[Cite as *Butler v. Stevens*, 2009-Ohio-2775.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

VERNESE E. BUTLER, et al. :

Plaintiffs-Appellants : C.A. CASE NO. 22822

v. : T.C. NO. 2005 CV 8367

MONTE STEVENS, et al. : (Civil appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 12th day of June, 2009.

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FROELICH, J.

{¶ 1} Vernese Butler and Denzel Hollis filed personal injury claims against Monte Stevens in the Montgomery County Court of Common Pleas. The claims arose out a single vehicular accident. In 2007, a jury awarded Butler damages in the amount of $9,983.34. In 2008, a different jury found that Hollis was not entitled to damages. Butler and Hollis appeal

from these judgments.

{¶ 2} We find that the jury verdicts awarding damages to Butler, but not to Hollis, were not inconsistent or against the weight of the evidence and that the amount awarded to Butler was not inadequate. The trial court did not err in ordering separate trials or in allowing a juror who had had a passing acquaintance with Butler and Hollis in the past to remain on Butler's jury. Because there was sufficient evidence to support the jury verdicts and because the verdicts were not against the manifest weight of the evidence, neither Butler nor Hollis was entitled to a new trial or to judgment notwithstanding the verdict. The judgments of the trial court will be affirmed.

I

{¶ 3} Butler and Hollis are mother and son. On November 6, 2003, they were traveling in their car on North Main Street when they were rear-ended by Monte Stevens. In 2005, Butler and Hollis filed a Complaint against Stevens for negligence. Separate trials were held in 2007 and 2008. Butler, who had been permanently disabled as a result of a prior car accident, was awarded $6,000 for pain and suffering and $3,983.34 for past reasonable and necessary medical expenses, but the jury did not award damages for the past or future effect on her physical health and inability to perform usual activities or for future pain and suffering. Hollis was not awarded any damages, and the trial court denied his motion for judgment notwithstanding the verdict.

{¶ 4} Butler and Hollis raise six assignments of error on appeal.

II

{¶ 5} Butler and Hollis' first assignment of error states:

{¶ 6} "THE TWO JURY VERDICTS ARE INCONSISTENT, CONTRARY TO

LAW, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND INADEQUATE AND THEREFORE MUST BE VACATED AND THIS CAUSE REMANDED FOR A NEW TRIAL."

{¶ 7} Butler and Hollis contend that the verdicts in their trials were inconsistent. They also claim that the verdicts were inadequate and against the manifest weight of the evidence, but these arguments will be discussed under the third and fourth assignments of error below.

{¶ 8} Butler and Hollis apparently believe that the jury verdicts were inconsistent because they were involved in the same car accident, yet Butler was awarded damages and Hollis was not. Stevens conceded his negligence; the only issues presented to the juries were whether the negligence proximately caused any injuries and, if so, what was the amount of damages, if any, each complainant had sustained.

{¶ 9} Damages for personal injury must be determined separately for each individual, and there is no reason to assume that two or more people involved in the same accident suffer comparable injuries. There was nothing inconsistent about the juries' conclusions that Butler had suffered injury in the accident and Hollis had not.

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

III

{¶ 11} Butler and Hollis' second assignment of error states:

{¶ 12} "THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR BY ORDERING SEPARATE TRIALS, WHICH WRONGFULLY REQUIRED THE PLAINTIFFS TO PROVE THEIR CASE TWICE. FURTHER, THE SEPARATE TRIALS CREATED THE PREJUDICIAL AND MISLEADING INFERENCE THAT ONLY ONE

PERSON IN THE VEHICLE WAS INJURED."

{¶ 13} Butler and Hollis claim that they were prejudiced by the bifurcation of their trials, which required them to "prove their case twice" and "misled" the juries by creating the impression that only one person was injured in the accident.

{¶ 14} The determination of a motion to bifurcate claims or issues for trial lies within the sound discretion of the trial court. Civ.R. 42(B); *Thomas v. Nationwide Mut. Ins. Co.,* 177 Ohio App.3d 205, 2008-Ohio-3662, at ¶124, citing *Heidbreder v. Northampton Twp. Trustees* (1979), 64 Ohio App.2d 95, 100. In order to conclude that the trial court abused its discretion, we must find that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} The record does not contain a motion to bifurcate or a written decision on such a motion. However, after Butler's trial, her attorney filed a Motion to Withdraw as Counsel in which he recounted:

{¶ 16} "[A]t the pretrial of this matter, the Plaintiff's attorney *** indicated that he had recently learned of medical treatment received by Denzel Hollis which would make it impossible to try Denzel Hollis' case at the same time that Vernese Butler's case was tried. The Court therefore ordered that the trial be separated under [Civ.R. 42]."

{¶ 17} By the time Hollis' case was tried, Butler and Hollis had retained a different attorney, and a question arose about prior court proceedings. At sidebar, the court explained to Hollis' attorney: "[Butler and Hollis] were both parties up until last year. It was only a day or two before [Butler's] trial that Vernese Butler and Denzel [Hollis] were together, and they got – decided that there was some additional treatment

or something that Denzel needed, and they asked to separate that out."

{¶ 18} Based on the motion to withdraw and the transcript of Hollis' trial, it appears that Butler and Hollis requested the bifurcation to which they now object.

{¶ 19} Although Butler and Hollis suggest that the juries were misled into believing that only one person was injured in the accident, only the injuries of the plaintiff in each trial were relevant to the jury's determination. Butler and Hollis have failed to demonstrate how they have been prejudiced by the jury in each trial confining its consideration to the injuries of the plaintiff in that trial. This argument also misrepresents the record; at each trial, the evidence demonstrated that both Butler and Hollis claimed to have been injured in the accident.

{¶ 20} Furthermore, based on the motion to withdraw and the trial court's statement about the case history, we conclude that Butler and Hollis requested that the trials be bifurcated, and thus invited the error of which they now complain. "The doctrine of invited error is a corollary of the principle of equitable estoppel. Under the doctrine of invited error, an appellant, in either a civil or a criminal case, cannot attack a judgment for errors committed by himself or herself; for errors that the appellant induced the court to commit; or for errors into which the appellant either intentionally or unintentionally misled the court, and for which the appellant is actively responsible. Under this principle, a party cannot complain of any action taken or ruling made by the court in accordance with that party's own suggestion or request." *Daimler/Chrysler Truck Financial v. Kimball,* Champaign App. No. 2007-CA-07, 2007-Ohio-6678, at ¶40, citing 5 Ohio Jurisprudence 3d (1999, Supp.2007) 170-71, Appellate Review, Section 448 (internal citations omitted). The fact that Butler and Hollis invited the error of

which they now complain provides an additional basis for us to conclude that the trial court acted reasonably in conducting separate trials.

{¶ 21} The second assignment of error is overruled.

IV

{¶ 22} Butler and Hollis' third and fourth assignments of error challenge the adequacy of the juries' verdicts. Additionally, Butler claims that she was entitled to a new trial, although she did not file such a motion in the trial court.

{¶ 23} An appellate court will not reverse the judgment of the trial court if the decision is supported by some competent, credible evidence going to all essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. This standard rests on the strong presumption that the trial court, as the trier of fact, is in the best position to weigh the evidence presented, assess the credibility of the witnesses, and make an informed factual determination therefrom. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 24} Civ.R. 59(A)(6) authorizes a trial court to vacate a judgment and grant a new trial "to all or any of the parties and on all or part of the issues" the judgment concerns, upon a finding that the judgment "is not sustained by the weight of the evidence." "[I]n order to set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim." *Drehmer v. Fylak,* 163 Ohio App.3d 248, 2005-Ohio-4732, at ¶9, citing *Bailey v. Allberry* (1993), 88 Ohio

App.3d 432, 435.

{¶ 25} The standard of review for a motion for judgment notwithstanding the verdict is the same as that for a directed verdict: Construing the evidence most strongly in favor of the party against whom the motion is directed, the motion must be overruled unless reasonable minds could reach no other conclusion but that, under the applicable law, the movant is entitled to judgment in his favor. Civ.R. 50; *Texler v. D.O. Summers Cleaners & Shirt Laundry Co., Inc.* (1998), 81 Ohio St.3d 677, 679.

{¶ 26} Butler and Hollis' third assignment of error states:

{¶ 27} "THE JURY VERDICT ON BEHALF OF PLAINTIFF VERNESE BUTLER WAS INADEQUATE AND THEREFORE THE VERDICT MUST BE VACATED AND A NEW TRIAL ORDERED."

{¶ 28} Butler claims that she "presented substantial evidence of injury," which the defense failed to rebut with any expert testimony. She contends that the jury verdict was inadequate because, while awarding her damages for medical bills and past pain and suffering, it failed to compensate her for other damages such as the past or future effect upon her health or her inability to perform usual activities. She relies on *Hook v. Brinker*, Montgomery App. No. 21389, 2006-Ohio-5583, and *Lovett v. Wenrich*, Montgomery App. No. 19497, 2003-Ohio-4587, in support of her argument.

{¶ 29} At trial, Butler claimed that her back and knee were injured in the car accident with Stevens. Butler acknowledged, however, that she was already permanently disabled at the time of the accident as a result of a back injury from a 1991 car accident. Stevens presented evidence, based on EMS and hospital records, medical charts, and therapy notes, that Butler did not immediately complain of a knee

injury and that it may have manifested itself sometime later. Specifically, Stevens presented evidence that the EMS run sheet from the 2003 accident reported "minor back pain" and no reference to knee pain; that the emergency room records listed her complaint as lower back pain and reflected that Butler stated she had not struck body parts on any structure; that her primary care doctor's records indicate a fall in her driveway in January 2004, and that her aquatic therapy records indicate a "new" complaint of knee pain in May 2004. Although Butler's prior back injury may have been aggravated by the collision with Stevens, the parties disputed whether she had suffered any diminishment in her health or ability to perform usual activities that was attributable to that accident, as opposed to her 1991 accident or other events, and whether her knee pain was caused by the accident.

{¶ 30} With respect to her preexisting injuries, Butler admitted on cross-examination that she had limited mobility before the 2003 accident, including pain from her back into her legs and muscle spasms, the severity of which varied with the weather temperature. She also testified that she had been unable to return to work and that she had not been able to travel extended distances by car or train since the 1991 accident because she could not tolerate sitting for extended periods. Butler described similar discomfort and limitations after the 2003 accident.

{¶ 31} Inadequate damages are insufficient and disproportionate to the harm alleged, appearing to have been given under the influence of passion or prejudice. Black's Law Dictionary (5 Ed.Rev. 1983) 387; Civ.R. 59(A)(4). The jury could have concluded, based on the evidence presented, that Butler's claimed injuries and damages were not all attributable to the 2003 accident. The jury could also have

reasonably concluded that the damages awarded were adequate based on her medical expenses and pain and suffering, but that her usual activities and general health were not significantly impaired by the 2003 accident. There is no evidence that passion or prejudice influenced the jury's verdict. The damages were not inadequate as a matter of law.

{¶ 32} Because there was a legitimate dispute over the extent to which Butler's injuries were attributable to the 2003 accident, the facts in Butler's case are distinguishable from *Hook* and *Lovett*, on which she relies. In *Hook*, a pedestrian was hit by a car. The jury found the driver of the car to be seventy percent negligent, but it awarded damages that did not even cover the pedestrian's visit to the emergency room. The plaintiff's and the defendant's experts agreed that the plaintiff-pedestrian had suffered injury as a result of the accident, although they disagreed about the extent of the injury. We held that the experts' agreement that the accident had caused some injury to Hook, and the fact that the accident "involved a vehicle hitting a pedestrian without a vehicle surrounding him to absorb most of the impact," compelled the conclusion that an emergency room visit was reasonably warranted. Id. at ¶19. Under these circumstances, and considering the jury's finding that the driver had been seventy percent negligent, we concluded that an award of approximately one-quarter of the emergency room bills was inadequate and against the manifest weight of the evidence. Id.

{¶ 33} *Lovett* involved a car accident after which the plaintiff did not seek treatment for his claimed injuries for almost three weeks. All of the medical experts who testified agreed that Lovett had suffered some sort of injury which would not have

subsided any earlier than two to three weeks after the accident, although the extent of the injury was disputed. The jury returned a verdict in Lovett's favor, but awarded no damages for pain and suffering or medical expenses. Because the experts all agreed that Lovett suffered injuries as a result of the accident and because he sought treatment for his injury within the period during which the experts agreed that he would be symptomatic, we concluded that a finding of zero damages was inadequate, although the evidence might reasonably have supported an award of very minimal damages. Id. at ¶38.

{¶ 34} Butler's case is distinguishable from *Hook* and *Lovett*. The extent to which she had *any* damages attributable to the accident, beyond the short-term aggravation of her prior injury, was disputed, and the damages awarded to her were not clearly inconsistent with the evidence presented regarding her injuries. Butler was permanently disabled and her activities were significantly limited before the 2003 accident occurred based on injuries and limitations similar to those which she claimed had resulted from this accident. The jury could have reasonably concluded that its award for pain and suffering and past medical expenses adequately compensated Butler for the aggravation of her previous injuries as a result of the 2003 accident, but that her long-term physical health and ability to perform usual activities had not worsened. The jury's verdict is supported by competent evidence and was not inadequate as a matter of law. Butler was not entitled to a new trial.

{¶ 35} The third assignment of error is overruled.

{¶ 36} Butler and Hollis' fourth assignment of error states:

{¶ 37} "THE JURY VERDICT IN THE DENZEL HOLLIS TRIAL WAS AGAINST

THE MANIFEST WEIGHT OF THE EVIDENCE AND INADEQUATE TO COMPENSATE THE PLAINTIFF DENZEL HOLLIS FOR HIS INJURIES WHICH WERE DIRECTLY AND PROXIMATELY CAUSED BY THE DEFENDANT."

{¶ 38} Hollis argues that the jury verdict cannot be reconciled with the evidence that he was injured in the accident. He relies on *Hook* and points out that there was no expert witness for the defense to contradict his evidence as to the cause of his injuries.

{¶ 39} The trier of fact is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses. *Hotel Statler v. Cuyahoga Cty. Bd. of Revision*, 79 Ohio St.3d 299, 304, 1997-Ohio-388; *Knowlton v. Schultz*, 179 Ohio App.3d 497, 2008-Ohio-497, at ¶56. The trier of fact is not required to credit any expert, even if the expert's testimony is unrefuted. *Hotel Statler,* 79 Ohio St.3d at 304. The trier of fact may accept all, some, or none of the expert testimony. Id.

{¶ 40} Under Evid.R. 705, "[t]he expert may testify in terms of an opinion or inference and give [his] reasons therefore after disclosure of the underlying facts or data." The provision of the underlying facts or data allows the jury to assess the validity of the expert's opinion. *State v. Broe*, Hamilton App. No. C-020521, 2003-Ohio-3054, at ¶53. The jury must decide whether the assumed facts on which an expert has based an opinion are true.

{¶ 41} In this case, Hollis' expert, Dr. Gogi Kumar, opined that Hollis suffered from headaches that have some features of migraines. She stated that migraines are 70-80% genetic and are not caused by head trauma, but that head trauma can trigger migraines. She opined, to a reasonable degree of medical certainty, that Hollis' headaches had been triggered by head trauma in the accident. Dr. Kumar's testimony

relied upon Butler's and Hollis' statements about Hollis' medical history, in which they had stated that Hollis hit his head in the accident and that his headaches started thereafter. She acknowledged that her opinion as to the cause of the headaches had been "based entirely upon subjective complaint" rather that objective factors, such as CT scans or x-rays.

{¶ 42} The medical history provided to Dr. Kumar by Butler and Hollis was refuted at trial. On cross-examination, Dr. Kumar was asked about the following: EMS records indicating that Hollis had not reported hitting his head at the time of the accident; the medical records from a visit to his pediatrician in January 2004, where Hollis reported an injury to his arm in the accident but did not mention a head injury; and the medical records from an ear, nose and throat specialist showing that Hollis had been treated for headaches in the past and had been diagnosed with sinusitis. Dr. Kumar stated that she had not been aware of these aspects of Hollis' medical history when she formulated her opinion about the cause of his headaches.

{¶ 43} The assumptions underlying Dr. Kumar's testimony that the accident had been the cause of Hollis' headaches were rebutted by Stevens. Based on the evidence presented, the jury could have reasonably concluded that the assumptions underlying Dr. Kumar's opinion were incorrect or, at least, incomplete. Under these circumstances, the jury was not required to credit Dr. Kumar's conclusion about the cause of Hollis' headaches. Indeed, Dr. Kumar acknowledged that her conclusions would be affected if the underlying facts were not as reported to her.

{¶ 44} Hollis' case is distinguishable from *Hook.* In *Hook,* the plaintiff immediately complained of pain in his neck, head, and back, went to the emergency

room the for x-rays and a CT scan, and incurred emergency room fees totaling almost $2,000. The testimony of all of the experts supported a finding that Hook had been injured in the accident. In Hollis' case, he and his mother claimed that he had immediately reported hitting his head and that he had been treated at the hospital. But the EMS and hospital records contradicted that claim. According to EMS records, Butler declined treatment for Hollis, and he was transported in the ambulance with Butler only because there was no one else to take him. No medical record was created for Hollis at the hospital, and a records clerk testified that no medical care would have been administered without the creation of a chart. In other words, unlike *Hook*, there was evidence from which the jury at Hollis' trial could have concluded that he had not been injured in the accident.

{¶ 45} The jury's failure to award damages to Hollis does not shock our sense of justice and fairness, nor is it irreconcilable with the evidence in the case. There is evidence from which the jury could have concluded that Hollis' headaches were not related in any way to the accident. The judgment was not against the manifest weight of the evidence.

{¶ 46} The fourth assignment of error is overruled.

V

{¶ 47} Butler and Hollis' fifth assignment of error states:

{¶ 48} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE PLAINTIFF DENZEL HOLLIS BY DENYING THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT."

{¶ 49} Hollis contends that the jury "clearly lost its way" is rendering a defense

verdict because there were "no objectively discernible reasons *** to disregard the testimony regarding the injuries suffered" by Hollis. He claims that the trial court erred in denying his motion for judgment notwithstanding the verdict.

{¶ 50} When considering a motion for judgment notwithstanding the verdict, a court must construe the evidence and all reasonable inferences most strongly in favor of the nonmoving party to determine whether the evidence is legally sufficient to sustain the verdict. *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.,* 119 Ohio St.3d 209, 214, 2008-Ohio-3833, at ¶23; *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347. This review does not involve weighing the evidence. *Osler* at 347, citing *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. Because this is a question of law, it requires a de novo review. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108.

{¶ 51} In his argument that he was entitled to judgment notwithstanding the verdict, Hollis erroneously relies upon the standard of review for determining whether a verdict is against the manifest weight of the evidence (which we considered in the Fourth Assignment of Error). The appropriate issue for our consideration is whether the verdict was supported by sufficient evidence, as discussed above. "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, ¶10, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. In contrast, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or

persuasive." *Wilson,* supra, at ¶12. The question before us in reviewing the denial of a motion for judgment notwithstanding the verdict is not whether the jury "clearly lost its way," as Hollis contends, but whether the evidence was legally sufficient to support the verdict if the evidence was construed in Stevens' favor.

{¶ 52} Hollis claims that there were "no objectively discernible reasons" to disregard his testimony and the testimony of Dr. Kumar about the injuries he suffered as a result of the car accident. As we discussed under the fourth assignment of error, Hollis' assertion that there was no evidence contradicting Dr. Kumar's finding on the causation of his injuries is incorrect. The defense was not required to call its own expert to contradict Dr. Kumar's testimony about causation; it rebutted the assumptions underlying Dr. Kumar's conclusion through cross-examination and the introduction of medical records. Although Hollis and Butler had told Dr. Kumar that his headaches originated with the accident, she testified that they had not told her of his history of headaches and of his ENT's prior diagnosis of sinusitis as the cause of those headaches.

{¶ 53} Stevens presented evidence through EMS and other medical records showing that Hollis had not complained to medical personnel of a head injury in the hours after the accident, that Butler had refused treatment for him, and that he had not reported a head injury to his pediatrician two months later. In sum, the assumptions upon which Dr. Kumar based her opinion were called into question at trial, and even she acknowledged that her opinion as to causation would change if the underlying assumptions based on the "subjective" accounts of Butler and Hollis were incorrect. Dr. Kumar's testimony on cross-examination significantly undercut her prior testiony

that Hollis' headaches had been caused by head trauma in the accident.

{¶ 54} Because there was evidence from which the jury could have concluded that the assumptions underlying Dr. Kumar's opinion were incorrect, it was not required to credit her opinion as to causation. The trial court did not err in concluding that there was sufficient evidence to support the jury's verdict and in denying Hollis' request for a judgment notwithstanding the verdict.

{¶ 55} The fifth assignment of error is overruled.

VI

{¶ 56} Butler and Hollis' sixth assignment of error states:

{¶ 57} "THE TRIAL COURT ERRED BY FAILING TO DECLARE A MISTRIAL DUE TO JUROR MISCONDUCT."

{¶ 58} Butler claims that she was prejudiced by a juror's failure to give "frank and truthful answers" to questions posed during voir dire. The juror revealed a prior contact with Butler and Hollis in the midst of the trial on Butler's damages, after failing to mention it during voir dire.

{¶ 59} During voir dire, Butler's attorney did not ask whether anyone in the jury pool knew his client. Defense counsel asked whether anyone in the pool knew anyone else in the courtroom, and several acquaintances were discussed. The juror in question did not indicate any familiarity with Butler at that time. During direct examination, Butler testified that her son, Hollis, was a musician and child prodigy who played with the Serious Young Musicians all over Dayton and had gone on a trip to the Apollo Theatre in New York City. After the next recess in the proceedings, the juror informed the court that she recalled knowing Butler and Hollis through the Serious

Young Musicians. In chambers, the juror informed the judge and attorneys that her nephew had also been a member of the Serious Young Musicians, and that she (the juror) had attended several of his performances, but had not realized the connection before hearing Butler's testimony. The juror recalled seeing Butler and Hollis at some of these performances in 2003 and 2004, although she did not recall any conversations with them. She stated that they had had "very little" contact on these occasions. The juror acknowledged some awareness of a dispute within the musical group about tickets to the Serious Young Musicians' performance at the Apollo, but she did not know the details of the dispute. The juror stated that she could be fair and impartial and that she would not favor or disfavor Butler based on their previous contact.

{¶ 60} Butler's attorney raised no objection to the juror's continued presence on the jury. He stated that he was "perfectly okay" with the type of contact the juror had described and asked only that she not discuss the case with her nephew's family until after the verdict. Defense counsel objected to the juror's presence on the jury. The trial court ruled that the acquaintanceship was not a problem because it was remote and attenuated.

{¶ 61} On appeal, Butler claims prejudice as a result of the juror's presence on the jury.

{¶ 62} Whether to disqualify a prospective juror for cause is a discretionary function of the trial court which will not be reversed on appeal absent an abuse of discretion. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, at syllabus. Thus, such a decision will not be reversed on appeal absent an abuse of discretion. Id. Moreover,

Butler did not object to the juror's continued participation at trial, so she has waived all but plain error. *Poole v. Becker Motor Sales, Inc.* (Feb. 2, 2001), Montgomery App. No. 18550. Indeed, because Butler expressly acquiesced in the juror's continued participation after learning of their prior connection, she arguably invited the error of which she now complains. The doctrine of invited error prohibits Butler from arguing that she was prejudiced by the juror's continued participation in the trial when, in the trial court, she acquiesced in this course of action.

{¶ 63} The record also does not support a finding of plain error. In light of the juror's assurances that her very minimal past contacts with Butler would not affect her view of the case, we cannot conclude that the juror's service on the jury created a manifest miscarriage of justice or undermined the character of or public confidence in the proceedings. The trial court did not abuse its discretion in allowing the juror to continue to serve on the jury.

{¶ 64} The sixth assignment of error is overruled.

VII

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

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DONOVAN, P.J. and GRADY, J., concur.

Copies mailed to:

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