IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

SHAO YONG WU,
Defendant-Appellant.

SUPREME COURT NO. TR-06-0039-GA
SUPERIOR COURT NO. 06-00005

Cite as: 2007 MP 29

Decided December 11, 2007

Kelley Marie Butcher, Assistant Public Defender, Commonwealth Public Defender's Office, for Defendant-Appellant.
Ann-Marie Roy, Assistant Attorney General, Commonwealth Attorney General's Office, for Plaintiff-Appellee.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

DEMAPAN, C.J.:

¶ 1 Defendant Shao Yong Wu ("Wu") appeals his convictions of reckless driving and driving under the influence of alcohol. He maintains there is insufficient evidence to support his convictions. Because we find there is sufficient evidence to support Wu's convictions, we AFFIRM the trial court's decision.[1]

I

¶ 2 Late in the evening on December 27, 2005, Officer Joseph Magofna ("the officer") observed Wu driving a green vehicle for two to four minutes. During this time, the officer saw the vehicle gradually swerve into the shoulder of the road three times including once where the vehicle almost collided with trees on the side of the road. The officer also observed the vehicle gradually swerve into oncoming traffic, gradually swerve into another driving lane, and switch driving lanes without signaling. As a result of these observations, the officer pulled the vehicle over.

¶ 3 The officer informed Wu that he was pulled over for swerving. Wu replied that he swerved because his feet were shaking. Wu informed the officer that his feet shake at night. After noticing Wu's feet shaking inside his vehicle, the officer asked for Wu's license and registration. Wu produced his registration, but could not produce his driver's license. The officer further noticed that Wu had a flushed face, bloodshot eyes,[2] slurred speech, and an odor of alcohol on his breath. Based on his observations, the officer asked Wu if he consumed alcohol. Wu admitted he drank one beer.

¶ 4 Consequently, the officer advised Wu to exit the vehicle for a field sobriety test. Wu stated he could not perform the test because his feet were shaking. The officer asked Wu again to perform the test. However, Wu replied that his feet hurt and that he could not perform the test. After Wu's second refusal to take the test, the officer asked Wu to take a breathalyzer test. Wu declined to take the test. Throughout his conversation with Wu, the officer believed Wu fully understood his inquiries.

¶ 5 After a bench trial, the trial court found Wu guilty of reckless driving, driving under the influence of alcohol, refusing to consent to a breathalyzer test, failing to carry a driver's license,

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[1] We note that the Assistant Attorney General responsible for the instant case was sanctioned for failing to file an appellate brief. *See In re Roy*, 2007 MP 28 ¶ 12.

[2] On cross examination, when asked to observe the present condition of Wu's eyes in the courtroom, the officer testified that he would characterize Wu's eyes as bloodshot.

and failing to drive on the right side of the road. Wu was sentenced to thirty days in jail, all suspended, except three days, fined $1,000, and placed on probation for one year.

II

¶ 6 The issue of whether there is sufficient evidence to support Wu's convictions of reckless driving and driving under the influence of alcohol are reviewed de novo. *Commonwealth v. Yan*, 4 NMI 334, 336 (1996). "Our review must encompass all of the evidence, direct or circumstantial . . . ." *Commonwealth v. Ramangmau*, 4 NMI 227, 237 (1995). We do not re-weigh the evidence, but we consider the evidence in the light most favorable to the government and determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See, e.g.*, *Commonwealth v. Yao*, 2007 MP 12 ¶ 5; *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). We "will not reverse the finding unless, after reviewing all the evidence, we are left with a firm and definite conviction that a mistake has been made." *Tropic Isles Cable TV Corp. v. Mafnas*, 1998 MP 11 ¶ 3.

III

¶ 7 Wu argues there is insufficient evidence to prove he drove in a willful or wanton disregard for property or safety of others as required under 9 CMC § 7104.[3] The Commonwealth's reckless driving statute provides that, "[e]very person who drives or operates any vehicle upon a highway in willful or wanton disregard for the safety of persons or property is guilty of reckless driving which is a misdemeanor." 9 CMC § 7104(a). To convict Wu under 9 CMC § 7104(a), the Commonwealth must prove, beyond a reasonable doubt, every element of the offense including that Wu drove in a willful or wanton disregard for the safety of persons or property.

¶ 8 "[W]illful or wanton disregard for the safety of persons or property means conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others." *Yao*, 2007 MP 12 ¶ 10. The driver does not need to be personally conscious of his wrongdoing, it is sufficient that the driver ought to realize it. *Id.* Therefore, to sustain Wu's

[3] Wu relies on *Commonwealth v. Scragg*, 2000 MP 4, and *Commonwealth v. Martinez*, 2000 MP 5, to support his argument. As we noted in *Yao*, 2007 MP 12 ¶ 7 n.3, "the issue of recklessness was addressed in the procedural history of the opinion, but was not discussed in the merits of the opinion. Procedural history cannot form the bases of our reckless driving jurisprudence." *Yao* was decided after the opening brief was filed in the instant case. We remind both parties that under Com. R. App. P. 28(j), a party shall promptly advise this Court when significant authorities come to the attention of a party after a brief is filed, and set forth the citations with a reference to either the page of the brief or to a point argued to which the citations pertain. Such supplemental authority would have been insightful in the instant case. We also remind counsel that citations should be made to the official N.M.I. Reporter and not to an unofficial source.

conviction for reckless driving it is only necessary to establish that Wu drove the vehicle "in willful or wanton disregard for the safety of others . . . under circumstances that show a realization of the imminence of danger and a reckless disregard or complete indifference for the probable consequence of such conduct." *Id.* (quoting *State v. Brueninger*, 710 P.2d 1325, 1330 (Kan. 1985)).

¶ 9 In *Yao*, we held there was sufficient evidence to support Yao's conviction for reckless driving. 2007 MP 12 ¶ 1. The evidence against Yao included his admission to drinking alcohol, drifting into multiple lanes of traffic multiple times, and erratically driving into the designated bike lane, all during the dark conditions of the early morning. *Id.* ¶ 13. Based on all the circumstances, Yao's conduct showed willful and wanton disregard for the property and safety of others. *Id.*

¶ 10 Based on all the circumstances here, Wu's operation of his vehicle was unsafe and showed blatant disregard for the property and safety of others. Just as in *Yao*, Wu admitted to drinking alcohol. Additionally, Wu gradually swerved into another driving lane just as the driver did in *Yao*, in addition to Wu gradually swerving into oncoming traffic. Wu was also aware of the problem with his shaky feet, which caused him to swerve only at night. While no evidence was presented as to the cause of his foot problems, Wu should not drive at night if he indeed suffers from a pre-existing condition that prevents him from safely operating a vehicle.

¶ 11 Most importantly, Wu gradually swerved into the shoulder of the road three times including once where he almost hit trees on the side of the road ─ an area pedestrians and bikers frequent. *See id.* ¶ 15 ("[O]ther drivers do not anticipate that a vehicle will drift in and out of traffic lanes and encroach into the bike lane."). "An automobile is a dangerous instrumentality, thus traffic laws are necessary for the safety of the public and must be strictly enforced." *Id.* Wu's conduct under the circumstances clearly demonstrates a willful and wanton disregard for the safety of persons or property. *See id.* ("We need not wait for a serious injury to occur . . . before finding [the driver's] driving willful and wanton.").

¶ 12 Wu also contends that the totality of the evidence against him is insufficient to support his conviction of driving under the influence of alcohol. "In the Commonwealth, drivers are prohibited from operating a vehicle with a blood alcohol concentration of 0.08% or greater, or driving under the influence of alcohol to any degree that renders the driver incapable of safely driving." *Andrew*, 2007 MP 25 ¶ 5. A driver impliedly consents to a breath test for alcohol. *Id.* "If a driver refuses to submit to a breath test, evidence of refusal is admissible at trial, and the driver's license can be revoked for six months." *Id.* The trier of fact can consider a driver's

refusal to take a breath test, "along with other evidence, in determining the driver's guilt of driving under the influence." *Id.*

¶ 13 In *Andrew*, 2007 MP 25 ¶ 1, we decided evidence was insufficient to convict a driver of driving under the influence of alcohol. The evidence against the driver only included the smell of alcohol on his breath and a refusal to take a breathalyzer test. *Id.* ¶ 9. There was "no evidence of erratic driving typically associated with intoxication and no evidence of physical or mental impairment throughout an extended period of police observation during and after the traffic stop." *Id.* ¶ 10. Based on the scant evidence presented, we could not say beyond a reasonable doubt that Andrew drove under the influence of alcohol. *Id.* ¶ 9.

¶ 14 We also previously decided cases where evidence was sufficient to convict a driver of driving under the influence of alcohol:

> In *Commonwealth v. Martinez*, 2000 MP 5 ¶¶ 6-8, 27, we held there was sufficient evidence to support a conviction of driving under the influence of alcohol when officers saw a motorist drive erratically on the road, almost hit another driver, and drive on the sidewalk. The officers also smelled a strong odor of alcohol and the driver refused to take a breathalyzer test. *Id.* ¶¶ 8-9. Similarly, in *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 344 (1996), we found sufficient evidence to support a conviction of driving under the influence of alcohol after defendant admitted to consuming three beers before driving. An officer also testified he observed defendant's vehicle speeding and swerving, defendant did not pull over immediately after the officer began pursuing him, defendant smelled of alcohol, defendant had bloodshot eyes and slurred speech, and defendant failed two field sobriety tests. *Id.* Finally, in *Blas v. Commonwealth*, 2007 MP 17 ¶ 8, while there was no direct evidence of the driver' alcohol intake, we concluded there was sufficient evidence to support that the driver drove under the influence of alcohol because witnesses testified they saw the driver drink six or seven cans of beer, that he could not walk in a straight line, and he had a strong odor of alcohol.

Id. ¶ 6.

¶ 15 The instant case closely resembles *Martinez*, *Deleos Reyes*, and *Blas*, rather than *Andrew*. Unlike *Andrew*, this case presents overwhelming evidence of erratic driving typically associated with intoxication. The officer observed Wu gradually swerve into the shoulder of the road three times including once where the vehicle almost collided with trees on the side of the road. The officer additionally observed the vehicle gradually swerve into oncoming traffic, gradually swerve into another driving lane, and switch driving lanes without signaling. The officer further noticed that Wu's face was red, his speech was slurred, and his breath smelled of alcohol. Wu even admitted he drank one beer. Finally, Wu refused to take a breathalyzer test. *See id.* ¶ 9 (stating that refusing to take a breathalyzer test creates a strong interference that a driver seeks to suppress evidence of his guilt when coupled with a flushed face, slurred speech, and a strong odor

of alcohol). Based on all the evidence, a reasonable trier of fact could conclude, beyond a reasonable doubt, that Wu drove under the influence of alcohol.

IV

¶ 16 Viewing the evidence in the light most favorable to the Commonwealth, we determine there is sufficient evidence to conclude that Wu committed the offenses of reckless driving and driving under the influence of alcohol. Accordingly, we AFFIRM the trial court's decision.

Concurring:
Castro, Manglona, JJ.