

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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|---------------------|---|------------------------|
| STATE OF OHIO | : | JUDGES: |
| | : | Julie A. Edwards, P.J. |
| Plaintiff-Appellee | : | Sheila G. Farmer, J. |
| | : | John W. Wise, J. |
| -vs- | : | |
| | : | Case No. 09 CA 010 |
| | : | |
| TARA MARTIN | : | <u>OPINION</u> |
| Defendant-Appellant | : | |

CHARACTER OF PROCEEDING: Criminal Appeal from Holmes County
Municipal Court Case No.
07 TRC 1895

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 2, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, P.J.

{¶1} Appellant, Tara Martin, appeals a judgment of the Holmes County Municipal Court convicting her of failure to control (R.C. 4511.202(A)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} Around noon on June 16, 2007, Brittany Mathie hosted a “girl party” at her home. Appellant attended the party. The group swam in the Mathie’s pool, ordered pizza and drank beer and margaritas.

{¶3} In the evening, more people arrived at the Mathie home for the party, including Tony Roberts, Drew Landon and Matt McSweeney. Alcohol continued to be consumed throughout the night at the party.

{¶4} A second party was being held a few miles away at the Durst property. Appellant visited the Durst party around 10:30 p.m. After staying a short period of time, the group she was with returned to the Mathie party. About 2:00 a.m. appellant returned to the Durst party with Rochelle Smith, Roberts, Landon and McSweeney. The group returned to the Mathie house about 4:30 a.m., with Roberts operating the vehicle.

{¶5} On the way from the Durst home to the Mathie home, Roberts began driving erratically. Rochelle Smith got out of the car at the Mathie residence because of Roberts’s erratic driving. She saw McSweeney go around to the back of the house to get more beer, and when the car left the Mathie home, Roberts was driving.

{¶6} Appellant remembers none of the events from the early morning hours of June 17, 2007. According to Roberts and McSweeney, after dropping off Smith and getting more beer they continued to drive around. Initially, appellant was in the

backseat. According to Roberts, at some point appellant asked to drive and he allowed her to drive because he had not witnessed her drinking a “whole lot.” Tr. 98.

{¶7} Shortly thereafter the car veered off the road and flipped over several times. When McSweeney and Roberts regained consciousness, they realized the car was smoking. Appellant was unconscious. Fearing for appellant’s safety in the event of a fire, Roberts and McSweeney pulled her out of the car through the driver’s side and moved her to a safe place.

{¶8} Appellant was charged with Operating a Motor Vehicle While Impaired (OVI) in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(c), and failure to control. The State dismissed the charge of OVI in violation of R.C. 2411.19(A)(1)(c). The remaining OVI charge was tried to a jury, while the failure to control charge was tried to the court.

{¶9} Following trial, the jury found appellant not guilty of OVI. The judge found appellant guilty of failure to control, stating from the bench, “Then I will enter the not guilty on the OVI charge by the jury. I will disagree with the jury. I will now find the defendant guilty on failure to control.” Tr. 246.

{¶10} Appellant assigns two errors on appeal:

{¶11} “I. THE TRIAL COURT’S VERDICT FINDING APPELLANT GUILTY OF FAILURE TO CONTROL IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12} “II. THE TRIAL COURT’S VERDICT FINDING APPELLANT GUILTY OF FAILURE TO CONTROL WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW, AS IT AMOUNTED TO AN AVOIDANCE OF A JURY’S VERDICT WITHOUT A SHOWING OF (A) NECESSITY ORIGINATING IN

DOUBT OF THE JURY'S IMPORT OR IRRESPONSIVENESS TO THE ISSUES SUBMITTED, OR (B) THAT THE JURY'S VERDICT ILLUSTRATED A MANIFEST TENDENCY TO WORK INJUSTICE."

I

{¶13} In her first assignment of error, appellant argues that the court's finding of guilty on the charge of failure to control is against the manifest weight of the evidence. Appellant argues that the court's finding that she was operating the vehicle is against the manifest weight of the evidence. Appellant also argues that the only issue submitted to the jury on the OVI charge was the issue of who was driving the car, and the court's verdict on the failure to control charge is therefore inconsistent with the jury's verdict on the OVI charge.

{¶14} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶15} Appellant was convicted of failure to control as defined by R.C. 4511.202(A):

{¶16} "No person shall operate a motor vehicle, trackless trolley, streetcar, agricultural tractor, or agricultural tractor that is towing, pulling, or otherwise drawing a

unit of farm machinery on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle, trolley, streetcar, agricultural tractor, or unit of farm machinery.”

{¶17} Appellant argues that the testimony of Roberts and McSweeney that appellant was driving the vehicle at the time of the accident was not credible. Appellant argues that Brittany Mathie and Rochelle Smith both testified that earlier they had tried to convince Roberts to allow them to drive because they believed he was too intoxicated to drive and he refused their pleas. Appellant also argues that both Roberts and McSweeney admitted to being very intoxicated on the night in question and that State’s Exhibit B-13, a photograph of the accident scene, failed to illustrate any disturbance of the tall grass next to the vehicle where Roberts and McSweeney allegedly pulled appellant from the vehicle.

{¶18} The only witnesses who were present in the vehicle at the time of the crash who testified that they remembered the crash were Roberts and McSweeney, as both Landon and appellant had no recollection of the crash and could not remember who was driving. Roberts and McSweeney both testified that at some point after leaving the Mathie residence, they switched drivers and appellant was driving at the time of the accident. Scott Balder, the EMT who responded to the accident, testified that someone at the scene told him appellant had been driving. Further, Deputy David Peebles testified that McSweeney told him at the scene of the accident and at the hospital that appellant was driving. McSweeney was the only partygoer who testified at trial who was not from Holmes County and knew none of the people in the vehicle prior to June 16, 2007.

{¶19} Appellant argues that Exhibit B-13, a photograph of the vehicle at its resting place after the accident, supports the proposition that she was not pulled from the driver's side after the crash as claimed by Roberts and McSweeney because the tall grass next to the driver's side of the vehicle is not disturbed. The photograph was taken from eye level and the level of the grass next to the vehicle is not clear from the photograph. Further, the car is covered in dirt except for an area around the driver's side door which is rubbed clean, giving the appearance that someone was pulled from the driver's side window.

{¶20} The court's finding that appellant was operating the vehicle is not against the manifest weight of the evidence.

{¶21} Appellant also argues that the judge's verdict is inconsistent with the jury's verdict because the only issue presented to the jury was the identity of the driver. Appellant argues that she admitted she was intoxicated, and the court impliedly recognized that the only issue before the jury was the identity of the driver when the court stated on the record that it disagreed with the jury.

{¶22} The jury found appellant not guilty of OVI as defined by R.C. 4511.19(A)(1)(a):

{¶23} "(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

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

{¶25} Appellant relies on *State v. Lovejoy*, 79 Ohio St.3d 440, 1997-Ohio-371, in support of her argument. In *Lovejoy*, the Ohio Supreme Court held that the "several

counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.” *Id.*

{¶26} This Court considered a claim of inconsistent verdicts in *State v. Kelley*, Delaware App. No. 2006CA00371, 2007-Ohio-6517. In *Kelley*, the defendant pointed a gun at two victims at the same time and said, “I’ll shoot both you bitches.” The jury convicted the defendant of one count of aggravated menacing and one count of felonious assault with a firearm. Applying the above-quoted syllabus of *Lovejoy*, this Court concluded that the inconsistent responses were to different counts, which did not create an inconsistency in the verdicts. *Id.* at ¶24.

{¶27} In the instant case, as in *Kelley*, if there were an inconsistency in the verdicts, the inconsistent responses were to different counts, which under *Lovejoy* does not create an inconsistency in the verdict.

{¶28} Further, the issue of identity of the driver was not the only contested issue at trial. Appellant defended the case both on the issue of identity of the driver and whether she was under the influence of alcohol at the time of the accident. Rochelle Smith testified that she assumed appellant drank in the afternoon at the party, but didn’t know for sure what she drank. Tr. 18. She testified that she didn’t see appellant drinking between the hours of 7:00 p.m. and 10:00 p.m., and saw appellant have one beer between the hours of 11:00 p.m. and 2:00 a.m. Tr. 22, 24. Cassie Shultz testified that she did not know how much appellant had to drink. Tr. 57. Stephanie Smith remembered appellant drinking from noon to 2:45 p.m., but did not see appellant drinking when Smith returned to the party at around 10:15-10:30 p.m. Tr. 64, 70. Drew

Landon testified that he assumed appellant drank alcohol but didn't see her drinking. Tr. 83. Tony Roberts testified that appellant did not act intoxicated and he had not observed her drinking a "whole lot." Tr. 109. He testified that he only observed her drinking one beer, and he allowed her to drive when she asked because she seemed fine. Id. Brittany Mathie saw appellant drinking in the afternoon of June 16 when just the girls were at the party, but wasn't paying attention to what appellant drank later. Tr. 210. Appellant testified that she remembered drinking earlier in the day.

{¶29} Further, counsel for appellant argued in closing argument that the state failed to prove beyond a reasonable doubt that appellant was under the influence of alcohol at the time of the accident:

{¶30} "So we have testimony from the States (sic) witnesses regarding operation and then we had the testimony from the States (sic) witnesses with respect to intoxication. And I guess I got the sense in in (sic) listening to the testimony that nobody knew how much Tara had consumed. A, and the states (sic) case is resting on an assumption that because she did something that was perhaps out of her character that she had to be intoxicated and that's proof beyond a reasonable doubt. And I don't think that that is proof beyond a reasonable doubt, I don't think that is proof about anything, that's proof of an assumption. In this case Tara said that she had one margarita may be (sic) one and a half margaritas and that was it, earlier in the day. The other witnesses testified that they saw her drinking and again we talked about whether Mr. McSweeney thought she was drinking but he wasn't sure and I think Tony said he saw her drink one beer and I think that's all the testimony you have about her consumption. There wasn't any testimony on her consumption other than that. And

again as the EMS person indicated and pointed out the odor of alcohol was not thee (sic), its one of many factors to determine if someone was intoxicated and he admitted on the stand he had no idea and he had no opinion what so ever as whether she was under the influence. He had indicated that in his testimony as you heard. So, on that element what we have is speculation and assumption and speculation and assumption does not rise to the level of proof beyond a reasonable doubt.” Tr. 235-236.

{¶31} Based on the evidence presented at trial and the argument of counsel, it is not clear whether the jury acquitted appellant of OVI on the basis that the state failed to prove beyond a reasonable doubt that she was the operator of the vehicle or failed to prove beyond a reasonable doubt that she was under the influence of alcohol at the time of the accident. Therefore, despite the court’s statement from the bench that she disagreed with the jury, it is not clear that the verdicts are inconsistent.

{¶32} The first assignment of error is overruled.

II

{¶33} In her second assignment of error, appellant argues that the court’s judgment amounted to an avoidance or rejection of the jury’s verdict. Appellant relies on *Norman v. State* (1923), 109 Ohio St. 213, 222, which states in pertinent part:

{¶34} “Verdicts are to have a reasonable intendment and a reasonable construction and are not to be avoided unless from necessity originating in doubt of their import or irresponsiveness to the issues submitted, or unless they show a manifest tendency to work injustice.”

{¶35} In the instant case, the court entered judgment in accordance with the jury’s verdict on the OVI charge and did not reject or avoid the jury’s verdict. As

discussed in the first assignment of error, it is not clear whether the jury acquitted appellant of OVI on the basis that the state failed to prove beyond a reasonable doubt that she was the operator of the vehicle or failed to prove beyond a reasonable doubt that she was under the influence of alcohol at the time of the accident. Therefore, the court's finding of guilt on the failure to control charge is not in conflict with the jury's verdict on the OVI charge.

{¶36} The second assignment of error is overruled.

{¶37} The judgment of the Holmes County Municipal Court is affirmed.

By: Edwards, P.J.

Farmer, J. and

Wise, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES

JAE/r0209

