NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3150-12T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

MARK E. GORGODIAN,

Defendant-Appellant.

Submitted May 29, 2014 – Decided June 11, 2014

Before Judges Simonelli and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Municipal Appeal No. 5023.

Steven H. Schefers, attorney for appellant.

Camelia M. Valdes, Passaic County Prosecutor, attorney for respondent (Marc A. Festa, Senior Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

Following denial of his motion to dismiss in municipal court, defendant Mark Gorgodian entered a conditional guilty plea to driving while intoxicated (DWI), N.J.S.A. 39:4-50. The judge sentenced defendant as a first offender, imposed a seven-month suspension of his driving privileges, ordered defendant to install an ignition interlock device for nineteen months, and

assessed appropriate fines and penalties. Upon de novo review, the Law Division found defendant guilty of DWI and imposed the identical sentence.[1]

On appeal, defendant argues that "[t]he court erred in failing to dismiss the charge of DWI against [him]." We affirm.

We derive the following facts from the record. At approximately 11:15 p.m. on January 27, 2012, Dina Howard was working in her home when she heard a noise outside. Howard's sister opened the door to investigate and, about thirty seconds later, Howard saw "a vehicle spinning its wheels and driving away from my residence." Howard testified the car "was very similar" to the Mitsubishi owned by defendant, who lived approximately sixty feet down the road. Howard went back inside her home to get a coat and, when she returned to the street, she saw her neighbor, Betty Jane Neill-Hancock, "flagging me down." Neill-Hancock stated, "I think you got hit[.]" Howard then took a look at her car and found a piece of a car bumper "sticking in [the] tire chambers" of her car.

Howard walked to defendant's home to look at his parked Mitsubishi. It was missing a part of its front bumper. Howard testified her sister began "yelling at [Howard] from her vehicle

[1] The Law Division judge issued an order staying the sentence pending appeal.

and saying she got hit, too, and that's when it was decided we would call the police." Howard did not observe who was driving the car that she had seen driving away from her home after she heard the crash and she did not observe who had parked the car at defendant's home.

Neill-Hancock testified she lived "[d]iagonal across the street" from Howard. That night, she "heard a loud bang outside" and "walked out on [her] porch to look to see in the direction of the crash to see what could have happened." She then walked across the street and saw defendant's "car parking" at his home. Neill-Hancock stated she "didn't see who was driving the vehicle, I just saw it parking." Neill-Hancock looked at Howard's car and saw that it "had a big dent in it and there was a piece of the vehicle sticking out of it." When she looked back toward defendant's home, Neill-Hancock testified she saw defendant "walking around the front of the car" from the driver's side and defendant's wife "was walking up the stairs to her house."

Neill-Hancock stated that defendant's wife "was falling up the stairs" and the couple were "talking to each other loudly." Neill-Hancock testified she heard defendant say "I can't believe you just did that," and she "thought perhaps he was commenting on the fact that [defendant's wife] tripped over her own feet as

she was falling up the stairs[.]" By that time, Howard and her sister had come out of their home and Neill-Hancock told them that "someone hit your car." Later that evening, Neill-Hancock spoke to Officer Michael O'Rourke and told him she observed defendant "going around the front of the car" and that she heard defendant tell his wife, "I can't believe you just did that." She denied telling the officer that she saw defendant in the driver's seat of the car.

Officer O'Rourke was dispatched to the scene after Howard called the police. When he arrived, he saw that Howard's and her sister's cars were damaged. He spoke to Neill-Hancock, who told him

> that she also was in her house, she heard the crash, she went out to her front porch and, you know, looked out the front window and noticed that the gray Mitsubishi was, you know, pulling in . . . front of [defendant's house], and then she stated she thought she had seen [defendant] get out of the driver's seat.

Officer O'Rourke recorded this observation in his report. Neill-Hancock did not tell the officer that she heard defendant say anything to his wife as they were going into the house.

Officer O'Rourke called for a back-up officer to join him and then went to defendant's home. The front door was "ajar" and, because of "the possibility that there was an injury," the officer "called into the house to see if anybody would answer."

Defendant came to the door and Officer O'Rourke "smelled the odor of alcohol." In response to the officer's questions, defendant said he was not injured and that his wife was "in the back of the house." Defendant "stated his wife was driving" the car "when the accident had occurred."

Officer O'Rourke asked defendant "if he could go get his wife" so he could "speak to her and make sure she was not injured from the accident." Defendant walked to the back of his home and called to his wife, who "came to the door by the bedroom." Officer O'Rourke testified that "when she came out I heard [defendant] say to her that she was driving the vehicle." Defendant's wife "immediately said no, that's not right." Defendant did not object to this testimony at the trial. The officers then separated the couple and Officer O'Rourke spoke to defendant's wife. She told the officer "she didn't remember the accident. She said that she was sleeping and she didn't know anything about an accident."

Defendant called two witnesses at trial. A family friend, Laura Figueroa, testified she spent the evening with defendant and his wife at a restaurant. Defendant was drinking at the restaurant, but his wife was not. When the couple left the restaurant at 11:00 p.m., Figueroa stated that defendant's wife was driving. She testified defendant had two cars, a Mitsubishi

and a Nissan, and that defendant's wife was driving the Nissan that night. However, when shown a photograph of the car involved in the accident on cross-examination, she acknowledged that it was a Mitsubishi.

Defendant's neighbor, Bradley Porter, also testified. Porter stated he was "[f]riendly" with defendant, who occasionally paid Porter to mow his lawn. That evening, Porter was in his home when he "heard some noise" and he "just came out, was standing out having a cigarette." He then saw defendant's Nissan drive up, with defendant's wife at the wheel. Porter testified that defendant got out of the passenger side of the car, opened up his wife's door, "put his arm out, he grabbed her arm and they walked around and went inside the house" together. He did not see defendant's wife stumble and did not hear defendant say anything to his wife. Porter testified he was "absolutely sure" that the vehicle was a Nissan.

At this point in the trial, the municipal court judge considered and denied defendant's motion to dismiss the DWI charge on the ground that the State had failed to prove beyond a reasonable doubt that he was the operator of the vehicle. In a thorough oral decision, the judge made specific and detailed credibility findings. He found that Officer O'Rourke's testimony was "extremely credible" and "straight forward,"

especially with regard to the statements made to him by defendant and Neill-Hancock. On the other hand, the judge found that the lay witnesses, with the exception of Howard, were not credible because their testimony was riddled with contradictions. Thus, based upon Officer O'Rourke's testimony of what Neill-Hancock told him, defendant's statement to his wife, and his wife's immediate response, the judge found that the State had met its burden of proving that defendant was the operator of the vehicle.

Defendant subsequently entered a conditional guilty plea to DWI, provided a factual basis for his plea, and reserved his right to appeal the denial of his motion to dismiss. Following a trial de novo in the Law Division, Judge Donald J. Volkert, Jr., issued a written opinion finding defendant guilty of DWI. The judge stated:

> Here, the strength of the State's circumstantial proofs relies heavily on the credibility of the witnesses as determined by [the municipal court judge]. The court properly considered the testimony of private citizens who observed the motor vehicle allegedly operated shortly before the officer arrived at the scene of the accident, as well as testimony from the victim whose car was struck. From this testimony, the court inferred that the motor vehicle had been recently operated by the defendant to the place where it was found, lawfully parked on the side of the road in front of the defendant's house. The fact that the credible testimony of Officer

> O'Rourke lay in stark contrast to the contradictory testimony of both the State and defense's lay witnesses only served to reinforce this inference.
>
> The totality of the circumstantial evidence offered in the form of testimony by private citizens that (1) the car was driven and (2) then parked in front of the defendant's house and (3) that the defendant walked around the front of the car, paired with Officer O'Rourke's testimony that (1) the defendant told his wife to say that she was driving and (2) that defendant's wife's answer to Officer O'Rourke's question was simply that she did not remember an accident is sufficient to satisfy the State's burden of proof.
>
> [(Citation omitted).]

The judge also found that the contradictory testimony provided by the lay witnesses

> confirms the [municipal court] judge's findings and determinations of credibility. Given the weight of the aforementioned evidence, even if the [municipal] court erred in admitting [defendant's wife's] statements as heard by Officer O'Rourke as non-hearsay, such an error was harmless. Defendant's continued emphasis of the obvious fact that no direct observations were made by any of the State's witnesses placing defendant in the driver's seat of the car does not offset the amount of circumstantial evidence offered by both the State's and the defense's witnesses.

After finding defendant guilty of DWI, Judge Volkert imposed the same sentence imposed by the municipal court judge. On appeal,

defendant contends the evidence was insufficient to find him guilty of DWI. We disagree.

On appeal from a municipal court to the Law Division, the review is de novo on the record. R. 3:23-8(a). The Law Division judge must make independent findings of fact and conclusions of law based upon the evidentiary record of the municipal court and must give due regard to the opportunity of the municipal court judge to assess the witnesses' credibility. State v. Johnson, 42 N.J. 146, 157 (1964).

On appeal from a Law Division decision, the issue is whether there is "sufficient credible evidence present in the record" to uphold the findings of the Law Division, not the municipal court. Id. at 162. However, as in the Law Division, we are not in as good of a position as the municipal court judge to determine credibility and should, therefore, refrain from making new credibility findings. State v. Locurto, 157 N.J. 463, 470-71 (1999). "We do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1997). We give due regard to the trial court's credibility findings. State v. Cerefice, 335 N.J. Super. 374, 383 (App. Div. 2000). When we are satisfied that the findings and conclusions of the Law Division are supported by sufficient credible evidence, our

"task is complete and [we] should not disturb the result, even though [we] . . . might have reached a different conclusion" or if the result was "a close one." Johnson, supra, 42 N.J. at 162. Given our standard of review, we are satisfied that the record contains ample credible evidence from which Judge Volkert could have found defendant guilty of DWI beyond a reasonable doubt.

Defendant alleges the State failed to prove that he "operated" his vehicle on the evening of January 27, 2012 because none of the witnesses testified that they saw him driving the car that night. However, "[o]peration may be proved by any direct or circumstantial evidence - - as long as it is competent and meets the requisite standards of proof." State v. George, 257 N.J. Super. 493, 497 (App. Div. 1992). Indeed, there are three ways to prove "operation": (1) "actual observation of the defendant driving while intoxicated[;]" (2) "observation of the defendant in or out of the vehicle under circumstances indicating that the defendant had been driving while intoxicated[;]" or (3) admission by the defendant. State v. Ebert, 377 N.J. Super. 1, 10-11 (App. Div. 2005) (citations omitted).

Here, Neill-Hancock testified she saw defendant walking around the front of the car from the driver's side after the

accident. She also told Officer O'Rourke "she thought she had seen [defendant] get out of the driver's seat." When Officer O'Rourke asked defendant to get his wife, the officer heard defendant tell her "that she was driving the vehicle," a statement with which defendant's wife immediately disagreed. Defendant did not object to this statement at trial. Defendant's wife later told the officer she did not remember the accident. Thus, there is sufficient credible circumstantial evidence to support the judge's conclusion that defendant was operating the vehicle. Ibid.

Defendant argues that the judge should have relied upon the testimony of Figueroa and Porter that his wife was driving the car. He also asserts that Neill-Hancock's allegation that she heard defendant tell his wife "I can't believe you just did that" was further evidence that she was the one driving that night. Again, we disagree.

"[W]hen the result of the contest must turn on the truthfulness of witnesses, the superior advantage of the trial judge in seeing and hearing and appraising the disputants must ordinarily be regarded as the fulcrum on which the issue should be resolved." Abeles v. Adams Eng'g Co., 35 N.J. 411, 423-24 (1961). Judge Volkert carefully considered all of the testimony presented and explained why he concluded, like the municipal

court judge before him, that Officer O'Rourke's testimony was the most credible. We discern no basis for disturbing this well-reasoned credibility determination. Locurto, supra, 157 N.J. at 470-71.

Affirmed.