[Cite as *State v. Petit*, 2009-Ohio-6925.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-084
	:	O P I N I O N
- vs -		12/30/2009
	:	
DUSTIN L. PETIT,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-02-0324

Robin N. Piper III, Butler County Prosecuting Attorney, Lina N. Alkamhawi, Government Services Center, 315 High Street, 11th Floor, Hamilton, OH 45011-6057, for plaintiff-appellee

Repper, Pagan, Cook, Ltd., John H. Forg, 1501 First Avenue, Middletown, OH 45044, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Dustin Petit, appeals from his conviction in the Butler County Court of Common Pleas for operating a motor vehicle while under the influence of alcohol. We affirm.

{¶2} In the early morning hours of November 24, 2007, appellant was stopped by Officer Tim Less, a 16-year veteran with the Hamilton Police Department, after he was

observed traveling 64 m.p.h. in a 40 m.p.h. zone. Upon approaching appellant, Office Less noticed a "strong odor of the alcohol on his breath," a "very noticeable slur in his speech," and that his eyes were "real glassy," "bloodshot and red." When Officer Less asked appellant if he had anything to drink that evening, appellant admitted that he "had a few beers." Officer Less then called Lieutenant Dan Pratt, a 22-year veteran with the Hamilton Police Department, to administer standardized field sobriety tests.

{¶3} Upon his arrival, Lieutenant Pratt detected a "strong odor of alcohol" on appellant's breath, and noticed that his "eyes were extremely bloodshot and his speech was extremely slurred." After administering the standardized field sobriety tests, during which time appellant was "very unsteady," "swaying back and forth, [and] basically having a hard time standing," Lieutenant Pratt placed him under arrest for operating a motor vehicle while under the influence of alcohol. Appellant, "who could hardly walk," and who later refused to submit to a breathalyzer test, continued to be "unsteady" after being transported to the Hamilton Police Department. Thereafter, Officer Less discovered four empty beer bottles, as well as one "open and half full" beer bottle, within appellant's impounded vehicle.

{¶4} Appellant was charged with, among other things, one count of operating a motor vehicle under the influence of alcohol (OVI) in violation of R.C. 4511.19(A)(1)(a), with a specification under R.C. 2941.1413 alleging that, within 20 years of committing the current OVI offense, he had been convicted of or pleaded guilty to five or more equivalent offenses. After a two-day jury trial, during which time appellant stipulated that he had been convicted of or pled guilty to five prior OVI offenses, he was found guilty and sentenced to serve a total of 38 months in prison and ordered to pay $1,350 in fines.

{¶5} Appellant now appeals his OVI conviction, raising three assignments of error. For ease of discussion, appellant's assignments of error will be addressed out of

order.

{¶6} Assignment of Error No. 3:

{¶7} "THE TRIAL COURT ERRED IN CONVICTING [APPELLANT] OF DRIVING UNDER THE INFLUENCE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." [sic]

{¶8} In his third assignment of error, appellant argues that his OVI conviction was against the manifest weight of the evidence. In support of this argument, appellant essentially claims that the jury, in returning a guilty verdict, improperly found the testimony of the state's witnesses, Officer Less and Lieutenant Pratt, to be more credible than his own. We disagree.

{¶9} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52; *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶44. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester,* Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James,* Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. When reviewing the evidence, the decision of the jury is owed deference since they are best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Mason v. Molinari*, Warren App. No. CA2006-05-056, 2007-Ohio-5395, ¶63; *State v. Bolish*, Butler App. No. CA2005-10-441, 2006-Ohio-5375, ¶43; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Upon review, the question is

whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton,* Madison App. No. CA2005-04-016, 2006-Ohio1785, ¶7; *Thompkins* at 387, 1997-Ohio-52.

{¶10} Appellant was charged with driving a motor vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), which prohibits any person from "operat[ing] any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶11} At trial, Officer Less testified that he noticed a "strong odor of the alcohol on [appellant's] breath," a "very noticeable slur in his speech," that his eyes were "real glassy," "bloodshot and red."[1] Officer Less also testified that appellant admitted to drinking a "few beers," and that he discovered four empty beer bottles, as well as one half-empty beer bottle, in appellant's impounded vehicle.

{¶12} In addition, Lieutenant Pratt testified that he detected a "strong odor of alcohol" on appellant's breath, noticed his "eyes were extremely bloodshot," "his speech was extremely slurred," and that he was "very unsteady," "swaying back and forth, [and] basically having a hard time standing," during the administration of the field sobriety tests.[2] Lieutenant Pratt also testified that appellant, who "could hardly walk," exhibited all six "decision points" the horizontal gaze nystagmus test is designed to detect, as well as all five "decision points" from the walk-and-turn test, and that he discontinued the one-legged-stand test because appellant "was so unsteady on the one leg that he almost fell

1. When questioned further, Officer Less testified that he smelled "an odor of alcoholic beverage, which [he] thought was beer[,] * * * a strong beer, not a stale beer, but a strong fresh beer."

2. Lieutenant Pratt clarified his testimony by stating that he smelled "an alcoholic beverage such as beer *** coming from his breath."

to the ground."[3] When asked why he believed appellant was so unsteady, Lieutenant Pratt testified that it was "[b]ecause he was under the influence of alcohol" and that "he was impaired to where he should not have been operating a motor vehicle."

{¶13} In his defense, appellant testified that he only drank "two beers," and that he did not have any alcohol inside his vehicle. Appellant also testified that he completed the field sobriety tests "as best as [he could] to [his] ability," and the way Lieutenant Pratt remembers his performance "might be a little different." In addition, when asked why he refused to submit to the breathalyzer test, appellant testified that it was "out of spite[.]"

{¶14} After a thorough review of the record, we find the evidence supporting appellant's conviction to be credible, and we cannot say the jury clearly lost its way or created a manifest miscarriage of justice in finding appellant guilty. See *Bolish*, 2006-Ohio-5375 at ¶47-50; *State v. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶15; *State v. Frazee*, Warren App. No. CA2005-11-119, 2006-Ohio-3778, ¶27. While appellant's version of events may differ from those of Officer Less and Lieutenant Pratt, "[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony" for it is entirely appropriate for the jury to believe the testimony of some witnesses while disregarding the testimony of others. *State v. Bromagen*, Clermont App. No. CA2005-09-087, 2006-Ohio-4429, ¶38; *State v. Lloyd,* Warren App. Nos. CA2007-04-052, CA2007-04-053, 2008-Ohio-3383, ¶51; *State v. Woodruff*, Butler App. No. CA2008-11-824, 2009-Ohio-4133, ¶25. Therefore, as appellant's OVI conviction was not against the manifest weight of the evidence, his third assignment of error is overruled.

{¶15} Assignment of Error No. 1:

3. According to Lieutenant Pratt's testimony, a "decision point" is synonymous with what the National Highway Traffic Safety Administration classifies as a "clue" indicating impairment.

{¶16} "THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTION TO CROSS-EXAMINE [APPELLANT] ON HIS PRIOR CONVICTIONS OF OVI OFFENSES."

{¶17} In his first assignment of error, appellant argues that the trial court erred by allowing the state to cross-examine him regarding his prior OVI convictions. In support of this argument, appellant claims that once he stipulated to his five prior OVI convictions, the state was "barred from any questioning whatsoever regarding those prior convictions," and therefore, "the trial court committed reversible error by allowing the prosecution to do so." We disagree.

{¶18} At the outset, we note that appellant failed to object when the state questioned him regarding his five prior OVI convictions on cross-examination. In turn, because he did not object to this line of questioning, we review appellant's challenge only for plain error. See *Lloyd*, 2008-Ohio-3383 at ¶13.

{¶19} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶11. An alleged error does not constitute plain error unless, but for the error, the outcome of the trial clearly would have been different. *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶12, citing *State v. Stojetz,* 84 Ohio St.3d 452, 455, 1999-Ohio-464; *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Courts are to notice plain error "with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *Barnes* at 27, 2002-Ohio-68.

{¶20} As appellant is undoubtedly aware, the state is responsible for providing the jury with sufficient proof in order to convince them, beyond a reasonable doubt, that every element of an offense is present. *State v. Craft*, 181 Ohio App.3d 150, 2009-Ohio-675, ¶35, citing *State v. Smith* (1990), 68 Ohio App.3d 692, 695. When a previous conviction

is an element of the current offense, such as the case here, the state is equally responsible for proving the existence of a prior offense beyond a reasonable doubt. R.C. 2941.1413(A); *Craft* at ¶35; *State v. Abercrombie*, Clermont App. No. CA2001-06-057, 2002-Ohio-2414, ¶26-27; *State v. Goode* (Sept. 27, 1999), Warren App. Nos. CA98-07-079, CA98-07-083, at 6. In order to satisfy its burden of proof, the state may obtain a stipulation to the defendant's prior convictions. *Craft* at ¶35.

{¶21} Prior to the start of trial, the following discussion took place:

{¶22} "[THE STATE]: Your Honor, we have five exhibits previously placed on the record with the stipulation that [appellant] was agreeing that these were equivalent offense for the purpose of the statute. This is him. He is the one that was convicted of these."

{¶23} The state then read appellant's five prior OVI convictions into the record, and moved to admit certified copies of the same. Appellant's trial counsel did not object to their admission.

{¶24} Due to appellant's pretrial stipulation, the state did not present any further evidence regarding appellant's five prior OVI convictions during its case-in-chief. However, while testifying in his own defense, appellant testified as follows:

{¶25} "Q: All right. Now, whether you remember or not, I'm going to ask you – I'm going to call your attention to August 1999 – August of 1999, *were you arrested in August of 1999 for DUI*?

{¶26} "A: Yes.

{¶27} "Q: And just so things are clear here, *you actually were found guilty or you pled guilty, right*?

{¶28} "A: Yes.

{¶29} " * * *

{¶30} "Q: ** * * And then you had these other four DUIs then?* [sic]

{¶31} "A: Yes.

{¶32} "* * * *

{¶33} "Q: *And all of those other DUIs you either pled guilty or no contest?* [sic]

{¶34} "A: Yes." (Emphasis added.)

{¶35} After a thorough review of the record, we find that by testifying to his five prior OVI convictions on direct examination, something which he had previously stipulated to, appellant opened the door to the state's inquiry on cross-examination. *Abercrombie*, 2002-Ohio-2414 at ¶27; see, e.g., *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶92 (defense counsel opened the door to prosecutor's inquiry regarding defendant's prior kidnapping and homicide convictions by asking him whether he had been "convicted of aggravated murder and kidnapping" on direct examination). In turn, any alleged error pertaining to the state's questioning was invited or induced by appellant himself. Under the invited-error doctrine, a party cannot take advantage of any alleged error that the party invited or induced the court to commit. *State v. Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶103; *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶28.

{¶36} In addition, any prejudice that arose from the state's questioning was appropriately curbed by the trial court's subsequent limiting instruction. Specifically, the trial court instructed the jury that while "[e]vidence was received that [appellant] was convicted of five prior operating a motor vehicle under the influence charges," that "evidence was received only for a limited purpose," that "[his five prior OVI convictions] are an element of the offense charged," and that "[i]t was not received, and [they] could not consider it to prove the character of [appellant] in order to show that he acted in conformity with that character." We must presume that the jury followed the court's instructions. *State v. Garrett*, Clermont App. No. CA2008-08-075, 2009-Ohio-5442, ¶51,

citing *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195.

{¶37} Regardless, in light of the overwhelming evidence of appellant's guilt, along with the stipulation to his five prior OVI convictions, we cannot say that the outcome of the trial clearly would have been different had the state been precluded from cross-examining him on such. Therefore, any alleged error that the trial court may have made by permitting the state to cross-examine appellant regarding his five prior OVI convictions was harmless. Accordingly, appellant's first assignment of error is overruled.

{¶38} Assignment of Error No. 2:

{¶39} "[APPELLANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE OF THE INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL."

{¶40} In his second assignment of error, appellant argues that "his trial counsel, after stipulating to his five prior OVI offenses, was ineffective in failing to object" to the state questioning him regarding those convictions on cross-examination. However, as discussed above, appellant opened the door to the state's inquiry regarding his five prior OVI convictions, and therefore, any objection to the state's questioning would have been futile. See *State v. Scott* (Aug. 1, 1994), Butler App. No. CA92-03-052, 1994 WL 394976 at *12. Accordingly, appellant's second assignment of error is overruled.

{¶41} Judgment affirmed.

YOUNG, J., concurs.

HENDRICKSON, J., concurs separately.

HENDRICKSON, J., concurring separately.

{¶42} I concur with the result reached by the majority and the greater part of its rationale in analyzing appellant's first assignment of error. Nonetheless, I write separately

to emphasize my aversion to the mode of questioning employed by the prosecution in inquiring into appellant's prior OVI convictions on cross-examination. Although the fact of prior OVI convictions is an element of the OVI offense for which appellant was on trial, the elicitation of the facts underlying the prior convictions was prejudicial and unnecessary. I agree that appellant invited the error by soliciting questions on the subject without objection. Where my opinion diverges is the extent to which the prosecution was permitted to question appellant on the prior OVI convictions once he opened the door on the subject.

{¶43} I agree that the prosecution was permitted to ask questions which confirmed the existence of appellant's prior OVI convictions. However, this did not authorize the prosecution to question appellant to the extent that it could inquire into the underlying facts of each conviction. I write separately to emphasize that, under such circumstances as these, the prosecution should be limited to asking whether the accused was convicted of the prior OVI offenses and nothing more. I would hold that, where the fact of prior convictions is an element of the offense for which the defendant is being tried, the prosecution may only inquire into the fact that a prior conviction exists and not the facts underlying the prior conviction, unless otherwise permitted by law.

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