Id. at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61

L.Ed.2d 560. The verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273, 574 N.E.2d 492.

{¶29} Whether the evidence is legally sufficient is a question of law, not fact. *Thompkins* at 386. 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*, supra, 443 U.S. at 319, 99 S.Ct. 2781. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶79. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *Jenks* at 273.

{¶30} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." *Thompkins* at 387, 678 N.E.2d 541. The court reviews the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of witnesses. Id. Additionally, the court 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., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. We reverse a conviction on manifest weight grounds for only the most, " 'exceptional case in which the evidence

weighs heavily against the conviction.' " *Thompkins* at 387, 678 N.E.2d 541, quoting *Martin* at 175, 485 N.E.2d 717. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10. In a manifest weight analysis, the appellate court must continue to be mindful that the weight of the evidence and the credibility of the witnesses are issues primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212.

{¶31} The testimony of a single witness, if believed by the trier-of-fact, is sufficient to support a conviction. *State v. Cunningham*, 105 Ohio St.3d 197, 824 N.E.2d 504, 2004-Ohio-7007, at ¶51-57.

{¶32} Appellant was charged with a violation of R.C. 4511.26(A), which states:

{¶33} "(A) Operators of vehicles and trackless trolleys proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one line of traffic in each direction, each operator shall give to the other one-half of the main traveled portion of the roadway or as nearly one-half as is reasonabl[y] possible."

{¶34} Regarding the sufficiency of the evidence, the record contains the testimony of Mr. Bolon, who stated that his vehicle remained completely in his lane of traffic when the accident occurred. (Tr., p. 10.) Based on this testimony alone, the court had sufficient evidence to find Appellant guilty of the traffic citation.

{¶35} Regarding the manifest weight of the evidence, the verdict is supported by Mr. Bolon's testimony, as well as that of Sergeant Yoho, the accident reconstruction expert. Sgt. Yoho based his conclusions on crash reports, field sketches, photographs, officer's notes, and his own examination of the accident scene. He testified that the road was wide enough for two vehicles to pass each other safely. He stated that the crest of the hill was not a contributing factor to the accident. He observed that there was a gouge mark in the road that indicated an area of impact during the time of accident, and that the gouge was still there when he personally inspected the road. (Tr., p. 52.) The gouge mark was located entirely on Mr. Bolon's side of the road. His opinion was that the gouge was made by Mr. Bolon's vehicle, although he could not determine what specific part of the vehicle made the gouge. His expert opinion was that Appellant's vehicle caused the accident after entering Mr. Bolon's lane of traffic. (Tr., p. 58.)

{¶36} Appellant testified that a piece of metal from his truck was torn off during the accident and came to rest on Mr. Bolon's side of the road. (Tr., p. 105.) Although Appellant's counsel would like us to disregard this testimony as the product of a faulty memory, it is nevertheless part of Appellant's testimony and supports the inference that his truck struck Mr. Bolon's truck in Mr. Bolon's lane, leaving debris from his truck on that side of the road.

{¶37} Based on the recollection of both Appellant and Mr. Bolon, and the supporting evidence including expert testimony, the verdict is not against the manifest weight of the evidence. Appellant's first and fifth assignments of error are overruled.

ASSIGNMENT OF ERROR NO. 4

{¶38} "JAMES DeWALT WAS DENIED A FAIR HEARING."

{¶39} Appellant is apparently arguing some type of due process error here, although his argument may also be interpreted to claim that cumulative errors occurred requiring a new trial. Appellant simply lists what he believes were errors without providing support as to why each occurrence was legally significant. We will attempt to address the issues seemingly raised.

{¶40} Appellant appears to allege that the prosecution should not have been permitted to use leading questions on direct exam. It is within the trial court's discretion to allow leading questions during direct examination. *State v. Jackson* (2001), 92 Ohio St.3d 436, 449, 751 N.E.2d 946.

{¶41} Appellant argues that the trial court prohibited his counsel from asking leading questions on cross-examination. Leading questions should be permitted, as a general rule, during cross-examination, but the court ultimately has discretion to limit the use of leading questions. Evid.R. 611; *State v. Foust*, 2d Dist. No. 02-04-2005, 2005-Ohio-440.

{¶42} Appellant claims that the prosecution was permitted to introduce exhibits not produced in discovery. Appellant makes no more specific claim. His argument appears to relate to the expert witness' credentials, but the expert's name was provided to Appellant during discovery and counsel had opportunity to explore Sergeant Yoho's credentials prior to trial.

{¶43} Appellant alleges that the trial court forbade defense counsel from exploring Mr. Bolon's purpose or motive for being on the road on the day of the

accident. The trial court has broad discretion in the exclusion of irrelevant evidence. This was a simple traffic case that did not require any evidence of intent or motive. Evid.R. 402; *State v. Blankenship* (1995), 102 Ohio App.3d 534, 549, 657 N.E.2d 559.

{¶44} Appellant argues that the trial judge was unhappy that the matter had been reversed on appeal and directed his displeasure at Appellant during retrial. Nothing in the record supports any overt vindictiveness by the trial judge during trial. If Appellant believed the trial judge harbored some type of unfair bias, counsel could have filed an affidavit of disqualification pursuant to R.C. 2701.031. As later discussed, the fine that the judge imposed after the second trial was greater than the original fine, and this does raise a presumption of vindictiveness in regards to sentencing.

{¶45} Appellant was afforded the full process he was due in this case. He was permitted to examine witnesses, present evidence, and defend himself against the charge. Appellant's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 6

{¶46} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN SENTENCING JAMES DeWALT WITHOUT GIVING HIM AN OPPORTUNITY TO ADDRESS THE COURT ON SENTENCING, AND IN INCREASING THE SENTENCE ON REMAND WITHOUT EXPLANATION."

{¶47} Appellant asserts that he was not afforded the right to allocution and that this constitutes reversible error. The purpose of allocution is to allow the defendant an opportunity to state for the record any further information which the

judge may take into consideration when determining the sentence to be imposed. Crim.R. 32(A). The right of allocution applies to both misdemeanor and felony convictions. *Defiance v. Cannon* (1990), 70 Ohio App.3d 821, 828, 592 N.E.2d 884; *State v. Brown*, 166 Ohio App.3d 252, 2006-Ohio-1796, 850 N.E.2d 116, ¶8. It also applies in minor misdemeanor cases. *City of Youngstown v. Czopur*, 7th Dist. No. 99 CA 120, 2003-Ohio-4883, ¶1, 11; *State v. Evilsizor* (Sept. 28, 1994), 2d Dist. No. 94CA11; *City of Cleveland v. Simna* (Feb. 22, 1980), 8th Dist. No. 40259. In a case where the trial court imposed sentence without first asking the defendant whether he wished to exercise the right of allocution created by Crim.R. 32(A), resentencing is required unless the error is invited or harmless. *State v. Campbell* (2000), 90 Ohio St.3d 320, 738 N.E.2d 1178, paragraph three of the syllabus. In this case, the court did not ask Appellant whether he had any further comments to make prior to sentencing. This error does not appear to be created by Appellant and there is no indication it could be claimed to be harmless. The record supports Appellant's argument that he was not afforded the right to allocation, and the matter must be remanded for resentencing.

{¶48} Appellant also objects that the court imposed a $150 fine after retrial when the fine imposed following his first trial was only $100. The maximum fine that may be imposed for a minor misdemeanor is $150. R.C. 2929.28(A)(2)(a)(v). There is no indication on the record why the court imposed a larger fine after retrial. The United States Supreme Court in *North Carolina v. Pearce* (1969), 395 U.S. 711, 723-24, 89 S.Ct. 2072, held that it was a violation of the Due Process Clause of the Fourteenth Amendment when the trial court judge, motivated by vindictive retaliation

caused by a defendant's successful appeal, resentenced the defendant to a more severe sentence. As a prophylactic measure, *Pearce* determined that a rebuttable presumption of vindictiveness exists when a harsher sentence is imposed following retrial unless, "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding," can be demonstrated to justify the harsher sentence. Id. at 726. The presumption has not been applied when the facts do not warrant its application, as in cases where new criminal conduct by the defendant supports a greater sentence or when retrial includes additional counts. *Texas v. McCullough* (1986), 475 U.S. 134, 106 S.Ct. 976, 89 L.Ed.2d 104.

{¶49} The Supreme Court later clarified its decision in *Pearce* by explaining that unless there was a "reasonable likelihood" that the increased sentence was the product of vindictiveness, the burden remains with the defendant to show actual vindictiveness. *Alabama v. Smith* (1989), 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865.

{¶50} In this case, the mere presumption of vindictiveness applies. Retrial was on the same single traffic charge, was based on the same evidence, and there was no identifiable conduct by Appellant that had occurred following the first trial to warrant a harsher sentence. Because of this presumption, the court should not have imposed a fine of more than $100 after retrial. As we have remanded the matter for resentencing, the trial court will be required to bear the presumption in mind and limit Appellant's fine to a maximum of $100.

{¶51} In conclusion, Appellant has not established any speedy trial error or any error in the credentials or testimony of the state's accident reconstruction expert.

The evidence fully supports the verdict. The court did err by failing to allow Appellant the right to make a final statement prior to sentencing, and based on this record the court may not impose a higher fine on retrial. Appellant's conviction is affirmed. His sentence is vacated and the case is remanded for resentencing.

Vukovich, P.J., concurs.

DeGenaro, J., concurs.