[Cite as *State v. Sias*, 2010-Ohio-3566.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2010-01-001 CA2010-02-003
	:	
- vs -	:	O P I N I O N 8/2/2010
PHILLIP M. SIAS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON COUNTY COURT OF COMMON PLEAS
Case No. CRI20090078

Stephen J. Pronai, Madison County Prosecuting Attorney, Eamon Costello, 59 North Main Street, London, Ohio 43140, for plaintiff-appellee

Kirsten J. Gross, Thomas J.C. Arrington, 67 East High Street, London, Ohio 43140, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Phillip M. Sias, appeals his conviction in the Madison County Court of Common Pleas for one count of aggravated vehicular homicide. We affirm.

{¶2} On the evening of April 25, 2009, appellant and his girlfriend, Titania Chapman, were involved in a single car accident while the couple was traveling

northbound on State Route 142 located in Madison County, Ohio. Chapman later died from injuries she suffered that evening.

{¶3} Following a police investigation, appellant was charged with aggravated vehicular homicide. After a two-day jury trial, appellant was found guilty and sentenced to serve four years in prison.

{¶4} Appellant now appeals his conviction, raising two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED IN THAT THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶7} In his first assignment of error, appellant argues that his conviction was against the manifest weight of the evidence. We disagree.

{¶8} 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. 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. Under a manifest weight of the evidence challenge, 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-Ohio-1785, ¶7. An appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances in which the evidence presented at trial weighs heavily in favor of acquittal. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶44.

{¶9} Appellant was convicted of aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), a second-degree felony, which prohibits any person, "while operating * * * a motor vehicle," from "caus[ing] the death of another * * * [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code." Pursuant to R.C. 4511.19(A)(1)(a), no person shall operate a vehicle 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."

{¶10} At trial, Tim Lewis testified that in the evening hours of April 25, 2009, he saw appellant, who did not have his lights on at the time, driving "very, very erratic" at "a very high rate of speed" as he traveled west through Madison County on Interstate 70 in a late model Nissan Maxima that "looked like it had already been in an accident." According to Lewis, appellant "almost rear-ended" another vehicle, drove off the road "multiple times," swerved and weaved "the whole time," and "basically dodg[ed] cars" by taking "very sudden, sharp turns" skipping "from lane to lane." Lewis, who called the police to report appellant as "a DUI driver," continued by testifying that after he followed appellant to the Plain City-Georgesville exit, appellant "got to the top of the ramp, [and] he just sat there, * * * [d]idn't go nowhere, didn't do nothing." Lewis, who thought "maybe [appellant] had just passed out," then testified that after sitting on the top of the ramp for what "seemed to be three or four minutes,"

appellant took a sudden right-hand turn heading north on State Route 142 towards Plain City. Lewis, however, turned left towards West Jefferson and did not see appellant again that evening.

{¶11} Zachary Hennis, another driver traveling west on Interstate 70, testified that he saw appellant speed by him "swerving in and out of lanes" without "any turn signal or caution as to other drivers." Hennis then testified that once he caught up to appellant at the Plain City-Georgesville exit ramp, he followed appellant northbound on State Route 142 when he saw him nearly swerve into a ditch, narrowly miss an oncoming car, smash through a mailbox, and slam "into a big rock in front of a house" at speeds approaching 65 miles per hour.

{¶12} Catherine Allen, Hennis' girlfriend and passenger that evening, also testified that she saw appellant drive past them "fairly quickly" before catching up to the vehicle at the Plain City-Georgesville Road exit ramp. Allen then testified that while Hennis followed appellant northbound on State Route 142, she saw appellant cross "far over" into the opposite lane before "overcorrecting" causing the vehicle to go "through a yard and hit a boulder, which then hit a tree." Allen continued by testifying that once the police arrived at the scene, she saw appellant "conscious and screaming, yelling at the people around the car." When asked if she thought appellant was intoxicated that evening, Allen testified that "[i]t was [her] impression that [appellant] was intoxicated."

{¶13} Also at trial, Trooper Matthew Himes with the Ohio State Highway Patrol testified that he was dispatched to the scene of the injury accident on State Route 142 at approximately 9:00 p.m. Upon arriving at the scene, Trooper Himes

testified that he made contact with appellant, who was sitting in the driver's seat, and Chapman, who was sitting unconscious in the passenger seat, when he noticed appellant "was talking with slurred speech" and had an "odor of alcohol about his person and on his breath when speaking."[1] Trooper Himes then testified that appellant claimed he had "a couple beers or a couple of drinks" at an "Outlaw party" in Columbus and that he thought "somebody might have given him * * * something that altered his state of mind."[2] Trooper Himes continued by testifying that appellant became "belligerent and disorderly" as emergency medical technicians tended to him, that no field sobriety tests were administered due to appellant's injuries, that appellant never claimed that he was involved in a prior accident that evening, and that a drug screen conducted at the hospital came back negative.

{¶14} In addition, Sergeant Rod Moser, also with the Ohio State Highway Patrol, testified that he went to the hospital the next day at approximately 9:00 a.m. to inform appellant that his girlfriend had died and to acquire a written statement. Appellant's statement, which Sergeant Moser read into the record, indicated appellant admitted to drinking "a couple of shots" at a bar in Columbus. When asked what type of shots he drank, Sergeant Moser testified that appellant claimed he drank shots of "beer." Sergeant Moser then testified that although appellant claimed to have had some pre-existing problems with the right front wheel of his vehicle, at no time did appellant state that he had been involved in a prior accident that evening.

{¶15} In his defense, appellant testified he drove to Columbus with Chapman,

1. Trooper Himes later testified on cross-examination that appellant "did have an odor of alcoholic beverage about his person."
2. The Outlaws were later identified as a "motorcycle gang."

his girlfriend, to cash a check and get a money order. After running these errands, appellant testified that Chapman had planned on visiting her son, but became upset and said "she felt like she wanted to have a drink." Wanting to appease his girlfriend, appellant testified that he stopped at "the first bar [he] seen," bought Chapman a drink, and started shooting pool. Appellant, who claimed no Outlaw gang members were at the bar, then testified that although the couple "made it a thing that [they] just don't drink," he "had two beers," whereas Chapman sat at the bar and got "drunk."

{¶16} Appellant continued by testifying that the pair stayed at the bar for "probably an hour, maybe an hour and a half." Upon leaving the bar, and although he knew his girlfriend was intoxicated, appellant testified that he let Chapman drive so that she would not "start crying again." Thereafter, according to appellant, once Chapman turned the corner from the bar, "[t]here was a little brown dog that ran in front of us. She dodged the dog. She hit something. I don't know what she hit. I know that I got jacked up in it. I got hurt in it. And I was running around in a daze." Appellant then testified that Chapman drove the damaged vehicle to a nearby gas station so the pair could switch seats. When asked if he told the police about this prior accident, appellant testified that he "didn't want [Chapman] getting in no trouble, and [he] didn't want anybody to put anything on her."

{¶17} After switching to the driver's seat, appellant testified that "it seemed like [he] was driving in a dream * * *," but that he "knew [he] had to get home." Appellant then testified that while driving "home" on State Route 142, a road he had "no idea what [he] was doing on" because he did not "even live that way," Chapman "let out a scream or a yell or something" so he "looked over at her" but "took [his]

eyes off the road too long" when he smashed into a mailbox just before the "whole front of the car shattered." When asked if he was under the influence of alcohol, appellant testified that he "didn't drink enough to be under the influence of alcohol."

{¶18} After a thorough review of the record, we find the evidence supporting appellant's aggravated vehicular homicide conviction credible, and therefore, we cannot say the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty. See *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, ¶30-31. As the evidence indicates, appellant was seen driving at a high rate of speed while swerving through traffic before finally losing control of his vehicle causing him to smash through a mailbox and into a boulder resulting in Chapman's death. The evidence also indicates that appellant admitted to consuming alcohol that evening, that he exhibited slurred speech, that he smelled of alcoholic beverage, and that he acted in a belligerent manner at the crash scene. See *State v. Bolish*, Butler App. No. CA2005-10-441, 2006-Ohio-5375, ¶47, 50. While appellant's version of events may differ from those of the state, "[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. 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 conviction was not against the manifest weight of the evidence, his first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES."

{¶21} In his second assignment of error, appellant argues that the trial court erred by failing to instruct the jury on "the lesser included offense" of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a).[3] We disagree.

{¶22} Contrary to his claim, appellant did not request the trial court to instruct the jury on the "lesser included offense" of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a), but instead, simply requested "the lesser of OVI."[4] In turn, even assuming aggravated vehicular homicide under R.C. 2903.06(A)(2)(a) is a "lesser included offense" of aggravated vehicular homicide under R.C. 2903.06(A)(1)(a), appellant's failure to request this instruction at trial waived all but plain error. See *State v. Haney*, Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶50, citing *State v. Goodwin*, 84 Ohio St.3d 331, 347, 1999-Ohio-356.

{¶23} 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." Plain error does not exist unless "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 97. Notice of plain error is to be taken "under exceptional circumstances and only to prevent a

3. R.C. 2903.06(A)(2)(a) prohibits any person from "causing the death of another" while "operating * * * a motor vehicle * * * [r]ecklessly."

4. **{¶a}** Specifically, when asked if appellant wished to request a lesser included offense instruction, appellant's trial counsel stated, in pertinent part, the following:

{¶b} "Judge, I'm still – we're still mulling this over, but the – considered under these unique facts requesting the lesser of OVI. And I apologize for not having raised that earlier. It's just kind of a – as I was mulling things over at lunch."

{¶c} Nothing in this statement suggests appellant was requesting the "lesser included offense" of aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a).

manifest miscarriage of justice." *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, ¶11; *State v. Robinson*, Fayette App. No. CA2005-11-029, 2007-Ohio-354, ¶25.

{¶24} After a thorough review of the record, we find appellant could not show that the outcome of the trial would have been different had the trial court instructed the jury on aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a). As discussed above, the state presented extensive competent and credible evidence indicating appellant caused Chapman's death by smashing his vehicle into a boulder while he was under the influence of alcohol. As a result, the trial court did not err, let alone commit plain error, by failing to instruct the jury regarding aggravated vehicular homicide under R.C. 2903.06(A)(2)(a). Finally, we do not address the failure to give an instruction on the "issue of OVI" because appellant did not raise the issue on appeal. Therefore, appellant's second assignment of error is overruled.

{¶25} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.