[Cite as *Cleveland v. Sammon*, 2009-Ohio-3381.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92469

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

BRIAN J. SAMMON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2008-CRB-030456

BEFORE: Celebrezze, J., Blackmon, P.J., and Stewart, J.

RELEASED: July 9, 2009

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Brian J. Sammon, brings this appeal challenging his October 29, 2008 conviction for disorderly conduct while intoxicated, as defined in Cleveland Codified Ordinance 605.03(B). Appellant argues that he lacked sufficient notice and time to prepare and that there was insufficient evidence to sustain his conviction. For the following reasons, we disagree.

{¶ 2} On the evening of September 6, 2008, appellant was aboard a ship, the Nautica Queen, in Cleveland, Ohio. Officer James Dunn of the Cleveland Police Department testified that he received a call that evening from ship security that he was required to respond to pick up a passenger being escorted off the ship when it docked. Officer Dunn consequently detained and arrested appellant. The record indicates that appellant was intoxicated and urinated off the side of the ship. In the process, he accidentally urinated on several passengers.

{¶ 3} When asked about the state of appellant, Officer Dunn testified that appellant had visible stains on his pants consistent with urine stains, he smelled a strong odor of alcohol on appellant's breath, appellant was incoherent when asked questions, and appellant was intoxicated. Officer Dunn interviewed six or seven passengers that had witnessed or were involved in the incident who he classified as "irate" and "very angry."

{¶ 4} Appellant was taken into custody and processed. He was cited for disorderly conduct-intoxication.[1] The citation issued by Officer Dunn was properly executed, but the narrative sections of the copies were illegible. The writing from the top sheet had not transferred sufficiently through to the subsequent copies. A summons was issued on September 11, 2008 to appellant, which contained the charge and the city ordinance that had been violated. Appellant was arraigned on September 11, 2008.

{¶ 5} Appellant brought a motion to dismiss on September 25, 2008 based on his lack of notice due to receiving a citation that did not contain a legible statement of the charges against him or any codified ordinance allegedly violated. At a pretrial hearing in regard to this motion, appellant was presented with a legible copy of the citation. On October 29, 2008, appellant's motion to dismiss was considered. Before ruling, the presiding judge asked if appellant had been given a legible copy of the citation. Appellant's counsel responded that he had been given one at the previous pretrial hearing. The motion was denied. A bench trial was then held. The judge found appellant guilty of disorderly

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[1]Cleveland Codified Ordinance 605.03(b) states:

"No person, while voluntarily intoxicated shall do either of the following:

"(1) In a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance or alarm to persons of ordinary sensibilities, which conduct the offender, if he were not intoxicated, should know is likely to have such effect on others;

"(2) Engage in conduct or create a condition which presents a risk of physical harm to himself or another, or to the property of another."

conduct-intoxication and imposed a fine of $150 plus court costs. Appellant appeals his conviction to this court.[2]

Review and Analysis

Illegible Citation

{¶ 6} "I. The trial court erred in failing to grant defendant/appellant's motion to dismiss the citation which was without any codified ordinance, revised code section or information concerning the allegations or charges and was therefore, void."

{¶ 7} The issue presented in this assignment of error is whether a properly executed, but illegible, copy of a misdemeanor citation provides sufficient notice and opportunity to prepare when a legible copy has been given to the defendant more than a month before trial.

{¶ 8} "The Ohio Constitution guarantees that every defendant has the right to know 'the nature and cause of the accusation against him.' Section 10, Article I, Constitution." *Cleveland v. Austin* (1978), 55 Ohio App.2d 215, 217, 380 N.E.2d 1357, 1361. The crux of appellant's argument flows from this basic right. Appellant contends the illegible citation was deficient notice to the nature of the crime charged.

{¶ 9} The written notice requirement, expressed through Crim.R. 7(B), demands a defendant be given notice of the charges against him so he may have an

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[2] The City of Cleveland did not submit a brief opposing this appeal.

opportunity to prepare a defense. *State v. Lindway* (1936), 131 Ohio St. 166, 182, 2 N.E.2d 490. However, strict compliance with statutory language is not always required. See *State v. Campbell*, 150 Ohio App.3d 90, 96, 2002-Ohio-6064, 779 N.E.2d 811. (In regard to Traff.R. 3, the citation failed to state the proper Revised Code section charged. Conviction affirmed.) So long as the substantive rights underlying the statutory requirements are satisfied, a conviction should not be overturned.

{¶ 10} Appellant points to *City of Cleveland Heights v. Pearlman* (1983), 8 Ohio App.3d 443, 457 N.E.2d 926, as instructive, and this court agrees. In this case, two traffic citations failed to define adequately the charges involved when two defendants were cited for driving while intoxicated without specifying the type of intoxication involved. Just before trial, the city moved to amend the charges to clarify, which the trial court granted. The defendants were subsequently convicted. This court upheld the convictions finding sufficient notice and a lack of prejudice. We stated in *Pearlman*, supra, "amendments of misdemeanor complaints should be allowed if the defendant still has a reasonable opportunity to prepare his defense and the amendments simply clarify or amplify in a manner consistent with the original complaint." Id. at 446.

{¶ 11} Crim.R. 7(D) governs the amendment of charges and states: "The court may at any time before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment, information, or complaint, or to cure a variance between the indictment, information, or complaint and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury."

{¶ 12} In cases where errors in the indictment did not "'permeate the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence,'" the plain-error analysis under Crim.R. 52(B) is the proper standard of review for amendment under Crim.R. 7(D). *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"), citing *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*"), at ¶23, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶17. The Ohio Supreme Court stated: "Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the

court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis." Id. at 205.

{¶ 13} To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 14} Amendment under Crim.R. 7(D) is a two-step analysis. First, we must determine whether the amendment changed the name or the severity of the charged crime. *State v. Davis*, 121 Ohio St.3d 239, 2008-Ohio-4537, 903 N.E.2d 609. Next, we must determine whether the amendment changed the substance of the complaint and, if so, whether the appellant suffered any prejudice as a result. *City of Chardon v. Bulman*, Geauga App. No. 2007-G-2811, 2008-Ohio-6769, ¶35.

{¶ 15} Here, amendment of the citation, namely curing the defect to appellant's copy, was consistent with Crim.R. 7(D). Neither the name of the charged crime nor the severity changed. At all times during the proceedings, from booking to conviction, appellant was charged with a violation of Cleveland Codified Ordinance

605.03(B). The summons, the judge at arraignment, and the legible copy of the citation given to appellant all stated this.

{¶ 16} Next, appellant cites to no prejudicial effect from the illegible citation, and none is disclosed in the record. Appellant was fairly put on notice to the charge against him in the summons issued on September 11, 2008 at his arraignment and, more importantly, when a legible copy of the original citation was presented to appellant during a pretrial hearing on September 25, 2008. Trial did not commence until October 29, 2008. This span provided appellant sufficient time in which to prepare.

{¶ 17} We find that appellant had sufficient notice and opportunity to prepare his defense, and no prejudice to a substantial right occurred. An illegible citation, when appellant is given a valid, legible copy with sufficient time to prepare a defense, is harmless error and not sufficient grounds for setting aside a conviction absent a showing of an abridgment of a substantive right. Crim.R. 52(A). See *Colon I*, supra. Appellant's first assignment of error is overruled.

Circumstantial Evidence and Hearsay Testimony

{¶ 18} "II. The trial court erred in convicting the defendant/appellant based on circumstantial, hearsay testimony alone."

{¶ 19} Appellant claims that inadmissible hearsay testimony and circumstantial evidence were the only evidence against him and denied him the right to cross-examine his accusers. This Confrontation Clause argument lacks merit for the following reasons.

{¶ 20} Ohio defines hearsay in Evid.R. 801(C) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶ 21} Under Evid.R. 701, a lay person can testify "in the form of opinion or inference limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue." The comment to this rule advises, "Ohio has also long recognized that there is an exception to the general rule which permits a non-expert witness to express his opinion. The exception is made for testimony which is a compound of fact and opinion. *The Steamboat Clipper v. Logan* (1849), 18 Ohio 375, 396. A prime example is that of the non-expert witness testifying as to physical condition. The witness is permitted to testify in the form of a conclusion because the primary facts gained from observation and upon which the conclusion is based are too numerous to detail." Staff Note to Evid.R. 701.

{¶ 22} Generally in Ohio, "sobriety or lack thereof is a proper subject for lay opinion testimony. 'When it appears that an individual in all probability has sufficient experience to express an opinion as to whether or not a man is drunk or sober and opportunity to observe him, he may do so without further explanation.' *Columbus v. Blanchard* (1963), 120 Ohio App. 72, 74, 201 N.E.2d 233, quoting *Reinheimer v. City of Greenville* (1930), 9 Ohio Law Abs. 573, 574." *Fairfield v. Tillett* (1990), Butler App. No. CA89-05-073.

{¶ 23} In this case, Officer Dunn had an opportunity to observe and question appellant. From these interactions and observations, Officer Dunn formed a conclusion that appellant was intoxicated. When asked if he had past experience in determining whether someone was intoxicated, Officer Dunn responded affirmatively. This testimony is permitted as the conclusion of a non-expert witness, as provided under Evid.R. 701. See *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, 801 N.E.2d 446.

{¶ 24} Officer Dunn's testimony was also not hearsay, as previously defined. He was offering direct testimony as to what he observed. When the prosecutor asked about witness statements, appellant properly objected, and Officer Dunn was precluded from discussing what others told him. At trial, it was Officer Dunn accusing appellant of drunkenly violating the peace and tranquility of those around appellant by conducting himself in an annoying manner, which is not hearsay. See *Fairfield v. Tillett*, supra.

{¶ 25} *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, stands for the proposition that each defendant has a constitutional right to confront his accusers, but that right was not violated here. Appellant had the opportunity to cross-examine Officer Dunn about his testimony and chose not to do so. Other witnesses may have been available to testify, but were not required in order to establish that appellant was guilty of disorderly conduct while intoxicated. Appellant's claimed lack of opportunity to confront his accusers is without merit.

Sufficiency and Manifest Weight of the Evidence

{¶ 26} "III. The trial court abused its discretion in convicting the appellant on insufficient evidence."

{¶ 27} "IV. The conviction is against the manifest weight of the evidence."

{¶ 28} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 29} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 529 N.E.2d 1236. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492; *Jackson v. Virginia*, supra.

{¶ 30} Appellant argues that Officer Dunn, the lone witness called by the city, provided insufficient evidence to sustain a conviction for disorderly conduct

while intoxicated. This argument is predicated on a lack of direct evidence against appellant and the admission of hearsay statements collected by Officer Dunn.

{¶ 31} The crime of disorderly conduct while intoxicated has three distinct elements: A person must be (1) voluntarily intoxicated (2) while in the presence of two or more people (3) and engage in conduct that is likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities. Cleveland Codified Ordinance 605.03(B). It is the city's burden to establish each element of the charge. *State v. Gardner*, 118 Ohio St.3d 420, 426, 2008-Ohio-2787, 889 N.E.2d 995, 1003, ¶36. Contrary to appellant's argument, no direct evidence need be adduced at trial because there is no substantive difference between direct and circumstantial evidence. In fact "'[c]ircumstantial evidence *** may also be more certain, satisfying and persuasive than direct evidence.' *Michalic v. Cleveland Tankers, Inc.* (1960), 364 U.S. 325, 330, citing *Rogers v. Missouri P. R. Co.* (1957), 352 U.S. 500, 508, 77 S.Ct. 443, 1 L.Ed.2d 493, fn. 17. Murder convictions and death sentences can rest solely on circumstantial evidence. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236, 1239." *State v. Lott* (1990), 51 Ohio St.3d 160, 167, 555 N.E.2d 293, 302.

{¶ 32} Examining whether the trial court abused its discretion in finding appellant guilty, we observe that the city called Officer Dunn, the arresting

officer, to testify about appellant's state on the day of his arrest. As stated above, Officer Dunn limited his testimony to what he observed at the scene of the incident, stating that appellant was visibly intoxicated, with urine stains on his pants, the smell of alcohol on his breath, and an inability to answer basic questions. The appellant had also angered a half dozen other passengers to the point that they were "irate." All the necessary elements of the crime were established through Officer Dunn's testimony. Circumstantial evidence is sufficient for the trier of fact to draw the conclusion beyond a reasonable doubt that appellant violated Cleveland Codified Ordinance 605.03(B). Officer Dunn did not testify as to what anyone said, other than appellant. He limited his testimony to only that with which he had personal knowledge and was properly within the Rules of Evidence.

{¶ 33} Viewing the evidence in a light most favorable to the city, we find the trial court did not abuse its discretion when finding appellant guilty and fining him $150. Appellant's third assignment of error is overruled.

{¶ 34} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of *** the trier of fact were so against the

weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 35} The United States Supreme Court recognized the distinctions in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs v. Florida*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43. Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Martin* at 720.

{¶ 36} Sitting as the "thirteenth juror," evaluating the evidence as a whole, we find that the trial court did not lose its way in convicting appellant. Uncontroverted testimony by Officer Dunn established the necessary elements of the crime as set

forth above. We find that no miscarriage of justice occurred. Appellant's fourth assignment of error is without merit.

{¶ 37} Finding no merit in any of appellant's claims of error, we affirm appellant's conviction for disorderly conduct while intoxicated.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

PATRICIA ANN BLACKMON, P.J., and
MELODY J. STEWART, J., CONCUR