

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 62
v.	:	T.C. NO. 09 TRD 02822
	:	
WILBURN L. BAKER	:	(Criminal appeal from
	:	Municipal Court)
Defendant-Appellant	:	

OPINION

Rendered on the 11th day of June, 2010.

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Defendant-Appellant

FROELICH, J.

{¶ 1} Wilburn Lee Baker was found guilty after a bench trial in the Fairborn Municipal Court of violating R.C. 4513.241, which prohibits excessive tinting of automobile windows and windshields. The trial court imposed a \$20 fine and court costs.

{¶ 2} Baker, who is an attorney, appeals, pro se, from his conviction, arguing that the trial court should have granted his Crim.R. 29 motion because the State failed to establish that his window tinting was an unlawful color. Baker further argues that the tint meter results should not have been admitted, because there was no evidence that the window tint measuring device was scientifically reliable and accurate. For the following reasons, the trial court's judgment will be affirmed.

I

{¶ 3} State Trooper Jennifer Hildebrandt, a sixteen year veteran of the Ohio State Highway Patrol, was the State's sole witness at trial. Her testimony established the following facts.

{¶ 4} During the morning of March 17, 2009, Hildebrandt was patrolling U.S. Route 35 in Beavercreek Township, Greene County, in a marked cruiser. Hildebrandt observed Baker's vehicle traveling at a speed of 71 mph in a 55 mph zone, as measured by laser. When Baker passed her, she was able to see inside his vehicle "but not to the point of being able to identify anyone." Hildebrandt pulled out behind him and initiated a traffic stop.

{¶ 5} Hildebrandt exited her cruiser and approached Baker's vehicle. She advised Baker that he had been stopped for speeding. She also told him that his window tint was too dark and that she was going to check the tint with a tint meter. The tint meter indicated that only 7.2 percent of light was being transmitted through the window. Hildebrandt advised Baker that she was going to give a warning on his speed and issue a citation for the window tint. Hildebrandt stated that the tint was on "[t]he front, the rear, and all of side

windows.”

{¶ 6} Baker moved for a judgment of acquittal pursuant to Crim.R. 29, arguing that R.C. 2513.241 and Ohio Adm. Code 4501-41-03(A)(3) require “that the State show the window was not red or yellow in color, as required by the statute. There’s been no evidence as to that whatsoever.” Baker further argued that his windshield was not tinted, and that Hildebrandt’s testimony referred only to the windows to the left and right of the driver. The trial court denied the motion.

{¶ 7} Baker testified on his own behalf and called Hildebrandt as a witness. Baker testified to his education and work experience in electrical systems engineering, and the court qualified him as an expert. Baker testified that Hildebrandt had used a Pocket Detective 2.1, manufactured by Guardco, to measure the tint of the window. The court excluded as hearsay Internet printouts about the device from Guardco’s website. Baker testified that bandwidth of the visible light spectrum is typically 400 to 800 nanometers. He stated that the State had presented no evidence that the officer measured any visible light within that nanometer range. Baker further testified that the window that Hildebrandt measured was “filthy with grime on the outside” and “with a Coke that had frozen on the inside. It had frozen in Telluride.” Hildebrandt did not clean the window before taking the tint measurement, and she only measured one window.

{¶ 8} On cross-examination, Baker agreed that he was stopped by Hildebrandt on U.S. Route 35. Baker did not know the color of the window tint on his vehicle. He stated that he did not own a tint meter, but had measured the tint with a “low-tech tint meter with basically shades of gray, 100 one-percent degradations, from 1 to 100 percent,” which he had

created. Using his “low tech” meter, Baker measured the tint to be about 75 percent light transmission.

{¶ 9} Upon questioning by Baker, Hildebrandt clarified that there was no tinting on the windshield. Hildebrandt indicated that she had been trained on how to use the tint meter. Hildebrandt could not explain “the theory of operation of the machine” in terms of physics, but she stated that “I know that putting it on the window, it gives a reading of the light transmittance. We also have a testing glass to be able to do like a calibration check on it before we use it.” Hildebrandt stated that she did not clean the window or look inside the vehicle before using the tint meter, and that she had never been instructed – and the user’s manual does not advise – to clean the window “unless there was a lot of mud where it could not be readable.” Hildebrandt stated that, according to the manual, the error rate for the tint meter is plus or minus two percent. Hildebrandt had not reviewed the manual “in probably 16 years.” She described Baker’s windows as “dark” and “closest to black” in color.

{¶ 10} Upon additional questioning by the State, Hildebrandt indicated that the window tint was not yellow or red. Hildebrandt had done the calibration on the tint meter at the beginning of her shift, and the tint meter was working properly at that time. Hildebrandt had tested the passenger’s window of Baker’s vehicle. The side windows and the back window were all tinted.

{¶ 11} At the conclusion of the testimony, Baker again moved for a judgment of acquittal, stating: “We have absolutely no information that the device used was, in fact, scientifically reliable.” The court denied the motion, found Baker guilty, and imposed a \$20 fine and court costs. Although Baker did not seek a stay of this sentence, we see no

indication in the record that Baker has paid the fine and court costs.

{¶ 12} Baker raises two assignments of error on appeal, which we will address in reverse order.

II

{¶ 13} Baker's second assignment of error states:

{¶ 14} "THE TRIAL COURT ERRED IN DENYING APPELLANT'S CRIM.R. 29 MOTION FOR ACQUITTAL."

{¶ 15} In his second assignment of error, Baker claims that the trial court should have granted his Crim.R. 29(A) motion at the end of the State's case, because the State failed to prove that the tinting "was not yellow or red in color."

{¶ 16} We review the denial of a Crim.R. 29(A) motion under the same standard as is used to review a sufficiency of the evidence claim. *State v. Thaler*, Montgomery App. No. 22578, 2008-Ohio-5525, at ¶14, citation omitted. "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, Montgomery App. No. 22581, 2009-Ohio-525, at ¶10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 1997-Ohio-372, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d. 560. In reviewing the trial court's denial of a Crim.R. 29(A) motion at the close of the State's case, we consider only the evidence then available to the

trial court. *State v. Stoner*, Clark App. No. 2008 CA 83, 2009-Ohio-2073, ¶24. A guilty verdict will not be disturbed on appeal unless “reasonable minds could not reach the conclusion reached by the trier-of-fact.” *Dennis*, 79 Ohio St.3d at 430.

{¶ 17} R.C. 4513.241(A) requires the director of public safety to “adopt rules governing the use of tinted glass, and the use of transparent, nontransparent, translucent, and reflectorized materials in or on motor vehicle windshields, side windows, sidewings, and rear windows that prevent a person of normal vision looking into the motor vehicle from seeing or identifying persons or objects inside the motor vehicle.” R.C. 4513.241(C) prohibits persons from operating a vehicle registered in Ohio “unless the motor vehicle conforms to the requirements of this section and of any applicable rule adopted under this section.”

{¶ 18} Ohio Adm. Code 4501-41-03(A), which was promulgated pursuant to R.C. 4513.241, sets forth the window and windshield tint specifications. It states, in relevant part:

{¶ 19} “(A) No person shall operate, on any highway or other public or private property open to the public for vehicular travel or parking, lease, or rent any motor vehicle that is required to be registered in this state with any suncreening material, or other product or material which has the effect of making the windshield or windows nontransparent or would alter the windows’ color, increase its reflectivity, or reduce its light transmittance, unless the product or material satisfies one of the following exceptions:

{¶ 20} “***

{¶ 21} “(2) Any sunscreening material or other product or material applied to the

windshield when used in conjunction with the safety glazing materials of such window, has a light transmittance of not less than seventy per cent plus or minus three per cent and is not red or yellow in color.

{¶ 22} “(3) Any sunscreening material or other product or material applied to the side windows to the immediate right or left of the driver, so long as such material, when used in conjunction with the safety glazing materials of such windows, has a light transmittance of not less than fifty per cent plus or minus three per cent and is not red or yellow in color.”

{¶ 23} Baker asserts that the State was required to demonstrate that the window tinting was not red or yellow in color. Baker’s argument is based on a misreading of the Administrative Code. Ohio Adm. Code 4501-41-03(A) establishes a general prohibition on window tinting, subject to several exceptions. With respect to the side windows to the immediate right and left of the driver, the tinting is permissible if both (1) the material or product has a light transmittance of not less than 50 percent (plus or minus 3 percent) and (2) the tinting is not red or yellow in color, i.e., if it does not meet both criteria – 50 percent or more light transmittance and a tint other than red or yellow – it is unlawful. Ohio Adm. Code 4501-41-03(A)(3). Thus, the State may prove that the tinting is unlawful by showing that either of these requirements is not satisfied.

{¶ 24} In this case, the State asserted that the tint on Baker’s side windows had a light transmittance of less than 50 percent. Hildebrandt testified that the tint was present on “[t]he front, the rear, and all of side windows” of Baker’s vehicle and that she used a tint meter to measure the amount of light being transmitted through the window. The tint meter

indicated a light transmittance of only 7.2 percent. Construing the evidence in the light most favorable to the State, the State's evidence established that the tinting on Baker's windows resulted in a light transmittance of less than 50 percent, plus or minus three percent and, consequently, that the windows did not comply with the exception set forth in Ohio Adm. Code 4501-41-03(A)(3).

{¶ 25} Construing the evidence in the State's favor, Hildebrandt's testimony on direct examination by the State that the tint was present on "[t]he front, the rear, and all of side windows" of Baker's vehicle indicated that Baker's windshield also was tinted. The exception set forth in Ohio Adm. Code 4501-41-03(A)(2), which addresses windshields, provides that windshield tinting is lawful if both (1) the material or product has a light transmittance of not less than 70 percent (plus or minus 3 percent) and (2) the tinting is not red or yellow in color. Ohio Adm. Code 4501-41-03(A)(2). Hildebrandt's testimony established that the tinting on the windshield was less than 70 percent, plus or minus 3 percent.

{¶ 26} The State presented sufficient evidence in its case-in-chief to prove a violation of R.C. 4513.241. Accordingly, the trial court did not err in overruling Baker's Crim.R. 29(A) motion. The second assignment of error is overruled.

III

{¶ 27} Baker's first assignment of error states:

{¶ 28} "THE TRIAL COURT ERRED IN ADMITTING SCIENTIFIC EVIDENCE WHICH WAS NOT PROVEN TO BE SCIENTIFICALLY RELIABLE OR ACCURATE."

{¶ 29} Baker claims that the trial court erred in admitting the results of the tint

meter, because the State failed to produce evidence that the tint meter was reliable and accurate. The State responds that Baker did not timely object to Hildebrandt's testimony regarding the tint meter reading and, as a result, has waived all but plain error. The State asserts that Baker has failed to establish that his conviction constitutes a manifest injustice.

{¶ 30} Where the reliability and accuracy of a measuring device has not been established by legislative enactment, such as with certain breathalyzer testing devices, or judicially noticed, such as with stationary radar or lasers to measure speed, Ohio courts have adopted three criteria to determine the admissibility of a device's test results:

{¶ 31} "A. *The type of apparatus purporting to be constructed on scientific principles must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related art.* This can be evidence by qualified expert testimony; or, if notorious, it will be judicially noticed by the judge without evidence.

{¶ 32} "B. *The particular apparatus used by the witness must be one constructed according to an accepted type and must be in good condition for accurate work.* This may be evidenced by a qualified expert.

{¶ 33} "C. *The witness using the apparatus as the source of his testimony must be one qualified for its use by training and experience.*" (Emphasis in original) *East Cleveland v. Ferrell* (1958), 168 Ohio St. 298, 301 (holding that expert testimony was no longer required to establish reliability and accuracy of stationary radar guns), quoting Wigmore, *The Science of Judicial Proof* 3 Ed. 1937, at 450. See, e.g., *State v. Everett*, Wyandot App. No. 16-09-10, 2009-Ohio-6714, ¶6 (addressing moving radar device).

{¶ 34} The State bears the burden to prove the reliability of the device upon which it

has based its case. *State v. Bailey*, Huron App. No. H-06-020, 2007-Ohio-445, ¶14.

{¶ 35} We have located only one case in Ohio that has addressed the reliability of the Pocket Detective 2.1 Window Tint Meter, the device used by Hildebrandt. In *State v. Bailey*, Huron App. No. H-07-023, 2008-Ohio-1290, the defendant received a window tinting citation following a state trooper's testing of his window with a Pocket Detective 2.1 Window Tint Meter. Bailey filed a motion in limine seeking to prohibit the test results from being introduced at trial on the ground that the device was unreliable and inaccurate. The State presented Donald Scharrer, the general manager of the device's manufacturer, as an expert witness. Scharrer "outlined extensive firsthand knowledge of the design, manufacture, workings, processes, and reliability testing of the Pocket Detective. Scharrer's testimony established why and how the Pocket Detective accurately and reliably works. Scharrer's testimony was based upon independently verifiable and accepted professional standards." The defendant offered the expert testimony of his son, who had electronics training and had constructed a "makeshift" spectrometer that allegedly demonstrated the device's lack of accuracy and reliability. The trial court found the Pocket Detective to be reliable. The appellate court affirmed, finding competent, credible evidence to support the trial court's finding. *Id.* at ¶13.

{¶ 36} In the present case, the State did not present expert testimony to establish the Pocket Detective's reliability and accuracy, and it did not ask the court to take judicial notice of that fact. However, Baker did not file a motion in limine or a motion to suppress the tint meter results prior to trial, nor did he object to Hildebrandt's testimony during the State's case-in-chief regarding her use of the tint meter and the results she obtained. Rather, Baker

first challenged the reliability of the tint meter during his own testimony, when he unsuccessfully attempted to introduce printouts of Guardco's Internet site and then testified that the "State has produced no evidence that they've measured any of the visible light, in particular, that within the 400 to 800 nanometer range." At the conclusion of all of the evidence, Baker moved for a judgment of acquittal based on the lack of evidence regarding the tint meter's scientific reliability.

{¶ 37} Under Evid.R. 103(A), "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context ***." Because Baker did not timely object to Hildebrandt's testimony during the State's case-in-chief regarding the tint meter results, he has waived all but plain error in the admission of that evidence. See *id.*; *Kettering v. Smith* (Nov. 2, 1994), Montgomery App. No. 14285 (pursuant to Evid.R. 103, defendant's failure to timely object waived all but plain error in the admission of radar data in speeding case). Plain error does not exist unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Powell*, 176 Ohio App.3d 28, 2008-Ohio-1316, ¶13.

{¶ 38} The admission of tint meter results did not rise to the level of plain error. Hildebrandt had been a State Trooper for sixteen years. Upon questioning by Baker, Hildebrandt testified that she had been trained to use the tint meter and that she had a testing glass in order to perform a calibration check on the meter. Hildebrandt had tested the calibration of the tint meter at the beginning of her shift, and it was working properly at that

time. Baker did not argue that Hildebrandt was unqualified to use the tint meter or that the tint meter was in poor condition. The trial court could have noted that in *Bailey* – a case that Baker had asked the court to take judicial notice of when he was trying to establish the visible light spectrum – the Sixth District addressed the scientific reliability of the Pocket Detective 2.1 (which Hildebrandt had used) and affirmed the trial court’s finding that the Pocket Detective 2.1 was a reliable scientific device for measuring light transmittance in automobile windows.

{¶ 39} Moreover, even if the tint meter results had been excluded, Hildebrandt testified that, when Baker had driven past her, she could see inside the vehicle, but could not see “to the point of being able to identify anyone.” When Baker asked her to describe the color of his windows, Hildebrandt described them as “dark” and the closest color “would be black.” Although the trial court would not have known the exact light transmittance of the windows absent the tint meter reading, under these specific facts, the court could still have reasonably found that Baker’s windows violated R.C. 2513.241, and we cannot say that there was plain error in crediting the trooper’s testimony.

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

IV

{¶ 41} The judgment of the trial court will be affirmed.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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Hon. Beth W. Root